1941

Cause in the Civil Law and Consideration in the Common: Much Ado About Nothing

Robert L. Henry

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Civil Law Commons, and the Common Law Commons

Click here to let us know how access to this document benefits you.

Recommended Citation


Available at: https://uknowledge.uky.edu/klj/vol29/iss4/1

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
CAUSE IN THE CIVIL LAW
AND CONSIDERATION IN THE COMMON:
MUCH ADO ABOUT NOTHING
ROBERT L. HENRY*

Cause in the Civil Law corresponds to consideration in the Common. They are essentially the same in conception. Not that the law as to cause and that as to consideration are identical in detail; but cause, like consideration, is something artificial,¹ which, in addition to consent, is said to be required to be present at the time of the making of an agreement. If there is no cause or consideration, even though the parties themselves intend the agreement to be legally binding, it is denied legal effect because of the absence of such form.²

That the Common Law of today, as applied by the courts, requires consideration no one will dispute. That three of the principal Civil Law countries, France, Italy, and Spain require cause would also seem difficult to deny, as their codes expressly prescribe it.

The Code Napoleon Art. 1108, says:—

"Quatre conditions sont essentielles pour la validité d’une convention:

Le consentement de la partie qui s’oblige;
Sa capacité de contracter;
Un objet certain qui forme la matière de l’engagement;
Une cause licite dans l’obligation.

* J. D. (University of Chicago), D. C. L. (Oxford), Judge in the mixed Courts of Egypt, formerly professor of law at the Universities of Louisiana, Illinois, North Dakota and Iowa.

¹Buckland and McNair, Roman Law and Common Law (1936) 177.
²It is described as essentially a “form” by Holmes in “The Common Law” (1881) 273.
And Art. 1131 says:—

*L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet."

We need not here concern ourselves with the requirement in Art. 1108 that the cause must be *licite*, nor with *fausse cause* or *cause illicite* of Art. 1131. Three quite different principles are involved. It will be sufficient to consider cause in its first sense, as being something required to support or clothe an obligation, and to leave aside entirely the quite different principles involved where the question is: whether the cause is false, that is where there is a failure of consideration; or whether it is illicit, that is where the consideration or the object is unlawful or *contra bonos mores*.

What then is meant by cause as used in the French Civil Code in its sense as something in addition to consent required to make a contract valid?

We shall have to go back to Domat, writing in the middle of the Seventeenth Century for the answer, as it was he who first formulated the doctrine in the shape in which it passed into the French Code and from the latter into those of Italy and Spain. There is no trace of such doctrine in the earlier French jurists, such as Dumoulin and B. d’Argentré; and Pothier who wrote in the Eighteenth Century and whose work served as the foundation for the Code Napoleon contents himself with reproducing the conception of Domat.3

In setting forth his doctrine, Domat begins by pointing out that in the case of synallagmatic, i.e. bilateral contracts the obligation is never assumed gratuitously. The engagement by one party is the foundation for that of the other party. As to “real” contracts, which are unilateral, such as a loan of money, the obligation of the borrower is preceded by something given by the lender. Thus in all such cases, of synallagmatic and “real” contracts, the obligation of one of the contracting

3 Planiol—Droit Civil—Tome II, Sec. 1029 and 1032.
3 A “real” contract is one having its origin in the delivery of a *res*, or thing, money, goods or services. A unilateral contract is one executed on one side at the very moment of its inception, leaving an obligation subsisting on one side only. A bilateral contract is one of mutual obligations.
parties always has as its cause something coming from the other party; and the obligation is void if in reality it is without such cause.\(^4\)

In the case of donations, says Domat, the engagement of the donor has as its foundation some reasonable or just motive, such as a service rendered or some other merit of the donee, or the mere pleasure of doing good. And this motive takes the place of a cause moving from him who receives and gives nothing.\(^5\)

Except for his third category, namely donations, Domat's cause is strikingly like the Common Law consideration of his day. In fact in the latter part of the 16th Century, that is just before Domat, the English Courts used the terms cause and consideration synonymously.\(^6\)

Domat does not say that he derived any part of his theory from the Common Law, and we should hardly expect him to do so. He was ostensibly writing about the law of France of his day. He paid little attention to the customary law and confined himself almost wholly to that part of French law whose roots go back to the Roman, that is to the principles of the received law which had been or which he thought ought to be applied in his country.

For his doctrine of cause, as for his other principles, Domat cites texts in the Corpus Juris Civilis of Justinian. But they give him very little support.\(^7\) It is quite certain that the Roman Law had no theory of cause or consideration; and in fact it did not require \textit{causa} or anything of the sort to give validity to a contract.\(^8\)

Planiol who is the author of the standard elementary treatise on the Civil Law used today by students in France, makes the following observations on the supposed Roman origin of the ideas of Domat:\(^9\)

\(^4\)Domat—Liv. I, Tit. I, Sec. I, No. 5.
\(^6\)Sidenham and Worlington—In the Common Pleas, Easter Term 1585, Reported in 2 Leonard 224.
\(^7\)Planiol—Droit Civil—Tome II, Sec. 1031.
\(^8\)Buckland and McNair—Roman Law and Common Law (1936) 171–6.
\(^9\)Planiol—Droit Civil—Tome II, Sec. 1031. The three following paragraphs are not a full or literal translation but what Planiol says in substance.
As to donations, some of the jurisconsults speak of *causa donandi* meaning the motive which the donor had in giving. Domat's innovation consists in attaching decisive importance to *causa*, while the Romans gave it none;

As to "real" contracts, Domat substituted the word *causa* where the ancients employed the word *res*, for which there is no justification whatever;

As to synallagmatic contracts the conception of Domat is entirely modern. He tries to found it on texts saying that in the absence of a real or lawful *causa*, money or property parted with may be recovered. But the texts cited by him concern cases of failure of consideration; and in the domain of quasi-contract, cases of unjust enrichment; and have nothing to do with something the presence of which is supposed to be required at the moment of the formation of a contract, to give it formal validity.

A demonstration that Domat did not in fact get his theory of cause from the Roman Law, because the Romans had no such theory, does not prove, however, that Domat was not sincere in thinking that his doctrine fitted the facts of that law. Without doubt he examined the various categories of contract and saw what he thought was a common element in them all, though in the case of donations and promises to give, the cause which he found was somewhat different from that in other cases, in that it was not what we should call a valuable consideration. He must have been familiar with the passage in the Institutes of Justinian which states that a voluntary promise whether in writing or not binds the promisor to deliver what he promised. Any open declaration of intention was sufficient.\(^1\)

That Domat did not in fact get his doctrine from the Roman Law does not of course prove that he got it from the Common Law. He may have originated it himself. He is in fact said to be its creator.\(^2\) Or he may have gotten his theory from some source other than the Common Law. The fact is, that the fundamental notion that something in addition to consent is necessary to make an agreement legally valid is much older than Domat.

---

\(^1\) Institute of Justinian Book 2, Title 7, Sec. 3.
\(^2\) Planiol—Droit Civil—Tome II, Sec. 1029.
The origin of both the theory of cause in the modern Civil Law and of consideration in the Common may in fact be traced back to the same source, namely to the Glossators. It is probable that their teachings came to Domat in a similar way to that in which they reached the judges who gave the Common Law the rule as to consideration. Both Domat and those judges had masters who taught them Roman Law; and it must have been through such masters that the tradition from the Glossators reached them.

