

It has sometimes been proposed that the doctrine of consideration be "abolished." Such a step would, I believe, be unwise, and in a broad sense even impossible. The *problems* which the doctrine of consideration attempts to solve cannot be abolished. There can be little question that some of these problems do not receive a proper solution in the complex of legal doctrine now grouped under the rubric "consideration." It is equally clear that an original attack on these problems would arrive at some conclusions substantially equivalent to those which result from the doctrine of consideration as now formulated. What needs abolition is not the doctrine of consideration but a conception of legal method which assumes that the doctrine can be understood and applied without reference to the ends it serves. When we have come again to define consideration in terms of its underlying policies the problem of adapting it to new conditions will largely solve itself.

LON L. FULLER

HARVARD LAW SCHOOL

Mason

THE UTILITY OF CONSIDERATION—A COMPARATIVE VIEW*

I. CAUSE AND CONSIDERATION

In both the civil law and the common law the validity of a contract promise is tested by rules of content, capacity and assent. For a contract promise to be enforceable, it must have a definite, possible and lawful content and must not be contrary to good morals, public order, or positive legal prohibitions. There must also be adequate capacity on the part of the promisor to promise and of the promisee to accept the benefit of the promise, and genuine, free and informed assent. A further requirement is stated by the French Civil Code—that of *Cause*: "An obligation without cause . . . can have no effect."¹ The common law of contracts also contains, for most contracts, an additional requirement—that of consideration. A rough parallelism of structure therefore suggests itself. The rule of cause and the rule of consideration are related in their development and sound very much alike in many of their applications. It is not surprising that both common lawyers and civilians have looked for the homologue of the one in the other. Nevertheless this comparison is highly misleading.

The requirement of consideration operates to invalidate certain contract promises which would otherwise be binding. It is seen in action when a promise satisfying the other requirements of our contract law is declared unenforceable because not supported by consideration. The requirement of cause, on the other hand, can never operate to invalidate an otherwise valid promise. Any promise which fails for lack of cause must necessarily also fail when tested by the rules of content, capacity and assent, and any promise which satisfies these rules must necessarily satisfy the requirement of cause. The requirement of cause is pleonastic, it reduplicates other elements of civil law contract doctrine.² It is

* This paper is based primarily upon a case-law study of French law, chosen as the leading example of the civil law systems. Some of the generalizations, however, could not conveniently be checked through further case study and have been tested against more orthodox civil law authorities. At the time of writing it is impossible to say whether I have been engaged in comparative law or legal history.

1. Code Civil art. 1131; *cf.* art. 1108.

2. Many of the civil law systems based on the French code have suppressed the requirement of cause without discernable consequences in case law. Austria, ABGB. §§ 865-882; Germany, BGB. §§ 305-319; Switzerland, Code des obligations (1911, 1936) art. 1-40; Portugal, Código Civil art. 643; Brazil, Código Civil (no corresponding code section); Mexico (Federal District and Territories), Código Civil art. 1279; Oaxaco (Mexico), Código Civil (1887) art. 1159; Durango (Mexico), Código Civil (1900) art. 1123. Argentina, Código Civil art. 533 re-

- object

✓
✓

}

not in fact an operative requirement but a jurisprudential truism. A brief outline of the doctrine of cause and a few typical illustrations will make clear this distinction.

The civil code declares invalid an obligation lacking cause or founded upon an erroneous or illicit cause.³ The invalidity of a contract founded upon an illicit cause clearly does not stem from the requirement that there be a cause. The requirement of licit cause as of licit object is but an incomplete statement of the independent rule that an agreement expressly prohibited by law or harmful to public order or public morals will not ordinarily be enforced. This is a rule which would obviously be understood even in the absence of any doctrine of cause.⁴ It is equally clear that the invalidity of an obligation founded upon an erroneous cause does not depend upon the requirement of cause but upon the requirement of an informed assent.⁵ Plainly it is not in these branches of the law of cause that an analogue of our requirement of consideration is to be sought. We may therefore narrow our inquiry to the requirement of an existing cause to support an obligation.

Roughly speaking, the cause of a promise is the purpose for which it is made—not the immediate, personal motive of the actual promisor, but an abstract conventional purpose recognized by the law for the type of contract promise intended. From this broad point of view a promise is made either in exchange for a counter-benefit or out of a desire to confer a gratuitous benefit. In the first case the cause of the promise is the desired exchange; in the second, the cause is the promisor's liberal intention. Either cause satisfies the requirement that a promise must have a cause.⁶ Thus, it is clear, as we have already stated, that

quires cause for the validity of an obligation, but an accepted view is that the cause of a contract obligation is not a separate requirement, but is the contract itself. Cf. SALVAT, TRATADO DE DERECHO CIVIL ARGENTINO, OBLIGACIONES (2d ed. Buenos Aires, 1928) p. 15, no. 29.

3. Code Civil art. 1131. For an excellent presentation of the orthodox view of the doctrine of cause, with a survey of the case-law and a bibliography, see Schiller, *The Counterpart of Consideration in Foreign Legal Systems* (1936) NEW YORK LAW REVISION COMMISSION REPORT 187.

4. Cf. Namur, 24 avril 1939, Pas. belge 1940.3.12, where an ambulance-chaser's contract with the victim of an accident was invalidated upon the ground that a court ought not lend its aid to an immoral transaction. The Portuguese Civil Code has no requirement of cause but contains a provision invalidating contracts upon an illicit cause: Codigo Civil art. 643, 692. The Austrian Code has no requirement of cause but likewise expressly invalidates contracts which contravene a legal prohibition or good morals. ABGB. § 879, KLANG, KOMMENTAR ZUM ALLGEMEINEN BÜRGERLICHEN GESETZBUCH (Vienna, 1934) 2.2.179; cf. Germany, BGB. §§ 134, 138, 307-309.

5. Cf. Portugal, Codigo Civil art. 657-660; Austria, ABGB. art. 869-877.

6. 4 AUBRY AND RAU, COURS DE DROIT CIVIL FRANCAIS (5th ed. Paris, 1902) p. 545, no. 345; 6 PLANIOL AND RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS (Paris, 1930) p. 348, no. 252; 2 LAURENT, COURS DE DROIT CIVIL (Bruxelles, 1878) p. 386, no. 538; 1 LAROMBIERE, THEORIE ET PRATIQUE DES OBLIGATIONS

any promise satisfying the remaining basic requirements of civil law contract doctrine, namely, a promise seriously and freely given between persons having adequate capacity and relating to a definite and licit object, must necessarily satisfy the requirement of cause, for the cause will be either the desired exchange or a desire to confer a gratuitous benefit.