But as Domat does not reveal to us the real source of his theory, while the judgments of the English courts do indicate clearly where the rule as to consideration came from, it would seem best to reserve a discussion of its origin for the latter part of this article, having to do with the story of consideration in the Common Law.

As to the merits of the doctrine of cause introduced into the French Law by Domat, Planiol considers the theory of cause:

1) false, at least in two out of three of Domat’s categories; and 2) utterly useless.14

As to synallagmatic contracts, Planiol says, “Two persons obligate themselves the one to the other, for example a buyer and a seller. Is it necessary to say that the obligation of the one is the ‘cause’ of the obligation of the other? There is a logical impossibility in that: the two obligations, arising from the same contract, are born at the same time; they are twin sisters; it is impossible for one of them to be the cause of the other, for a cause and its effect cannot be exactly contemporaneous. It is a vicious circle. If each of the two obligations is the effect of the existence of the other, neither one can be born. The phenomenon of mutual production is incomprehensible. Therefore the idea is false.”15

“As to ‘real’ contracts the ‘causalists’ say that the obligation of the borrower, the depositary, the pledgee, has as its cause the thing which he receives. They do not perceive that

---

12 Pollock and Maitland, History of English Law (2d ed.) 212.
13 Planiol—Droit Civil—Tome II, Sec. 1037.
14 Planiol—Droit Civil—Tome II, Sec. 1038.
what they here call cause of the obligation is nothing else but the fact which gives rise to the obligation (fait générateur). If one may call that the cause of the obligation, it is using the word cause in the sense of the source which produces it, which is a sense entirely different from that in which the modern jurists use it in their theory of cause. To say that the thing received is the cause of the obligation is playing on the double sense of the word 'cause'.16

"As to liberalities the modern authors tend to discard the ideas of Domat only to lose themselves in a deeper error. Domat saw the cause of a liberality in the motive which inspires it, more recent authors wish to distinguish cause and motive. They find the cause of a donation in the will to give, (volonté de donner), considered in an abstract way and independently of the motives which give rise to it. Such conception has always seemed to me devoid of sense. What is will without motive? How can one appreciate its moral value?"

As to the matter of utility, Planiol says, "There can be no such thing as absence of cause in the case of unilateral acts such as real contracts or donations. In the matter of deposit or loan, for example, it is clear that there can be neither a depositary nor a borrower in a case in which the thing has not been given. The absence of cause confounds itself here with the absence of the contract; nothing has been done which could be declared nul for default of cause."

"In the matter of donations, the absence of cause would be the absence of motive: a donation therefore without cause would be the act of a madman, of a person devoid of reason."

"The 'causalist' authors therefore cannot apply their idea of nullity for absence of cause except to synallagmatic contracts. If the thing sold does not exist, the obligation of the seller is void in default of an object; that of the buyer is nul in default of a cause because the obligation of the seller which should constitute the cause never was born. One can arrive at the same result without the intervention of the idea of cause, by the simple nature of the synallagmatic contract which presupposes reciprocal promises, (prestations); each party only intends to bind himself in consideration of the advantage he is

16Planiol—Droit Civil—Tome II, Sec. 138.
17Planiol—Droit Civil—Tome II, Sec. 138.
to receive from the other, and the reciprocity which makes binding the two engagements is a relationship of mutual dependence entirely distinct from the relationship of causality. The proof of that is that the obligation of the buyer to pay the price falls also and for the same reason, if the obligation of the seller to deliver the thing, although legally formed and existing, receives no execution: the buyer is released and yet his obligation does not lack a cause."

But the reader in a Common Law jurisdiction has no doubt already before reaching this point said to himself "it is all very well for a treatise writer to say that the theory of cause is all foolishness, but what I want to know is, what do the courts of France, Italy, and Spain do about the matter? They can hardly ignore it, as their codes say an obligation without cause is void."18

That is precisely the question I put to myself on taking up my work on the bench of a Civil Law jurisdiction. I had a vast number of contract cases to decide. It was rather nonplussed at first to find that the lawyers never spoke of cause or consideration. I could understand the lawyers for the plaintiffs not doing so in the absence of a law of pleading or any requirements as to essential allegations. But what I could not understand was why sometimes the lawyers for the defense did not point out that the contracts as stated by the plaintiffs lacked cause and hence were void. I decided that I must look into the jurisprudence, i.e. the reports of cases, on the subject. I was unable to find any case in the jurisprudence of France or Egypt which held an agreement void for want of a cause. There were cases which did so where the cause was fausse or illicite, but they obviously had nothing to do with the problem with which I was concerned. I doubt very much whether any court in a Civil Law jurisdiction has ever held a contract obligation void for want of a cause. It has been said "that if cause were not mentioned in the French Code—and many modern codes say nothing about it in their dispositions as to the formation of contracts,19—no difficulty would be found in reaching the same results. In every case where a contract is annulled for want of a cause, or because the

---

18 PlanioI—Droit Civil—Tome II, Sec. 1039.
19 E. g. the German and the Swiss Codes.
cause is illegal or immoral, there is no object, or else there is an unlawful object; and the theory as stated amounts to very little."

It is quite accurate to say then that it amounts to nothing at all in litigation, as the results would be precisely the same whether in each case an inquiry were made as to whether cause is present, in order to determine whether the court will recognize the agreement as legally binding, as is done in Common Law jurisdictions with respect to consideration, or whether the matter is completely ignored by bar and bench.

Then if we take into consideration the immense literature in France and Italy on the subject; the fact that "it is the most discussed and most indecipherable problem of modern legal literature, the battle ground for metaphysical elucubrations and juridical psychology", we may well say of the story of cause that it is "Much Ado About Nothing".

It may seem to the reader that this result of nullity would not have been reached if Domat’s doctrine of cause had not contained two contradictory principles. He says in one breath that certain kinds of contracts are only valid where there is a cause, by which he means a valuable consideration; and in the next that donations, which include promises of liberalities, may also be valid if there is another sort of cause.

If he had classified all promises into two sorts, those for which something is given in exchange, and those for which nothing is given, and had said that in the first case something must be given, and in the second nothing, his doctrine would obviously have amounted to nothing at all.

But Domat did not do that. His three categories do not cover the whole field of contracts. There are quite a number of different sorts of promises for which nothing is given in exchange which are not liberalities, such as those to pay debts barred by the Statute of Limitations, those discharged in bankruptcy, and promises to perform voidable obligations. The Common Law, which does divide all promises into two classes, those for which consideration is given and those for

Amos and Walton, Introduction to French Law, 163.
Buckland and McNair, Roman Law and Common Law (1936) 175 (quoting the Italian jurist Bonfante).
which it is not, has to resort to the very lame expedient of making exceptions to uphold those promises which are not of liberalities.\textsuperscript{22}

The Civil Law Classification is much more clean cut, and scientific. The Roman Law had its special dispositions as to liberalities and the modern Civil Law has them also. The Code Napoleon provides that all donations, which include promises of liberalities, must be made by \textit{act authentique} and must be accepted in the same way.\textsuperscript{23} The effect is obviously to put promises of liberalities in a class by themselves, and there is no reason why a different rule as to cause should not be applied to them, or one requiring a cause at all, as their validity or invalidity is determined in another way. It should be observed also that Domat did not say that the cause in the case of liberalities was the desire to give. He merely says such “motive takes the place of a cause”, which is quite different.