But from this it does not follow that the notion of cause is a useless one. Quite the contrary, it is very useful to inquire into the cause of every promise sued upon, not because the promise may prove to be lacking in cause but because the treatment afforded the promise will vary greatly according as it has one kind of cause or another. In our law, for example, we have discovered the utility of distinguishing, in construing the promise of a surety, between the paid and the gratuitous surety, although both kinds of suretyship are entirely permissible. So, if a promise sued on is alleged to have its cause in a liberal intention we are prompted to inquire into the family and personal relations of the parties in order to test the probability that such a promise was actually made as alleged, questions which would not be pertinent if the promise were alleged to have a commercial basis. On the other hand, if the promise is alleged to have its cause in an intention of commercial exchange, we would be justified in regarding the lack of substantially equivalent return as creating at least a suspicion of fraud, mistake or duress, while the same fact would have no such significance in the case of a promise alleged to have its basis in generosity, or in a desire to adjust a family difficulty.

Inquiry into the cause of a contract thus serves to focus attention upon the facts which suggest the presence of tacit understandings, which aid in judging the essential or non-essential character of conditions, which reveals most convincingly the presence of defects of consent, or of illegal or immoral purpose. Many important questions of proof and procedure relating to these issues are conveniently expressed in terms of the apportionment of the burden of showing the cause of the promise sued upon.⁷ Thus, the doctrine of cause is in fact a highly useful one.

(Paris, 1885) p. 284, art. 1131, no. 2; BUFNOIR, PROPRIETE ET CONTRAT (2d ed. Paris, 1924) 528-532; 1 BAUDRY-LACANTINIERE AND BARDE, TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL, OBLIGATIONS (3d ed. Paris, 1906) pp. 335-338, nos. 298-300; 2 COLIN AND CAPITANT, COURS ELEMENTAIRE DE DROIT CIVIL FRANCAIS (7th ed. Paris, 1932) pp. 53-61, nos. 57-61; cf. 2 BONNECASSE, PRECIS DE DROIT CIVIL (Paris, 1934) p. 250, no. 230; cf. Spain, Codigo Civil art. 1274.

7. Bruxelles, 22 nov. 1879, Pas. belge 80.3.94; Buenos Aires, 17 oct. 1924, Jurisprudencia argentina 14.504; Paraná (Provincia de entre rios), 13 dic. 1926, Jurisprudencia argentina 23.1157; Cuba, Tribunal Suprema, 4 nov. 1913 (no. 83), Jurisprudencia al día, 1913. civil. 341. The question whether a promise is commercial or civil in character, an important problem in the civil law systems, is also most conveniently expressed in terms of cause. Cf. Cuba, Tribunal Suprema, 27 feb. 1933 (no. 2), Jurisprudencia al día, 1933. civil. 51.

The distinction between utility and functional independence can be made clear by an examination of several cases advanced by writers who have sought to show that the doctrine of cause performs a distinctive and necessary function. This will afford us at the same time a convenient survey of the characteristics of the doctrine of cause.

A classic instance of a promise said to be invalid because lacking cause is the accommodation instrument in the hands of the accommodated party.⁸ *A* subscribes an instrument purporting to be a promise to pay *B*. The understanding of both *A* and *B* is that *A* is not to fulfill this promise to *B* but that *B* shall be privileged to sell *A*'s promise to a third party who, if he does not receive payment from *B*, will have recourse against *A*. We say that *A* may rely upon the defense of lack of consideration as against *B*. The French say that such an instrument lacks cause in the hands of *B* as against *A*.⁹ But note that in French law the unenforceability of the instrument in the hands of *B* as against *A* may equally well be expressed without recourse to the concept of cause. For the essence of the transaction is that *A* has never promised to pay *B*; the promise on which *B* relies simply does not exist. The only obstacle to showing the non-existence of the purported promise is the rule against contradiction of a writing by parol.¹⁰ In the French system, however, that rule does not apply to commercial cases¹¹ and does not apply to proof concerning defects of consent.¹² It would not govern here. Thus, explanation in terms of cause reduplicates another adequate explanation for the result of the case already inherent in the French system. The doctrine of cause does, however, supply a convenient approach to the problem of proof and procedure for it focusses attention upon the element in the case which most strikingly persuades us that the promise is not a real one; namely, the fact that the alleged promisor got nothing for his promise. The effect of this is to put upon the plaintiff the burden of supplying a credible explanation for the promise upon which he relies, and since, by hypothesis, he cannot show either that the promise was a payment or that it was a gift, his action must fail.

We may now observe a vital distinction between the doctrine of

8. Cf. BUFNOIR, PROPRIÉTÉ ET CONTRAT, 537-538; 4 AUBRY AND RAU, COURS, p. 548, no. 345 n. 7; 1 BAUDRY-LACANTINERIE AND BARDE, TRAITÉ, p. 341, no. 303.

9. Cf. Bordeaux, 6 mars 1868, DP. 70.1.102, where enforcement sought by a holder with notice was refused on the ground of lack of cause.

10. Code Civil art. 1341.

11. Code Civil art. 1341, al. 2; Code de Commerce art. 109, applying to sales but establishing the principle for commercial transactions generally; cf. Code de Commerce art. 49, applying to associations.

12. This results from a case law extension of Code Civil art. 1348, 1353. Cf. 2 COLIN AND CAPITANT, COURS, p. 443, no. 479.

cause and the doctrine of consideration. We seem to be saying pretty much the same thing when we say an accommodation instrument is invalid in the hands of an accommodation payee for lack of cause and when we say that an accommodation instrument is unenforceable in the hands of an accommodation payee for lack of consideration. In both cases we are pointing to the fact that the promise sued upon is not matched by an equivalent benefit to the promisor. The lack of counter-promise is not a substantial cause of invalidity in the French system, however, for if the plaintiff were to offer the same instrument and allege and convince the trier of the fact that it had been given to him as a gift, the instrument would be entirely enforceable, being now adequately supported by cause, namely, the promisor's liberal intention.¹³ The doctrine of consideration as applied to the same instrument has a different effect. Once it is established that the promise represented by the instrument is not supported by a matching benefit to the promisor, with certain obvious exceptions, it will be useless to prove that the promise really was made and seriously intended. Such a promise in our system is wholly unenforceable.

A second instance offered as an example of the invalidating force of lack of cause is that of a Corsican employer, heavily in debt to a Marseilles correspondent and threatened by the latter with judicial proceedings, who had obtained from his employees notes payable to the Marseilles correspondent and purporting to be given in exchange for goods sold and delivered. No forbearance or other exchange was requested by the makers and none is promised by the payee, although of course the employer expected and got some measure of delay in fact by obtaining these notes. In an action upon these notes the employees denied that they have ever received any goods as recited and claimed that the notes were executed under threat of peremptory discharge. The payee was unable to show any evidence that goods were delivered to these employees, and in view of his situation he must have realized that the makers of the instruments were in no position to have incurred obligations of the magnitude involved and were very unlikely to have engaged in commerce of such size. In short, he knew or had reason to know of the duress exercised against the makers. In our law these instruments would be invalid for lack of consideration. A French court found them to be invalid for lack of cause,¹⁴ but here again the explanation in terms of cause is merely an alternative expression of an independent underlying ground of invalidity. The promises were extorted by severe

13. Cass. req., 16 août 1881, DP. 82.1.478; Nancy, 20 déc. 1873, DP. 75.2.6.

14. Bastia, 6 août 1892, DP. 93.2.359; cf. BUFNOIR, PROPRIÉTÉ ET CONTRAT, 536.

economic duress and are plainly invalid for lack of genuine and free consent.¹⁵ Nevertheless, the notion of cause is again useful for it concentrates attention immediately upon the most probative fact in the case, the absence of matching benefit to the promisor. This, in French law, it may be repeated, is not itself a ground of invalidity, but together with the other circumstances of the case raised a strong presumption which the plaintiff was unable to rebut. Had the duress been absent, the promises being given by the employees freely and with knowledge of the facts, out of a feeling of loyalty towards their employer, the lack of matching benefit to them would not have been a ground of invalidity.¹⁶ In the common law system, on the other hand, even if an intention on the part of the maker to confer a gratuitous benefit without duress and with full knowledge of the circumstances had been adequately pleaded, the lack of consideration for the instrument would have been a complete defense.

A final type of case commonly relied upon as showing the functional utility of the theory of cause is that presented when a promise has been made in exchange for a counterpromise and the counterpromise has not been performed, either because of impossibility or because of simple refusal by the counter-promisor. In such a case the promisor is entitled to refuse to fulfill his promise and to demand a formal rescission.¹⁷ We sometimes refer to such cases in our law as cases of "failure of consideration," but it is clear that the doctrine of failure of consideration does not depend upon the doctrine of consideration, and the term is thus misleading, for if we were to abolish our requirement of consideration, we would plainly not abolish our law of failure of con-

15. Bastia, *supra*, n. 14; but *cf.* BUFNOIR, PROPRIETE ET CONTRAT, 536. We must note a qualification to the assertion that the notion of cause has no operative effect here. The Code provides, and the textbooks teach, that if attacked as lacking cause, a promise such as this should be held void, while if attacked upon the alternative theory of duress, the promise should be held merely voidable. Code Civil art. 1131, 1117. *Cf.* 2 COLIN AND CAPITANT, COURS, p. 149, no. 162. Further, the action for rescission on the ground of duress is subject to a limitation of ten years, while the action for rescission on the ground of lack of cause is subject to a thirty year limitation. Code Civil art. 1304, 2262; 5 LAROMBIERE, OBLIGATIONS, pp. 358-360, art. 1304, no. 54. While theoretically correct under the language of the Code, these distinctions are unsupported by the case law. *Cf.* Gand, 14 déc. 1872, Pas. belge 1873.2.38; accord: 6 LAROMBIERE, OBLIGATIONS, pp. 309, 334-335, art. 1338, nos. 8, 25. *Cf.* also Cass. (Belgique), 12 juil. 1855, Pas. belge 1855.1.336; Cass. req., 5 mai 1862, DP. 62.1.341. And even if these narrow, technical and doubtful distinctions really exist, they are too marginal to justify a comparison of cause and consideration.

16. Cass. req., 10 nov. 1884, DP. 85.1.198, S. 87.1.308. The false recital of value received would not militate against the effectiveness of the instrument. Cass. req., 10 janv. 1898, DP. 99.1.196; Caen, 10 juil. 1854, DP. 55.2.162.

17. Trib. com. Seine, 1 déc. 1892, J.T.C. 1894.60; *cf.* Paris, 13 fév. 1837, S. 37.2.290; Code Civil art. 1184.

sideration. Equally misleading is the French terminology which refers to such cases as involving lack of cause, for if the French were to abandon the requirement of cause they would not change the rule permitting a promisor to refuse performance upon showing non-performance of a counterpromise for which he had bargained. This rule, in our law as in the French, rests upon another principle which seeks to give effect to an implied condition.¹⁸

To sum up then, the doctrine of cause is, from a logical point of view, a reduplication of other elements in the French contract system. From a practical point of view, it provides a useful alternative approach which frequently cuts quickly to the nub of a case and aids in setting up a case procedurally in such a way as to focus attention upon the real issues most directly. The doctrine of consideration, on the other hand, performs a definite operative function, rendering unenforceable promises fully complying with all the other requirements of our contract law. Its suppression would alter our ways of approaching contract cases and it would alter the results of many cases. Its utility must therefore be tested by the wisdom of refusing enforcement to those promises which we declare invalid for lack of consideration. It is helpful to keep firmly fixed in mind this negative approach to the problem of consideration for the characteristic effects of the doctrine of consideration are to be seen only where consideration is lacking, never where it is present.