With liberalities in a compartment by themselves the courts of France might very well have required a cause in the sense of a valuable consideration as to all other promises, for the requirement of cause is laid down in the Code as applicable to contracts in general. But the fact is they have not; perhaps because they perceived that as Domat’s categories did not cover the entire field, his test is false; but more probably because the true test of intent had been perceived and found sufficient in itself.

The whole blame should not be placed on Domat, for he did not profess to lay down a rule for all sorts of contracts. He merely observed that in two sorts there was a valuable consideration given in exchange for the promise, and in a third sort none. Pothier should share the blame for having repeated, what Domat said, without comment; and the drafters of the Code Napoleon for incorporating a general requirement of cause into their code, supposedly adopting Pothier, but failing to perceive that he was not laying down a general rule, and that his rules, taken from Domat, were in fact nothing but truisms, and of absolutely no value as a test of the validity of contracts.

We come then to the question, how did it happen that the Common Law has the test of consideration?

\textsuperscript{22}Restatement, Contracts, Secs. 85–94.

\textsuperscript{23}French Civil Code, Secs. 931-2.
We know it appeared rather suddenly in the last third of the 16th Century\(^2^4\) in cases in which the action was Trespass on the Case.

Two explanations have been offered. One is that there was something inherent in that writ which gave rise to it. The other is that by the use of that action for breach of contract the doors of the royal courts were opened to parol contracts, and the judges were faced for the first time with the necessity of finding a rule for determining what parol promises to hold actionable and what not, and found it in the presence or absence of consideration.

As to the theory that consideration arose from something inherent in the writ used, Ames having demonstrated that Assumpsit developed out of Case in the form of deceit,\(^2^5\) suggested that consideration came from the allegation in that writ, of the detriment suffered from the deceit. But there is not the slightest evidence in the cases that the allegation of deceit was ever taken seriously. The judges realized, that the breach of a contract was not a deceit, but that they were allowing a tort action to be used in contract cases. They never confused consideration, which they required to be present at the formation of a contract, with the damages suffered from the breach.\(^2^6\)

As to the second and generally accepted theory, there would seem, also, little in the facts to support it. In the first place it is not a fact that parol contracts were not actionable in the royal courts before Case became available for breaches of contract. Parol contracts had always been actionable under the writ of Debt. In its origin Debt was the generic and general form of action for every sort of claim known to the law.\(^2^7\) It appears in the earliest royal court rolls. Quite early Covenant also became available. With its advent Debt became restricted to claims for definite sums of money.\(^2^8\) For any other sort of contract claim,

\(^{2^4}\) The leading cases are collected in Willistons Cases on Contracts. They are Hunt v. Bate (1568), Smith and Smith Case (1583), and Sidenham v. Worlington (1585).


\(^{2^6}\) Ames' theory is fully discussed by the author in Consideration in Contracts 661 A. D. to 1520 A. D. (1917) 26 Yale Law Journal 664.

\(^{2^7}\) As late as Edward I it was used by the purchaser of land who had paid his money, against the vendor who would not enfeof him. Year Book 21, 2 Edw. I, p. 599.

whether based on a writing or on a simple parol agreement, Covenant lay. Later that writ was restricted to claims based on writing under seal.

When that stage had been reached, it is assumed that parol covenants were no longer actionable. It is recognized that Debt was still available. But, it is said, it was conceived of as 'proprietary' in character; that it was only available in certain definite situations; that it was not brought for the breach of a promise; and that it could not, generally speaking, be brought for breach of parol covenants.

It is true that, except when used to create contracts of court record, or brought on recognizances under seal, Debt was rarely used except in four cases: (1) against a surety, (2) for money lent, (3) for the price of goods sold, (4) for arrears of rent.

But it should be observed that those were the common everyday transactions, and that the action was not restricted even as to them. It could be brought whenever the claim was for a sum certain.

And the injured party, in situations in which the claim was not for a sum certain, was not left without a remedy. In every case in which the breach of a contract gave one party the right to bring Debt, a way was found to give the other party a remedy, when he was the injured one. Thus where a chattel was sold, bailed, or let, the buyer, bailor or lessor could recover the chattel, or damages for its unlawful detention by the writ of Detinue. Case was first allowed for breach of contract in order to provide a reciprocal remedy to the buyer of land, who had paid the price, but had not been enfeoffed. There was, however not a single type of unilateral contract, one executed on one side at the time of its inception, which was not before actionable, which became so as a result of the use of Case for breach of contract. But it may be said that Case, at any rate, was the writ which admitted bi-lateral contracts, those executory on both sides, consisting of a promise given for a promise.

---

29 Id. at 218. 30 Id. at 219. 31 Id. at 205. 32 Id. at 210. 33 Ibid. 34 Year Book 20 Hen. VI, Chap. 34, pl. 4; Year Book 3 Hen. VII, 14, pl. 20. The reciprocal remedy in such a case could earlier have been had in Debt before it was restricted to sums certain. Year Book 21-2, Edward I, p. 599.
It was held in *Strangborough and Warner*,\(^\text{35}\) "that a promise upon a promise will maintain an action upon the case", and that is probably the first case which sanctioned that type of contract, when made without earnest. It should be observed, however, that the bi-lateral bargain with God's penny or earnest had been recognized for centuries. In 1303 it was provided by the *Carta Mercatoriae* of Edward I that among merchants the God's penny binds the contract of sale so that neither party may resile from it.\(^\text{36}\) Long before that it was the general rule that the person who received the earnest, whether merchant or not, was bound by his bargain. Generally such contracts were handled by the local courts, but they must also have been actionable in the central.

Therefore by *Strangborough and Warner* the doors were not opened to bi-lateral contracts in general, they had always been open as to them, as well as to uni-lateral, but only to promises given for promises, when no earnest had been given by either party. And the holding in that case was not due to the form of action employed. It is rather to be attributed to the fact, that the rule of consideration had already been adopted before that case was decided, and its adoption facilitated the holding. If a promise can be a consideration for an act, and an act for a promise, it follows that a promise may be supported by a promise.

However, it is probable that the decision would have been the same, even if consideration had not been thought of. The time was ripe for it. Earnest was a form a *wed*, and it had already been held that a surety was bound even when he had received no *wed*.\(^\text{37}\) The old ceremonial forms were going out, and the courts looked to the substance. They recognized without hesitation every form of contract in general use.

It is certain, then, that the premise is quite erroneous which would attribute to Case the opening of the doors to parol agreements in general, or even to new types of them. But admitting that, it may still be argued; that the availability of Case, by augmenting the number of contract cases coming before the royal courts was the cause of the formulation of the consideration rule in the latter part of the 16th Century; that before the advent of

\(^{35}\) In the Queen's Bench, 1588 or 1589. Reported in 4 Leonard, 3.