II. CONSIDERATION AND THE RULES OF FORMALITY

The most obvious function performed by the doctrine of consideration is its service in channeling the formalities of contract-making. Roughly speaking, agreements supported by consideration are excused of formality. Agreements lacking consideration require formality for

18. Trib. com. Seine, *supra* note 17; Paris, *supra* note 17; *cf.* Rennes, 1 fév. 1834, S. 34.2.379. The Codes which have abandoned the requirement of cause recognize this principle: Austria, ABGB. § 901, KLANG, KOMMENTAR, 2.2.336; Germany, BGB. § 320; Brazil, Código Civil art. 1092; *cf.* Mexico, Código Civil art. 1421. Since the problem of supervening failure of cause is often regarded as the field of the greatest utility of the doctrine of cause, *cf.*, e.g., 4 AUBRY AND RAU, COURS, p. 548, it seems desirable to emphasize that the theory of cause is pleonastic here as elsewhere, because the results to which it leads are adequately explained on other grounds and would be reached in its absence. But it is useful, because it explains the results most simply, and frames the issues for decision in the most convenient way. It should be noted that in a case of failure of cause the word cause does not have exactly the same meaning that it has in doctrine concerning the requirement of cause. This is most apparent in cases of express conditions which have become impossible of fulfillment. To avoid confusion it has been found necessary to invent a separate expression—*cause impulsive et déterminante*—which involves motive, while cause does not. *Cf.*, e.g., Cass. req., 2 mai 1892, DP. 93.1.501. The same distinction is involved in all cases of failure of cause, but is not often made explicit. *Cf.*, e.g., Cass. civ., 20 nov. 1877, DP. 78.1.222.

their validity. The doctrine of consideration thus acts as a signpost dividing the traffic. Is the signpost well-placed? Let us compare the rules which in French law similarly divide the formal from the informal.¹⁹

First however, we must note that, apart from a number of obvious exceptions which we may ignore for convenience of discussion, this simple and orthodox statement of the function of consideration contains one important latent ambiguity. Some promises, a commercial sale for example, are dispensed from the requirement of formality because of the presence of mutual promises of mutual benefit which we call consideration. Other promises however are excused from formality not because they in fact involve an exchange of matching benefits but because they have been deliberately dressed up in the style of such an exchange for the purpose of making them enforceable without further formality. Some but not all such promises are enforceable and are treated as adequately supported by consideration. But when such promises are enforceable, what is called consideration is in reality a formality although perhaps a less severe one than the strict formality of the seal. The doctrine of consideration thus serves to distinguish three major classes of enforceable promises: those which because of their substantial character are enforced without formality, those whose nature makes formality requisite and are enforced because they have been cast into the form of a simulated bargain and are thus supported by the formality of a symbolic consideration, and finally, those which are enforced solely because provided with what was once in fact and is still called the strict form of the sealed instrument. The basic line of division is that between promises for matching benefit enforced without formality and gratuitous promises enforced, if at all, because executed with an appropriate formality.

1. Gifts.

The strict formality of the French law is the notarized instrument, required in principle for the validity of gifts of movables or immovables, executory or executed.²⁰ The requirements of this institution are very

19. Had space permitted, I should have discussed the rules of consideration as rules of substance, of proof, of damages. In each of these aspects the doctrine of consideration finds its analogue in different sets of rules of French law. All that I have attempted here is to deal with one branch of the question fully enough to suggest a method and an approach.

20. Similar formality is also required for the validity of certain other transactions. Code Civil art. 1250, 1394, 2127; L. 5 juil. 1844, art. 20; L. 23 mars 1855 (modif. 13 fév. 1899) art. 9; 2 COLIN AND CAPITANT, COURS, p. 15, no. 15. The rules requiring formality in these cases have their origins in the special nature and history of the transactions involved and are largely intended for the protection of purchasers. Cf. 2 COLIN AND CAPITANT, COURS, p. 295, no. 314; 3 *id.* pp. 20-21, nos. 19, 20; 2 *id.* p. 1031, no. 1265; p. 999, no. 1229.

much more severe than those of our contract under seal. An instrument of gift must be executed before a notary and in the presence of a second notary or of two witnesses. The original must be retained by the notary. It must contain or must be supplemented by an express acceptance executed in similar form. If personalty is involved, a detailed appraisal signed by both parties must be added to the instrument.²¹ The apparently excessive ceremony of these rules may be explained by a policy which provides a key to many of the complexities of the French system. In the interest of prospective heirs (and of equality among heirs) it is sought to discourage the making of improvident gifts, not merely by imposing procedural obstacles but by the following indirection: it is the intention of the law that a gift can be effected only under such conditions that the transaction be immediately put beyond the donor's recall.²² To accomplish this it is sought to assure unchallengeable certainty to every element of the gift, and also a measure of publicity and a public record.

Out of the same desire to make as sharp a differentiation as possible between an effective gift and no gift spring the principal exceptions to this strict rule of formality. A gratuitous release of a debt may be made without formality.²³ The reason for this is that otherwise a creditor could, by forbearance in fact following upon an informal but legally ineffective release, confer the effective benefit of a gratuity without divesting himself of the legal power to change his mind and enforce the debt. And the policy which abhors ambiguous situations and seeks to permit persons to conduct their affairs with confidence that the past is closed wherever reasonable persons would so rely, seconds the result. In the same way, if manual gifts were not effective as a matter of law, it would be possible for a donor to make a gift in effect, to enjoy the gratitude of the donee and the satisfaction of having conferred the benefit and still retain the power—until the statute of limitations has run or the proofs have been lost—of recalling his liberality. The policy of the law therefore requires that a gift made in that way shall be immediately binding, and this is well-established law, in spite of the lack of textual authority.²⁴

21. Code Civil art. 931, 932, 948.

22. 12 LAURENT, PRINCIPES DE DROIT CIVIL, (4th ed. Bruxelles, 1887) pp. 281-283, nos. 220-221.

23. Cass. req., *supra* note 13. A creditor gave a note to the debtor for a large sum of money and withdrew pending proceedings against him. This was held to show a release of the debt. Cass. req., 29 mars 1938, DP. 1939.1.5; Cf. Code Civil art. 1282, 1283.

24. Rouen, 24 juil. 1845, DP. 46.2.87, S. 46.2.104; Nancy, 20 déc. 1873, DP. 75.2.6, S. 75.2.141; Cass. req., *supra* note 13.

A delicate balance of means and end is involved here. Where it is factually within the power of the parties to create a transaction effective in practice as a gift, the rule of formality would be self-defeating. In such cases an exception is recognized. But where a transaction can be effective only with the assistance of the law, strict compliance with the rules of formality is required.

The same underlying theory explains another exception to the statutory rule of formality. A transaction intended to create a gift is often deliberately dressed up in the form of an onerous transaction, such as a fictitious sale or an acknowledgement of a debt, in order to avoid the requirements of strict formality. In general, it is possible to make the gift practically effective in this way. If the donor may be heard to assert the fictitious character of the transaction and thereby obtain its rescission, he will thus be able to make a gift and still retain control over it. Accordingly, the policy of the law requires (1) that, if a transaction apparently onerous really has the commercial basis it indicates, the promisor should be able to show that he has not received the promised consideration; (2) but if the transaction was intended as a gift he should not be able to challenge its validity by showing its gratuitous character, although (3) he should be able to show that it was intended as a gift, not to invalidate it, but to enforce its legal consequences as a gift.²⁵ This is now well-established law.²⁶ The other purposes of formality are not defeated, for a transaction commercial in appearance will have in fact the definiteness desired by the law, and the fact of simulation operates as a sufficient assurance of deliberate and serious intent. How this rule works may be seen by an example.