\(^{36}\) At a later date this rule passed into the Common Law, 2 Pollock and Maitland, History of English Law (2nd ed.) 209, citing Noy, Maxims c. 42.

\(^{37}\) Year Book, 12 Hen. VIII, q. ii, pl. 3 (1520).
Case in assumpsit, the number of parol contract cases were too few to give the courts concern, or to make them feel the necessity of finding a test.

It is a fact that, during the 12th, 13th, 14th and 15th Centuries, the proportion of contract cases before the central courts was relatively small, and most of those adjudicated were upon covenants under seal. During those centuries the great bulk of parol contracts were handled in the local courts.37a

It is also a fact that the availability of Case, in the 16th Century, increased the number of parol contract cases, due to the fact that the defendant could not wage his law against that form of action as he could when the writ was Debt. If the action was brought in a local court, law could be waged in defense. Plaintiffs, therefore, brought cases into the king’s courts by the writ of Case in assumpsit, to escape law.

But admitting that there was a larger flow of parol contracts to the royal courts in the 16th Century, it is not a fact that there were not enough of such cases adjudicated, during the four previous centuries, to give the courts the occasion to apply the consideration test. There had been in fact, hundreds of them, perhaps thousands, including all of the various types of contracts in common use. There had been full opportunity for finding and applying a test, such as consideration, during those four centuries and the first two thirds of the 16th, if a need for a test had been felt.

But the fact is that it had not. There is not the slightest evidence in a single case, during those five centuries that the consideration test was applied consciously or unconsciously. The courts simply went on following their own precedents, and where there were none, sought the law where they always did under such circumstances, in the custom of the country. Therefore, it is evident that the slight increase in the volume of parol contract business, induced in the 16th Century, by the availability of Case in the form of assumpsit, was not what caused the courts to look, for the first time, for a test. If they did in fact adopt the consideration test in the latter part of the 16th Century, because at that time the necessity for such a test was

felt, it must have been because the old forms were breaking down; and without such forms to guide them they sought some other test.

That is a plausible thesis. To ascertain, however, whether or not it is the correct one, it will be necessary to examine carefully the first cases in which the consideration test was applied.

We have already noticed the case of Strangborough and Warner in which the subject matter was precisely an old type of contract where the traditional form had been omitted. But it was observed as to that case, that it was not one of those which gave rise to the consideration test, but one in which it was applied, after it had first been adopted in other cases.

To ascertain the real origin of consideration it is essential to examine the very first cases in which it appeared. The first is Hunt v. Bate, decided in 1568. It will be given here in full as reported by Dyer:38—"The servant of a man was arrested, and imprisoned in the Compter in London for trespass; and he was let to mainprize by the manueaption of two citizens of London (who were well acquainted with the master), in consideration that the business of the master should not go undone. And afterwards, before judgment and condemnation, the master upon the said friendly consideration promised and undertook to one of the mainpernors to save him harmless against the party plaintiff from all damages and costs, if any should be adjudged, as happened afterwards in reality; whereupon the surety was compelled to pay the condemnation sc. 31 £., etc. And thereupon he brought an action on the case, and the undertaking was traversed by the master, and found in London at nisi prius against him. And now in arrest of judgment it was moved that the action does not lie. And by the opinion of the Court it does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. Wherefore, etc.'"

"But in another like action on the case, brought upon a promise of 20£. made to the plaintiff by the defendant, in con-

---

38 Dyer 272.
sideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant. And land may be also given in frank-marriage with the cousin of the donor as well after the marriage as before, because the marriage may be intended the cause, etc. And therefore the opinion of the Court in this case this Term was, that the plaintiff should recover upon the verdict, etc. And so note the diversity between the aforesaid cases."

We should observe in the first place that the "report" is in reality notes on two cases; the first paragraph is on Hunt v. Bate, and the second on another, an unnamed case, which was decided at the same term. The court in which the cases were decided is not named, nor are the judges; and the judgment is not given in the words of the court. The reporter simply gives, in his own words, the decision in each case and the reason for it.

In Hunt v. Bate the court held that the master could not be held on his promise because he "did never make request to the plaintiff for his servant to do so much, but he did it of his own head". In the other case the defendant was held "because the marriage ensued the request of the defendant".

It was well established law that where a person gave credit or changed his position at the request of another, the person who made the request was bound. The original contract was the surety contract made with the wed and bórh ceremony, (the wed being generally a stick which was handed to the bórh, i.e. the surety): and it was the surety only who was bound, not the person we should call the debtor. The old ceremony had gone out of use, and, long before Hunt v. Bate, it had been held that even where no wed was given the surety was bound. It was sufficient that he made the request.

But in Hunt v. Bate the defendant never made a request and hence never became a surety. That is all that it was necessary for the court to say and apparently all that it did say, to justify its refusal of plaintiff's demand. Certainly if the case had given rise to a discussion by the court there would have

"See the articles by the author Forms of Anglo-Saxon Contracts and Their Sanctions (1917) 15 Michigan Law Review 552 and 639."
been a report of it. In the first case in which Case was brought for breach of contract, there was a very full report of the discussion. The exact words of everyone of the six judges is given. But in the report of *Hunt v. Bate* none of the words of the court are given.

Under those circumstances, it would be difficult to believe that the court was conscious of making the momentous decision of giving the Common Law the consideration test. If they had considered the case before them one of first impression, involving a novel form of contract, or an old one in which the traditional ceremony had been omitted; and in that situation had felt the need of finding a new test in order to enable them to decide whether the promise should be held legally binding or not, it is certain that they would have indulged in an extended discussion to justify the new rule they were about to apply. The least they would have done was to review the precedents, to consider the various types of contract which had been held binding, and to extract from them a general principle. But they did nothing of the sort.

There is not the slightest indication that the court applied a test or felt the need of one. Certainly the consideration test was not applied. The word ‘consideration’ is used four times, thrice in the note on the principal case, and once in that on the unnamed case decided the same term. The word consideration as defined in any dictionary has several different meanings. It may mean, among other things; 1. deliberation, 2. importance, 3. motive or reason. It was in the third sense, (and not in the technical legal sense it has since acquired), that it was used in *Hunt v. Bate.* "In consideration that" means in order that; "Friendly consideration" means because of the desire to do a good turn to a friend; "Because there is no consideration wherefore" means because there is no reason for; and "In consideration that the plaintiff" means because of the fact that the plaintiff.

But while there is no suggestion of consideration in the principal case, there is in Dyer’s note calling attention to the diversity of the holding in another an unnamed case, decided

---

*Year Book, 20 Hen. VI, Chap. 34, pl. 4; A full translation of that case is given in the article by the author *Consideration in Contracts.* 601 A.D. to 1520 A.D. (1917) 26 Yale Law Journal 664, 666.

*Chambers Twentieth Century Dictionary.*
the same term. Dyer uses the term "good cause" in much the
same sense that "good consideration" subsequently acquired in
the law. He says the fact that the plaintiff had taken to wife, at
the request of the defendant, the latter's cousin, "that was good
cause" for an action on the case brought upon a promise made
by the defendant to pay the plaintiff £20.

It is quite impossible for us to know whether or not, the
court, in that unnamed case, upheld the promise on the ground
that there was good cause to support it. Certainly there was no
necessity whatever for the court to drag in such a notion.
The case could have been decided in accordance with a long
series of precedents without more ado.

As we have seen, in the original, or surety contract, in
which the surety was the principal and only debtor, vis a vis
the promisee, the surety had been held for centuries where the
promisee had released the debtor from custody, accorded credit,
or in any way changed his position, at the request of the
surety. It was quite immaterial who got the benefit of the
promisee's act, or whether anyone else other than the surety
also became debtor to the promisee. The rule was applied to
analogous situations, which we should not look upon as of
suretyship. It was quite general. All that was necessary was
for the promisee to change his position at the request of the
promisor. Certainly in the unnamed case, in the note to Hunt v.
Bate, the man who had married the defendant's cousin had
changed his position at the request of the defendant.

But, if there was such a general rule, that wherever a
surety, (or anyone else in an analogous position), made a request
and the person to whom it was made complied with it, the surety
could be held, was the consideration test not, in effect, already
in operation? Ames says of the case in Year Book, (1520),

"Year Book 7, Edward II, f. 242, (A.D. 1314); Year Book 37,
Henry VI, 8, 18, (A.D. 1459); Year Book 12, Henry VIII, q. ii, pl. 3,
(A.D. 1520).

"In 1459, in Year Book 37, Henry VI, 8, 18, it was said: "If I
say to a surgeon, if he will go to one J. who is sick, and will give him
medicine, and will make him well, he shall have 160 shillings. Then
if the said surgeon goes to J. and gives him medicine and cures him,
he would have a good action of debt against me, although the thing
was done for another and not for me."

"Ames, J. B. The History of Assumpsit (1888) 2 Harv. L.
Rev. 1."
12 Henry VIII, q. ii, pl. 3, holding a surety on a parol promise, "From that day to this a detriment has always been deemed a valid consideration."

But that is reading into the case a notion of a later generation. The court upheld the surety's promise not because the detriment suffered at the latter's request constituted a good consideration, but simply and solely because of the fact that from time immemorial a person who had given credit to a surety, who had delivered goods or done anything else in reliance on the promise, had been allowed to recover. It was enforcing a type of contract which had always been actionable. In early times the wed ceremony had been used to mark the consent of the surety to be legally bound. The old ceremony had gone out; but the courts continued to hold the surety who had made the request, which of itself could be considered sufficient to show consent.

There is not the slightest suggestion in the cases during the five centuries preceding Hunt v. Bate of the consideration test. Certainly the courts did not enquire as to whether or not the promisee had suffered a detriment. They simply followed precedent and custom. They gave redress in those contract situations, which, according to the understanding of the people, were intended to create legal relations. It was only where the promise was made as a part of one of the everyday common business transactions, or could be implied from it, that the promisor was held, and precisely because the promise was such a part. It was not at all because the promisee had suffered a detriment, a conception which had not even been thought of.

Cause, it would seem, was first mentioned and applied in the unnamed case in Dyer's note to Hunt v. Bate. At least no earlier case seems to have been found in which the notion appears. A few years later, in 1583, we see the same idea cropping up in Smith and Smith's Case. However it is there called 'consideration'. There was no more reason for dragging in the notion, than in the unnamed case mentioned in the note to Hunt v. Bate, in fact even less excuse for doing so. The court, in Smith and Smith's case, could and should have rejected the demand simply and solely on the ground that it was contrary to

---

45 In the Queen's Bench, Michaelmas Term, 1583,—Reported in 3 Leonard 88.
public policy to enforce a contract which was entered into with the object of gaining an unlawful advantage. The judgment explicitly indicates that as the true ground for the decision, when it says that the benefit intended should not be recognized as "a consideration in law". What they really did was to apply the Roman maxim, with which the court was undoubtly familiar, ex turpis causa non oritur actio. It has above been pointed out in connection with the discussion of cause in the Civil Law that causa used in that context has nothing whatever to do with causa as a requirement for the creation of a valid contract. The court held the contract invalid because of the unlawfulness or turpitude of its object, and said, incidentally, that there was want of "sufficient consideration", which had nothing whatever to do with the case.

Two years later in the case of Sidenham and Worlington, consideration is again used in the technical sense of something given in exchange for a promise, and required to make it legally actionable. The facts were similar to those in Hunt v. Bate, except that the surety had requested the plaintiff to go bail. The promise, as in the earlier case, was made later, but the court held, that that was immaterial, that it was sufficient that the request was made at the time. The court used the terms cause and consideration as equivalent. Each time mentioned, they were used in the alternative, i.e. the phrase "cause or consideration" was employed.

Clearly there was no more need to talk of cause, or consideration, than in the preceding cases of Hunt v. Bate and Smith and Smith's case. The contract involved was the typical surety contract, in which the surety had been held for centuries, and as to which there were precedents in the royal court holding the surety, even where no wed had been given him.

With Sidenham and Worlington consideration became firmly established as a rule of the Common Law. The requirement of consideration as a test simply slipped into our law without discussion, or consideration, by the courts. It is quite clear that it was not because the courts felt the need for it, that such a test was adopted. There is not the slightest indication to that effect, in the first cases in which it was applied. The courts

---

46 In the Common Pleas, Easter Term, 1585—Reported in 2 Leonard 224.
were not dealing with new types of contract, or old ones shorn of their traditional forms which required a new test, other than form. The first cases could all have been decided by simply following precedents. Fortunately for us, the cases themselves clearly indicate the veritable origin of consideration.

We have seen that in the unnamed case in Hunt v. Bate the court used the expressions "good cause" and "may be intended the cause", and in Sidenham and Worlington it three times used "cause or consideration", and Anderson said:— "This action will not lie; for it is but a bare agreement and nudum pactum". Such language points clearly to the fact that bench and bar were familiar with a heresy which originated with the Italian Glossators of the 12th Century. It was their theory of "vestments". They had worked out, from Roman Law texts, the rule that all contracts must be clothed. The garment might be a form, or it might be the special "investative" facts required in a certain sort of contract. Such facts were said to be the cause. For instance, as to "real" contracts, those contracted by the delivery of a thing, there was the maxim "re contrahitur obligatio". It was the delivery of the thing which invested the promise, and was its cause.

The Glossators were led into their theory by the passage in the Corpus Juris of Justinian which says, that a bare pact does not give rise to an obligation, but only to an exception. The inference is that if a nude or bare agreement does not create an obligation it must follow that only agreements which are clothed are contractual obligations.

But such interpretation overlooks the essential difference between a pact and a contract. Contractus was the name for all those agreements, or conventions which were enforceable by action. "A pactum could not originate a contract. It was used to dissolve a contract, or to vary and amplify the usual terms of a contract, not to create one."48

To convey to the reader the true meaning of the maxim concerning bare pacts I can do no better than to quote from Hunter. "In the XII Tables a provision is made that if one breaks the limb of another, unless he is forgiven, he must submit

47 Nuda pactio obligationem non parit, sed parit exceptionem
Digest or Pandects Book 2, title 14, fragment 7, section 4.
to his own being broken. *Si membrum rupsit in cum eo pacit talio esto.* The punishment of retaliation could not be avoided except by coming to terms with the injured person. This is an example of the rule that an agreement to waive an action for a delict is binding and a good answer to the action. (Digest 2, 14, 7, 14.)"