Suppose a suit upon an instrument acknowledging a debt where in fact no legally recognized debt existed between the parties. If the plaintiff advance the document as a genuine commercial instrument, the defendant will be entitled to defend by showing the non-existence of the debt acknowledged and the instrument will be declared void for lack of

25. Among the legal consequences of a gift referred to here are the following: Ungrateful conduct may entitle the donor to rescind the gift. Code Civil art. 953, 955-958; Riom, 4 juil. 1892, DP. 93.2.340, Cass. req., 20 juil. 1893, DP. 93.1.598 (donee showed ingratitude by forging the donor's name to a will and power of attorney). A gift may be revoked for nonfulfillment of its essential conditions. Code Civil art. 953, 954, 956; Cass. req., *supra* note 18. A gift made when the donor has no descendants is revoked by operation of law upon the birth of subsequent issue. Code Civil art. 960. Finally, if the patrimony has been depleted by gifts which do not leave to the heirs in direct line their rightful portion, gifts may be reduced retroactively to the extent necessary. Code Civil art. 913-930.

26. Riom, *supra* note 25 (a lease for 25 years upon a rent less than half the income of the property was held to be a disguised gift—on proof of ingratitude on the part of the donee, the court decreed revocation); Cass. civ., 8 déc. 1912, DP. 1913.1.175, S. 1914.1.388.

cause.²⁷ This is merely another way of saying that an acknowledgment of a debt where no debt in fact existed must of necessity be void for mistake, fraud, duress, or some other defect of consent if no other adequate explanation can be offered by the plaintiff. If, however, suing upon the same instrument, the plaintiff allege that it was executed in settlement of a disputed claim, defendant's offer to show that no debt actually existed should now be rejected, for the only material issue will be not whether there was a debt but whether there was a reasonable and bona fide claim of a debt, in settlement of which the instrument was made.²⁸ Finally, if, suing upon the same instrument, the plaintiff allege that it was executed with the intention of making a gift in his favor, defendant will again not be permitted to show the non-existence of the supposed debt, but the parties will be required to show, by direct testimony, and circumstantial evidence, with the aid of appropriate presumptions, whether such a gift was in fact intended and made.²⁹

The French doctrine of formality is not static. It has adjusted itself, where need has appeared, to changing problems, and is very different in its contours now from what it was when the Code was approved. But its changes have been made with a clear eye to its controlling principles.

The extent to which our law, on the other hand, exhibits unresolved conflicts of policy, is well illustrated in the classic case of *Schnell v. Nell*.³⁰ There, the promisor desired to make a gratuitous promise to fulfill in some measure the wishes of his deceased spouse whose last will had been frustrated by the fact that property she believed to be her own was, as it turned out, held in joint tenancy. There appears to be no reason of substance why his desire, if adequately expressed, should not have been respected by the courts. To make the seriousness of his intentions unmistakable, Schnell put his promise under seal, recited in addition the actual considerations moving him to the promise, and added, so that there could be no mistake, a recitation of one cent in hand paid, and a counterpromise on the part of the donees to pay the one cent in question by way of consideration. It is true that the recital with respect to this consideration was somewhat contradictory. It is also true that it was unmistakably fictional. The penny was not paid and it was not in fact intended that it should be paid. This is so clear as to put beyond

27. Bastia, *supra* note 14.

28. Code Civil art. 2044, 2052; BAUDRY-LACANTINERIE AND WAHL, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, DES CONTRATS ALEATOIRES (3d ed. Paris, 1907) pp. 634-635, no. 1202.

29. Caen, *supra* note 16.

30. 17 Ind. 29 (1861).

question the fact that the intention of this recital was to make Schnell's promise and his intention to be legally bound as unmistakable and unchallengeable as it was possible for a legal instrument to do. Nevertheless, Schnell's promise was not enforced: the seal no longer has its common law power in Indiana; Schnell's love and affection for his wife and his deliberate intention to fulfill her last will, however laudable, is not consideration. And the recital of one cent in hand paid, precisely because it was so clearly and unmistakably intended solely to make the promise binding, failed to do so. On the other hand, if it had been seriously intended, it would, by some strange alchemy, have made this highly honorable agreement an "unconscionable contract." *Schnell v. Nell* appears to lay it down as the law of Indiana that no lawyer, and surely no layman, should venture a confident prediction as to what must be done or what can be done to make a gratuitous promise binding.³¹ Such a rule serves to establish in effect a rule of formality far more severe than that demanded by the highly formal French law. It is true that *Schnell v. Nell* is not altogether typical, but it is crucial. It displays very clearly the conflicting cross-currents affecting our modern law of consideration.

The availability of a formal method of contract making, when desired by the parties, is highly useful. To serve its purpose such a formality should plainly be decisive—strict in its making, conclusive in its results. But the imposition of such formality when not desired by the parties does not seem to be either necessary or tolerable under modern conditions. There should therefore be available a simple and natural lesser formality of such character as to adequately guarantee serious intention and reasonable deliberation in the making of gratuitous promises, but whose requirements are not so tricky or precarious as to make compliance a matter of uncertainty.

A device providing a lesser formality does exist in our system. A promise, not made upon a consideration in fact, may be rendered binding by supplying an artificial consideration for that purpose—a horse, a hawk, a robe, a peppercorn or a "dollar and other valuable consideration

31. It has been suggested that the result of *Schnell v. Nell* may be justified because Schnell probably acted under the same mistake as had his wife and under duress of threatened litigation. Steele, *The Uniform Written Obligations Act—A Criticism* (1926) 21 ILL. L. REV. 185, reprinted in SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 608. The instrument itself, however, convincingly demonstrates that at the time of making the promise Schnell entertained no mistaken belief in the validity of the claim and no fear of threatened litigation. If he did, the law of mistake and duress should be adequate or should be made adequate to reach a fair result. There does not appear to exist such a relationship between liberality and mistake or fear of litigation as to justify a conclusive presumption against gratuitous promises.

to me in hand paid, receipt of which is hereby acknowledged." Yet, while the corresponding device of the simulated commercial transaction has worked successfully in France, nothing is more notorious in Anglo-American law than that the effectiveness of this device in a particular case is wholly unpredictable, subject, in various jurisdictions, to conflicting rules diversely applied by individual judges, in a fashion so uncertain as to approach the whimsical.

The seal was originally a cleancut manifestation of serious intention to bind oneself. The failure of our law of consideration to supply a satisfactory lesser formality led almost inevitably to the degradation of the formality of the seal. As a mere scribble, or printed recital and printed L. S., came to be given the full efficacy of the seal, the new conception of the seal ceased to have any significance as a genuine formality at all. The paradoxical result of this attempt to relax formalities has been to channel expressions of liberality into the severely limited mold of the executed and manual gift. Since the seal no longer performed the function of a solemnity, the law of consideration, the surrogate of the formality of the seal, came to overflow its banks and flood the domain of the formal sealed instrument, so that, to a varying extent in each jurisdiction, consideration has become a requirement of sealed as well as of unsealed instruments. The function of the law of consideration as a traffic guide distinguishing promises requiring formality from those which do not, has thus become very largely lost. What is perhaps more important, these complex readjustments have occurred blindly, without measure, without regard for the harmonious relationships of the whole structure.

2. *Gratuitous promises other than gifts.*

We turn now to consider briefly two classes of gratuitous promises to which the policy of the French rule of formality does not extend.

A gift of a service, or of a temporary use of property, or forbearance of a debt, does not in general affect the patrimony. The interest of the heirs in the discouragement of gifts out of the patrimony does not, therefore, come in play here. Accordingly, an informal promise of a gratuitous service,³² or use³³ or forbearance,³⁴ may be binding. (I am

32. See Code Civil art. 1984-1997, *mandat* (agency); art. 1917-1954, *dépôt* (bailment for benefit of bailor).

33. See Code Civil art. 1875-1891, *commodat* (loan for use).

34. Bruxelles, 30 mars 1867, Belgique Judiciaire, 1867.498; Trib. com. Anvers (Belgique), 3 fév. 1865, Jur. du Port d'Anvers, 1865.1.21. A gratuitous promise to forbear, although binding, is not an accord nor a novation, but a collateral pact: Argentina, Sentencias de la Suprema Corte, 6 marzo 1929, 154.85; Buenos Aires, 24 oct. 1924, Jurisprudencia argentina, 14.463; cf. Buenos Aires, 12 marzo 1924, Jurisprudencia argentina, 12.299.

speaking here only of a temporary use or forbearance. A freehold use does affect the patrimony and is subject to the formalities of gift; a perpetual forbearance does affect the patrimony, but is freed of the formalities of gift for reasons already stated.) It should be noted that the law in this field develops out of a set of separate special institutions, only gradually and recently brought together and slightly generalized. The result is that there are somewhat artificial limitations upon the ways in which such transactions in theory should and in practice do arise. It is difficult to speculate as to what would be done were the parties to step out of the usual forms, but in fact the gaps are not important and no obvious awkwardness or inequity has arisen. One reason for this is that in any event an injury caused by non-performance or malfeasance of a gratuitous promise, if it does not fall within any of the special rules, is covered by the catchall of the Civil Code article 1382: Every human act whatsoever which causes damage to another obliges him by whose fault it has happened to compensate for it. For example, a promise to accept a gratuitous bailment is not enforceable as a bailment, for that contract arises only upon delivery of the chattel. It does not appear to be the kind of service which may be enforced as an agency (*mandat*). It cannot be enforced as a hiring of work, for that contract evidently presupposes a hire. Nevertheless, if plaintiff, relying on acceptance of his chattel for safekeeping, has put himself in a position where he cannot obtain other safe care for it, he should obviously be entitled to recover his damages. It seems fairly clear that he would recover, if under no other provision, then under article 1382.³⁵

The common law with respect to such promises has also developed through a gradual rationalization of separate special rules. By way of what now appears to be an anomalous exception, for example, gratuitous bailments and gratuitous agencies are enforceable. But the gaps are more significant in our law than in the civil law system. Gratuitous promises of forbearance are not enforceable and gratuitous promises of a service are enforceable only if performance of the service has begun. The distinction is wholly irrational. While of course one who undertakes a gratuitous service should be entitled to withdraw and escape

35. The case does not appear to have arisen, but it is generally agreed that such a promise would be enforceable. See 4 AUBRY AND RAU, COURS, p. 467, no. 340 n. 6; 1 BAUDRY-LACANTINERIE AND BARDE, TRAITÉ, p. 24, no. 23. Cf. Colmar, 8 mai 1845, DP. 46.2.219, enforcing a gratuitous promise of loan for use. Cf. also, Dijon, 9 oct. 1928, Gaz. Pal. 1928.2.885, dictum concerning gratuitous promise of transportation. The authors who have discussed this problem have placed the result upon a ground which appears to me untenable and which would lead to substantive and procedural incidents that can hardly be intended. Correct results are reached under art. 1382 and I am confident that recovery would be had under art. 1382 if it were not granted on some other theory.

liability upon giving notice sufficient to permit the promisee to avoid damage, nevertheless if he fail to give such notice he should be liable for the injury caused whether he has wholly failed to perform or has entered upon performance. That is the French law of gratuitous agency (*mandat*)³⁶ and the rule of the catchall article 1382. It should be our law.

The important difference between the civil law and the common law in this field is that we lack a catchall doctrine corresponding to article 1382. We have indeed our basic tort law which should perform that function, but it does not do so. The law of consideration, because so many generations of lawyers have been trained to accept it as the law in spite of its obvious nonsense, has shown a tendency to intrude itself into domains which do not belong to it and has overflowed not only upon the banks of formality but upon the opposite shore. Promises, it has long been recognized in every modern system of law, may give rise to enforceable rights not only through their own force when regarded, for one reason or another, as binding promises, but through their operation simply as facts. A representation may, under certain circumstances, be regarded as a binding promise, but even apart from its operation as a binding promise, a representation is a fact, an act, which if done negligently or wilfully may lead to responsibility under ordinary principles of tort law. Similarly a promise is an act, which if negligently or wilfully made may under ordinary principles of tort law give rise to responsibility. Examples of this are many but clear recognition of the principle is in our law hard to find. It seems clear that when promissory conduct is advanced by a party plaintiff as the basis for tort liability, rules of contract-making are entirely irrelevant and the ordinary rules of tort law, so far as they are applicable to the specific circumstances, ought to be sufficient guides to a just result. In our law, however, the law of consideration has far too frequently intruded its incongruous peculiarities into this domain and the effort to achieve reasonably fair results and consistent doctrine at the same time have inevitably conflicted and have produced a great deal of bad law and confused theory.