"The effect of such a pact was entirely to take away the sufferer's right of action. A special defense was not necessary but, if it appeared that the sufferer had agreed not to sue the wrong-doer, he was defeated. (Digest 2, 14, 17, 1.)"49

In other words a pact was a composition. "'To pact' meant to compound, not to contract. A bare pact meant one which amounted to a forgiving or release of the right of retaliation and gave the injured party no substituted rights against the wrong doer or against the latter's pledge or surety. Hence a bare pact was a defense only. But most pacts were not bare. Usually the injured party did not forgive. He sold out. The wrong doer or one of his relatives either paid or bound himself to pay a price or composition. In Roman law the bronze and balance ceremony was used for that purpose. That was not a bare pact, but what the Glossators would call an invested or clothed pact, which gave right to an action for the amount agreed on.

To quote Hunter again: "'At some period, which it would be difficult to determine, but which was certainly before the time of Cicero, (De Orat. 2, 24 Pro Publio Quintio, 5), the praetor inserted a provision in his edict, making a pact a good defense to an action on contract, as well as to an action on a delict. He said, (Digest 2, 14, 7, 7), "'I will support all pacts that do not sin against good faith, or any statute, plebisciturm, senatus consultum or imperial constitution, and which are not an invasion of these.'"50

"'The pact specially in view of the praetor was doubtless the pact of release, (de non petendo); each contract had its special divestitive as it had its special investitive facts. A contract *per aes et libram* could be dissolved only *per aes et libram*. A literal contract was terminated by writing; a stipulation by

44 Id. at p. 546.
50 Pacta conventa, quae neque dolo malo, neque adversus leges, plebiscita, senatus consulta, editus principium, neque quo fraud cui corum fiat, facta erunt, servabo, in footnote p. 546 Hunter—Roman Law, 4th ed.
a stipulation. A mere release from a formal contract had no effect. But it would have been against good conscience to allow a person to reimpose upon another, by taking advantage of the forms of law, an obligation that he had deliberately though informally, cancelled. The praetor, therefore, by inserting an exceptio in the pleadings, practically enabled any contract to be dissolved by mere consent, without any formality."

The Glossators evidently failed to appreciate that the word 'pact' as used in the rule that a nude pact will not support an action, does not mean an agreement intended to create a contractual obligation, but only one to release or compound a right already created. Therefore it was not correct to conclude that every actionable agreement must be clothed.

After once having arrived at the generalization that every contract must have a 'vestment', it was simple enough to identify 'vestment' and causa. The 'vestment' of each type of contract known to the law was found in the special investitive facts required to give it being, to 'cause' it. The Roman jurists never spoke of a 'vestment', but they were continually using the term causa in connection with obligations. They used the term in many different senses just as we do 'cause', but it does not appear that they ever used it in a technical sense to mean something required, in addition to consent, to create a valid contractual obligation, which was the sense the Glossators gave to it.

Long before Hunt v. Bate the word 'consideration' had acquired a legal significance. It was not so used in contracts, nor in contract cases, but it did appear in a legal sense in deeds of conveyance. It is said by Pollock and Maitland that:52 — 'Every alienation of land, a sale, an onerous lease in fee farm, is a 'gift', but no gift of land is gratuitous; the donee will always become liable to render service, though it be but the service of prayers. Every fine levied in the king's court will expressly show a quid pro quo.'

"In the very old Lombard laws we see that the giver of a gift always receives some valueless trifle in return, which just

51 causa donandi, turpis causa, justa or injusta causa, causa naturalis, causa civilis, causa lucrativa, causa noxalis, etc.
52 The quotations are from History of English Law (2d ed.) Vol. II, p. 213, the last one being in a note at the foot of the page.
serves to make his gift not a gift but an exchange. When a fine is levied in favor of a religious house, the "consideration" stated in the chirograph is very often the admission of the benefactor into the benefit of the monk's prayers."

For some reason, most probably induced from a study of Roman Law which prohibited gifts of large amount, at least unless they were registered, there was a strong feeling that gifts of land might be considered invalid; and that therefore it was safer to make them in the form of an exchange. At any rate the practice became general of always putting in the deed a *quid pro quo*. The word used to introduce the *quid* was "consideration". For instance land might be given in consideration of a peppercorn, or a fine levied in consideration of a sparrow-hawk, or land given to a monastery in consideration of prayers. "In consideration" meant "in order to get". "Consideration" expressed the motive or inducement. But by a simple transition of ideas the term came to mean the thing induced or given in exchange. Thus the conveyancer would say "for a peppercorn and other valuable considerations".

Also the word 'consideration' had already been used in English courts in discussing the validity of uses. A use was created by the will of the grantor, "but his will could not be known by the court without sufficient proof of his intent; and such proof might consist in the mutuality of the transaction, or in the existence of a natural duty towards the *cestui que use*. Either kind of reason was called consideration." Such employment of "consideration" corresponds very closely to Domat's "cause" which might consist of mutuality, in the case of 'real' or synallagmatic contracts, or of the desire to benefit in the case of liberalities. Holmes identified "consideration", as so employed to make a gift not a gift, and to raise a use, with the *quid pro quo*. And that is undoubtedly correct. But it should always be kept in mind that up until the time of *Hunt v. Bate* and *Smith and Smith's* case neither a *quid pro quo* nor a "consideration" had ever been required for a contract.

We are dealing with an innovation, which came into the Common Law, under the name of "cause"; and endeavouring to account for the fact that very soon the word "consideration" was substituted for "cause". It is very easy to see how that

---

came about. The courts had long been accustomed to the use of the term "consideration", used in conveyances, in the sense of something given in exchange for something else. Nothing could be more natural once "cause" had been accepted in the sense of something done or given, in exchange for a promise, than to employ the more English sounding "consideration" in the place of "cause" which obviously was a conception derived from the Roman Law or what was supposed to be Roman Law.

But how did such a notion of the Glossators of Italy of the 12th Century get to the judges of the royal courts of England of the 16th? In the first place Vacarius one of the most distinguished of the Glossators was taken from Bologna to England, in 1144, by Theobald, Archbishop of Canterbury. It is said that the law school at Oxford was founded by Vacarius. It is certain that his glosses were reverently received, and for centuries were studied by those who became members of the bar and bench of England.

It should be remembered that in the 16th Century the greater part of the reading of law students was in the Roman Law. There was very little in the way of treatises on the Common Law, which could be studied. And we may be certain that they learned the doctrine of the Glossators, that every contract must have a cause. We see that teaching perpetuated in the law study even of the present time, which goes to show the persistence of tradition, the toughness of taught law.

The belief, then, of bench and bar, learned from their law teachers, that in the Roman Law every contract required a cause, in addition to consent, might of itself have been sufficient to have induced them to require cause for contracts in the Common Law. If the Roman Law needed such a test, they would think that the Common Law must also. There was such a reverence for the Roman Law, that there was little hesitation in borrowing a rule from it, where it did not run counter to the traditional Common Law. And here was an excellent oppor-

---


Hunter who has given us the standard text book on the Roman Law, used today by English students, goes to great pains to find that the Roman Law had the consideration test. Hunter, Roman Law (4th ed.) pp. 490-516. It would be too much of a digression to discuss at length Hunter’s reasoning. There is no doubt about the fact that the Roman Law had no such test. Buckland and McNair, Roman Law and Common Law, pp. 171-6.
tunity for there was no rule of the Common Law on this subject. No general principle had been worked out for determining what promises created legal obligation and what not. But that may not have been sufficient to induce the courts to adopt the cause or consideration rule, if they had not felt that it was already a part of the Common Law, as set forth in the old and revered treatise writers.

The doctrine of the Glossators had passed at once into the writings of the early French and English jurists. We find it in our own Glanvill in the 12th Century. He says a person may owe or become obligated for various causes, and then proceeds to speak of cause in connection with each of the common types of contract.56 The notion that every actionable promise must be supported by a legitimate cause, is even more clearly stated in the Norman customal of the 13th Century. It reads, "Ex promisso autem nemo debiteur constituitur, nisi causa precessit legitima promittendi." The French text says, "Auleun n'est estably debiteur pour promesse qu'il face, se il ny eust droicte cautse de promettre."57 And Bracton imported the system of the Glossators, and his epitomators Fleta and Britton repeated it.58 About one point they were quite clear—Nudum pactum non parit actionem. It was that maxim which had led astray the Glossators and all those who accepted their doctrine. And St. German in his "Dialogue of Doctor and Student", which first appeared in 1530, followed suit.59

Thus all the great treatise writers, from Glanvill to St. German in the 16th Century, were unanimous on the point that for every contract there must be a cause. It is probably that fact, more than any other which induced the courts to accept the doctrine.

Unlike the courts of the Civil Law, those of the Common Law generally have paid little attention to the doctrines of jurists. The Common Law has been made by the courts. But in

---

56 Glanvill X 3: Is qui patit pluribus ex causis debitum petere potest, aut enim debitur ei quid ex causa mutui, aut ex causa venditionis, aut ex commodato, aut ex locato, aut ex deposite, aut ex alia justa debendi causa.
59 Wald's Pollock on Contracts, 3rd ed. by Williston, p. 190.
this very important matter of consideration it would seem that the courts simply took over a doctrine, apparently without discussion or consideration. It was a matter that both bar and bench had been taught as students as being a rule of the Roman Law, and also of the law of England. But unfortunately the requirement of cause or consideration was, as a matter of fact, not a rule either of the Roman Law or of the law of England.

It may be admitted however, that if the judges of the king’s courts had taken the trouble to review the precedents, they might have extracted from them precisely the rule which they adopted, apparently without consideration. If the judges had considered the various types of contracts which had been held legally binding they could easily have seen cause in all of them. In most of them such as sale, exchange, and loan, something had in fact been given to the promisor which could be considered the cause. In the surety contract, the request made by the surety could be reputed the cause.

On the other hand it was quite certain that a purely gratuitous promise, a promise to make a gift, was not actionable. No precedent could be found holding a promisor on such a promise. Persons who desired to make promises of gifts, which would bind them legally, did so either by contract of court record, or by recognizances under seal, which by admitting the obligation formally, put it out of their power to subsequently retract.

If such were the precedents; if wherever there was mutuality, where the promisor had received a benefit, or something was done by the promisee at the request of the promisor, the promisor could be held legally; and if on the other hand whenever the promise was to make a gift, he could not be so held, the judges themselves might by the inductive method have arrived at the consideration test, though in doing so they would have fallen into error.

In the 16th Century the Common Law was not sufficiently mature for the extraction of a principle by such method. If the courts had waited before making a generalization, as they did in the case of the rules as to offer and acceptance, until the 19th Century, they would not have arrived at the existing rule
as to consideration. The falsity of it would have been apparent, because there would have been a long series of precedents on which to test it, some of which would not fit in.

The great pity is that the courts of law did not perceive the true test, as did the courts of Equity, in the matter of uses. They came very nearly doing so when they said of promises under seal, that the seal "imports consideration". In that phrase "consideration" is used in its primary sense as synonymous with "deliberation". They evidently meant by that, when a person employs the formal sealed contract he thereby shows his intent to deliberately bind himself; his promise is not made hastily, without consideration. If consideration had been employed in that sense, as a substitute for cause, it would have been perceived that the ultimate test was intention to be legally bound. It would have been quite right to say, that the fact that the promisor recived a benefit may be taken as sufficient evidence of his intent to be legally bound, and also that wherever the promisee has changed his position at the request of the promisor there is sufficient evidence of intent. The error lay in taking such proofs of intent, instead of intent itself, as the test. For it by no means follows that unless the promisor has received a benefit, or the promisee suffered a detriment, that the promise is not made with the requisite intent. For example where a person promises to pay a debt barred by the Statute of Limitations, or a debt discharged in bankruptcy, or to perform a voidable promise, there is intent to be bound legally, and such promises are upheld, although other reasons are given by the courts for making the exceptions to the consideration rule.\footnote{The various sorts of promises, including the three mentioned, which the courts have been forced to hold valid, even though there is no consideration, are to be found in secs. 86–90 of Restatement of the Law of Contracts of The American Law Institute.}

But unfortunately the "consideration" which was substituted for "cause" had by a transition of ideas, come to mean the thing which was considered, the inducement for the promise. In connection with conveyancing it had already acquired such a secondary meaning. That led to a confusion of ideas. It obscured the true principle. What really happened was that the courts adopted a form. They were not content to say that, if such form were present they would recognize the
contract as legally binding; they went on and said that unless the form of consideration was found to be present the contract would not be recognized.

To prove that the test of consideration is false and useless all we have to do is to classify promises in accordance with the true principle; that is, on the basis of whether they are of a sort intended to give rise to legal consequences or not.

And first let us eliminate those which are not intended seriously. Matters of banter do not create contractual obligations, even where the promises are supported by perfectly good consideration. Serious promises may be divided into two classes: A. Those intended to have legal consequences, and B. Those which are intended to be a matter of honor only.

In class A. we find the ordinary business transactions, all of which are held to be legally binding. They fall into two groups: (1) promises for which a valuable consideration is given. These comprise 99 per cent of the cases which come before the courts. They may be unilateral, promises for which a thing or act or forbearance is given; or bilateral, promises for which promises are exchanged; and (2) promises for which no valuable consideration is given in exchange, such as promises to pay debts barred by the Statute of Limitations, or discharged in bankruptcy, or to perform voidable promises, which are held binding by way of exception to the consideration rule.

In class B. we may place:

(1) social engagements which may be for good consideration; and

(2) Liberalities for which no consideration is given. If I ask you to dinner and you accept, I have promised you a dinner and you have promised me the honour of your company. Each promise is supported by a consideration and yet nobody would think of bringing an action for the breach of such an engagement. In the case of promises of liberalities it is certain that in 99 cases out of a hundred the promisor does not intend to bind himself legally. In the hundredth case we may very well insist that if we are to hold it legally binding that we must require the promisor as evidence of such an intent to employ some form which will unequivocally prove such intent.