The Restatement of Contracts, in its Section 90, emphasizes these results. It attempts to provide a remedy by permitting the enforcement, if strictly necessary to a fair result, of promises without consideration, which have caused damage. It presupposes that, in principle, consideration is even here a requirement. This is a patch on a patchwork. The

36. Code Civil art. 2007. The *mandataire* will be excused however when performance would cause him great loss.

true solution is to recognize that in this field the law of consideration has no business in the first place.

The second class of gratuitous promises which under the policy of the French law do not require formality are promises to fulfill a moral obligation. It must be remembered that in the Roman law systems what is here called moral obligation is not a mere general description but a technical concept belonging to a definite body of law having to the civil law somewhat the relation of our system of equity to the common law. The moral obligations include the obligation of parents to establish a son or dower a daughter, the obligation of an heir to fulfill the unenforceable testamentary intentions of his ancestor, the obligation to compensate for an injury for which no action lies, to pay a debt discharged by bankruptcy, or voidable by reason of infancy.³⁷

In modern French law, moral obligations have two major consequences. Although a moral obligation may not be directly enforced, payment of a moral obligation is binding and may not be reclaimed, while payment where there is no debt may be reclaimed.³⁸ And a promise to perform a moral obligation gives rise to a civil obligation which may be directly enforced.³⁹ Such a promise is effective even though informal. The reason for this is clear. Performance of such an obligation cannot be regarded as improvident, nor can prospective heirs be allowed to assert an interest against its fulfillment. That being the case, the policy of the rule requiring formality does not apply.⁴⁰

It is often urged that our rule of moral consideration be broadened to correspond with the French doctrine of moral obligation, but comparison between the two is misleading. The French rules relating to moral obligation form a distinct, self-consistent doctrine—we have nothing comparable—and they operate as an exception to the rules of formality.

37. 7 PLANIOL AND RIPERT, *TRAITÉ*, pp. 285 *et seq.*, nos. 978 *et seq.*; 2 COLIN AND CAPITANT, *COURS*, pp. 262-267, nos. 275, 276.

38. Code Civil art. 1235 al. 2; 7 PLANIOL AND RIPERT, *TRAITÉ*, p. 299, no. 992.

39. Toulouse, 5 avril 1892, DP. 92.2.568, informal promise to fulfill a legacy declared orally and therefore inefficacious, enforced; *but see* Tribunal de l'Empire Allemand (Reichsgericht), 16 oct. 1891, DP. 1893.2.115, where an oral promise of dower made to the groom was held unenforceable, by German court applying French law, because of court's belief, erroneous under French law, that there was no moral obligation to dower a daughter; a contention, like that advanced in *De Cicco v. Schweizer*, 221 N. Y. 431; 117 N. E. 807 (1917), that the promise was bargained-for was rejected on the ground that it conflicted with the public policy which required that marriage-promises should be freely entered into and not bargained-for.

40. Indeed, not only the rules of form but the rules of substance peculiar to gifts are in part at least inapplicable for the same reasons. Thus, a payment in fulfillment of a moral obligation is not subject to diminution in the event that the heirs do not receive their legal portion, nor to revocation for ingratitude, nor to revocation upon birth of subsequent offspring. 2 COLIN AND CAPITANT, *COURS*, p. 267, no. 277.

Our doctrine of moral consideration is an anomalous exception to the doctrine of consideration. On the one hand, we recognize no affirmative reason why the promises in question should be formally made, and on the other hand, in many jurisdictions, even if made formally, their validity is not assured. For us, the real question is, should such promises be enforced in spite of the lack of consideration. In the French system that question has no significance; on the other hand the questions which control the French result—whether the interests of the prospective heirs are improperly infringed—have little significance for us.

A truer comparison may be made if we look at the problem affirmatively instead of negatively. Granting that in our system no affirmative consideration requires formality here, and that in the French system, the affirmative reasons for formality do not apply, a positive rationale for the enforcement of a promise to fulfill a moral obligation can be made out as follows: First, the existence of a previous obligation, even though an unenforceable one, raises a reasonable presumption in favor of believing that the promise in question was actually made, and affords reasonable assurance that if made, the promise was seriously intended. Second, while a person to whom such an obligation is owed is not reasonably entitled to count on its performance until he knows whether the obligor intends to fulfill it, once the obligor has stated his intention to perform, it is reasonable for the obligee to count on performance and adjust his affairs accordingly. These considerations seem adequate to justify enforcement of the promises to which they are applicable.

The controlling facts of the rationale here advanced, are: reasonable ground to believe the promise was made, reasonable assurance that the promise, if made, was seriously intended, reasonable basis for the promisee to manage his affairs in reliance on performance, and absence of any positive reason to refuse performance. This rule, so framed, is wider than the French doctrine of moral obligation, but it is not wider than the French law. The French law enforces promises which meet these tests, whether they are promises to fulfill a moral obligation or not. The rule here urged is also wider than our doctrine of moral consideration; it goes further than any rule accepted in our legal system. But in the light of this proposed rule, it may be seen that the deficiency of our doctrine of moral consideration is to be measured not by comparing the French rules of moral obligation, but by comparing the much wider principle of which the doctrine of moral obligation is a mere fragment separated off for reasons which have no pertinency to our law. To make our doctrine of moral consideration as wide as the French doctrine

of moral obligation and no wider would be merely to substitute what would, in the context of our law, be an irrational system for an absurd one. The real question is, has the requirement of consideration itself any justification in this field.

3. Promises bargained-for.

Ordinarily, promises not made for a gratuitous purpose are supported by consideration. But even commercial promises sometimes fail to satisfy the technical requirements of the law of consideration or come close to the edge. Rules of strict formality—requiring certain promises to be notarized, or under seal—have, as applied to promises in this category, little immediate bearing on the theory of consideration. Rules of quasi-formality have a more direct relationship. These are the rules requiring contracts of a certain importance to be in writing, represented, in our system, by the Statute of Frauds supplemented by the parole evidence rule. While generally regarded as rules of proof, these rules have much of the effect of rules of formality and are in part so intended. Their formal aspect is even more apparent in French law.