Why make exception in the case of promises to pay debts barred by the Statute of Limitations, discharged in bankruptcy, to perform voidable obligations, and hold them legally binding when no consideration has been given in exchange? Obviously because in all those cases the intention was that they should affect the legal relations of the parties. Why on the other hand hold that promises made in jest, and social engagements, although upon good consideration, are not legally valid? Obviously because such promises are not intended to affect the legal relations of the parties. Thus since the other classes of contracts, which are held valid because there is a valuable consideration, could quite as well be held so on the ground of intent, the courts are in effect employing the consent test.

True they go through the motions, and ostensibly apply the consideration test. They must, as long as they are saddled with it. They cannot openly come out and say that the question of whether there is an intent to affect the legal relations of the promisor is the true and only test. All they can do is to apply the true test under the guise of employing the consideration test. Not that the courts consciously apply the intent test, but when it comes to the pinch, that is, whenever it would make a difference, they instinctively resort to it. That is the only satisfactory explanation of the exceptions which they make, and of the further fact that in cases where the intent is absent, even though there is consideration, they hold the promise not legally valid.

This point is made even more clear when we recall that the courts have never attempted to apply the consideration test to any sort of promise where it is in a formal contract. They do not say that the test does not apply, but that the seal of the Common Law formal contract, "imports consideration". What does that mean? Is that the idea of the Glossators that form is one sort of cause; or does it mean precisely what it says, that the seal indicates that the matter has been considered? If the latter, it is an implied admission that the true test is intent. The very purpose for which formal contracts have existed is to mark the intent. Any ceremonial which is associated in men's minds with contract making serves to call the attention of the parties to the fact that they are entering into a legal relationship. If then the parties go through the ceremony of signing,
sealing and delivering a written instrument, it is certain that
the promise therein contained is made with consideration,
deliberately with the intent of affecting legal relations.

Modern considerationists speak slightingly of the court’s
dictum that the seal “imports consideration”; and without
giving us any satisfactory explanation of why an exception is
made as to formal contracts, content themselves by saying that
the consideration test applies only to informal. All of which
shows conclusively that the consideration test is false; quite as
much so as the doctrine of cause in the Civil Law. Is not a
generalization which does not generalize a sorry one? First, it
begins by making an exception of all contracts of whatever sort,
if made formally. Then even as to certain informal contracts
it is forced to make further exceptions. That on the other hand
intent is the true test is shown by the fact that it is absolutely
general, that it need admit no exceptions. For not only are all
the exceptions of the consideration rules based on the intent test;
but all of the cases in which the consideration test is applied
with success would be decided the same way by the intent test.

It is said in Buckland and McNair, Roman Law and Com-
mon Law," Is it not possible that we might have escaped the
the doctrine of consideration entirely if the judges of the six-
teenth and seventeenth centuries had preferred to adopt as a
test of enforceability the difference between a promise intended
to affect the promisor in his legal relations and one intended to
affect only his social relations or his duties as a man of honour?
See for instance Weeks v. Tybald (1604) Noy 11 ("general
words spoken to excite suitors"); Balfour v. Balfour (1919)
2K. B 571; Rose and Frank Co. v. Crompton (1923) 2K.B. 261;
1925 A.C. 445. The consideration test may have appeared
simpler, but it has led to much artificiality."

However, it may be said that even if the consideration test
is not perfect, even though one must admit exceptions, it works;
it can be applied successfully to the great majority of cases.
If so, is it not a rough practical test which serves its purpose?
Has it not proved its utility? But it by no means follows from
such premises that the rule is useful. Even admitting that it
works perfectly in nine hundred and ninety-nine cases out of a

a P. 177 in footnote
thousand which come before the courts, it may be quite unnecessary to apply it to any of them. It may be impossible to go astray if it were not applied.

It happens in practice that not only the nine hundred and ninety-nine, but usually the thousandth contract case also, are business affairs. People simply do not bring social engagements, nor promises of liberalities before the courts. Their grievances due to breaches of such engagements do not get even as far as the offices of lawyers. The instinct of the public in this matter is certain. They know what a contract is; that only such engagements as are intended to affect the legal relations of the parties are contracts. In nine hundred and ninety-nine of the contracts, something has in fact been given in exchange for the promise. That is the usual thing in business affairs. People are not in business for their health. As to such contracts the courts could not be mistaken, even without the assistance of the consideration test. They could be depended on to recognize a contract, and to distinguish it from other engagements, by the fact that it is of a sort which people make with the intention of affecting their legal relations.

As to the thousandth case it generally concerns a promise which, though not given in exchange for anything, is of one of the categories held to be exceptions to the rule; and the promise is upheld on some other ground. That means, that in much less than one case in a thousand, is a promise held to be invalid for want of consideration. Cases frequently occur where the engagement is held not legally enforceable for want of "sufficient consideration." But that is quite a different matter. Such cases correspond to those in Civil Law jurisdictions in which promises are held to be not legally enforceable because of cause illicite. There is a consideration, but they are thrown out on account of the object. Their enforcement would be contrary to public policy. There is absolutely no excuse, as was said above in connection with Smith and Smith's case, to talk about "want of sufficient consideration" in such cases. Again cases frequently occur where there is a failure of consideration, which corresponds to fausse cause in the Civil Law, but they also have nothing to do with the requirement of consideration, which must be present at the inception of a contract.
Thus the courts in fact are not aided in the slightest degree by the application of the consideration test. It would seem hardly necessary to demonstrate that, as it has been proved before taking up consideration that such a test is quite unnecessary. If the Roman Law got on very well without it, and if all modern Civil Law jurisdictions do also, it stands to reason that Common Law countries can also. The actual result of the rules as to consideration is practically a nullity, as far as the decisions of the cases are concerned.

It has been said above that in Civil Law jurisdictions exactly the same results are reached by not applying the test of cause as would be reached if that test were applied. It may here be said that substantially the same results would be reached in Common Law jurisdictions if the test of consideration were not applied. As an illustration of that, I shall return to my own personal experience. In the thousands of contract cases which have come before me on the bench of a Civil Law country, I can say without hesitation that not a single contract which was upheld would have been thrown out, if the Common Law consideration test had been applied.

I cannot of course say that no promises have ever been held legally invalid in Common Law jurisdictions for want of consideration which would have been upheld in Civil Law courts. There must be some. But they are very rare. If that is all that the rule requiring consideration has accomplished, it is not much to its credit. It amounts only to having in a very few cases succeeded in frustrating the intent of the parties, and hence of having produced a few judgments that shock the conscience. Except in those rare cases the rule has accomplished nothing.

In view then of the enormous labor which for the past three or four centuries the applying of the test has caused to professors and law students, bench and bar, and to writers of articles, we may conclude that the story of consideration, like that of cause, is Much Ado about Nothing.

The contrast between the Civil Law and the Common Law jurisdictions however, is great. In the former, bench and bar have tacitly ignored the requirement of cause; in the latter they have conscientiously applied the equally futile consideration

---

McDevitt v. Stokes, 174 Ky. 515, 192 S. W. 681 (1917).
test. The one slipping into the cases, without discussion, as the judicial adoption of a doctrine taught by law teachers and treatise writers, has been taken seriously; the other coming as a legislative fiat in the codes, has never been taken seriously, and is never applied in the cases coming before the courts. Consequently in Common Law countries it is a case of *Much More Ado about Nothing*. 