The writing demanded by French law⁴¹ has two major forms applicable to two types of promises. The first is the formality of the double.⁴² Whenever executory promises of a kind requiring a writing are exchanged, there must be drawn up as many distinct copies of the attesting instrument as there are distinct parties in interest and the instrument itself must contain the express statement that it has been drawn up, as the case may be, in duplicate, in triplicate, or so on. Compliance with the formalities gives the written expression of the agreement a conclusive force which would otherwise be lacking. Non-compliance does not invalidate the transaction but raises a higher standard of proof to be met if there has not been part performance by the party to be charged.

The second special form applies to unilateral promises of money or of goods having a definite money value. Such promises must be expressed in an instrument either entirely written in the handwriting of the promisor, or, the more usual practice, containing an additional statement in the handwriting of the debtor, *good for* or *approved for* so many francs.⁴³ The purpose of this is to give assurance that the promisor has not been imposed upon, that he knows what he is committing himself to.⁴⁴

41. Code Civil art. 1341.

42. Code Civil art. 1325.

43. Code Civil art. 1326 al. 1.

44. Cf. Bruxelles, 23 fév. 1880. Pas. belge 80.2.146. Defendant had signed "for surety." She claimed that she had put those words on a blank piece of paper

From this requirement of acknowledgment merchants are said to be excused.⁴⁵ What this really means of course is that merchants may be bound by a promise lacking these formalities, if the promise is adequately established by other means, whereas other persons cannot in general be bound by a unilateral promise of substantial magnitude unless these formalities have been complied with. Similarly, commercial contracts of a bilateral character are not subject to the formality of the double.⁴⁶

The reason for these exemptions is obvious and eminently reasonable. On the one hand, the necessities of commerce require that the formation of binding promises shall not await the execution of a formal instrument. On the other hand, merchants are relatively unlikely to put themselves unwittingly into a position where they may be held to a substantial promise which was not seriously intended; and this consideration applies to the merchant personally, to his non-commercial promises as well as commercial ones.

No such exemptions in favor of merchants' contracts exist in our law. An adequate explanation for this difference however seems to be supplied by the fact that the Statute of Frauds and the corresponding French rules requiring writings have a multiple basis. They serve not only as rules of quasi-formality tending to assure the deliberate and unmistakable expression of a promise, but also as rules of public policy in respect to proof, calculated to minimize the danger of perjury. Varying circumstances seem to justify or at all events to have produced a difference in attitude in this country and France with respect to the relative importance of these two functions of the rules governing writings. If the danger of perjury is great enough we may well be justified in subjecting business dealings to otherwise unnecessary obstacles. These obstacles indeed are not as serious as they may seem at first, for there are important exceptions from the requirement of a writing. Sales of goods may be enforced without writing where there has been acceptance of part delivery or payment of earnest money or part of the price, or in

at her husband's request. This contention was not challenged. Her signature was held not binding. If she had signed "good for ten thousand francs," there would be no doubt that she had signed wittingly. On the other hand, where it is clear that a deliberate obligation is undertaken with full knowledge, a technical defect will not be a defense: Cass. req., *supra* note 13. The note was signed: "good for ten thousand." Although it should have been signed: "good for ten thousand francs," it was held valid nevertheless.

45. Code Civil art. 1326 al. 2. This paragraph also excludes other classes of persons, such as domestics, for the reason that they may be illiterate and unable to comply. Their cases are scrutinized with additional care by the trial judge.

46. Code Civil art. 1341 al. 2; See Code de Commerce art. 109; cf. note 47 *infra*.

states having the Uniform Sales Act, where the goods are to be made to the buyer's peculiar requirements. What these exceptions do in effect is to restore in large measure the result of the French rule, but by way of specific provision for the most obvious cases rather than by way of general principle. The French rule gives the judge leeway; if he is persuaded of the reality of a business relationship somewhat like that alleged, to admit and consider at his discretion, testimony filling in the details.⁴⁷ Our rule replaces discretion with a list of the important facts which should open the door to testimony. The artificial character of the rule is one perhaps inevitably associated with the jury system.

The failure of our law to exempt mercantile contracts generally from the Statute of Frauds cannot be attributed to a lack of proper solicitude for the convenience of commerce, since other adequate explanation for our treatment of this subject can be made. No such explanation appears to defend our law of consideration itself from the same charge. The rules of consideration operate not infrequently and without apparent justification to render nugatory genuine, seriously intended, commercial promises unmistakably proved.

An outstanding example is the offer in terms irrevocable but which our law makes revocable at will. An attempt to make a firm offer legally binding runs up against offer and acceptance problems in both our law and the French. These difficulties, however, are readily surmountable. One solution out of several is to note that an undertaking to keep an offer open for a definite or reasonable period is wholly to the advantage of the offeree and may be presumed to have been accepted on coming to his notice: the maker of the offer has obviously waived the requirement of notice of acceptance, and plainly has the power to do so. The real difficulty with firm offers is that the undertaking to hold the offer open is not supported by consideration. Hence, the French system, which does not require consideration, enforces the irrevocability of the firm offer.⁴⁸ Our law does not, except in the case of an offer under seal. In some jurisdictions the seal does not have its common law force; there we cannot have firm offers at all. In the others, firm offers are possible only upon compliance with the artificial and unbusinesslike formalities of the sealed instrument—and are practically unavailable in the field of their greatest usefulness—the telegraphic offer.

47. Code de Commerce art. 109 makes testimony admissible where the tribunal believes it should admit it. Code de Commerce art. 49, relating to associations, makes testimony admissible if the tribunal judges that it may be allowed. Proof of a commercial case by testimony is customary but it is not a matter of right and is always subject to the discretion of the tribunal.

48. 2 COLIN AND CAPITANT, COURS, pp. 28-29, no. 28; cf. Cass. req., 29 mars 1938, DP. 1939.1.5, note de Voirin.

The firm offer is a useful business device. It is subject to no rational objection on substantial grounds and it ought to be enforced. All we really ask in the states where a sealed offer is binding, and all we should ask anywhere, is an unambiguous sign that the offer was meant to be irrevocable for the period stated or for a reasonable period. L. S. satisfies this need but clumsily. It is difficult to see why L. S. should be more efficacious than the unequivocal FIRM.

Commercial transactions, reasonable in their nature and satisfactorily proved, should not be impeded by requirements of formality more burdensome than those to which merchants are accustomed to subject themselves in serious matters. The difficulties occasioned by the law of consideration are particularly unwelcome since they cannot conveniently be guarded against. Ordinarily, any business-reasonable agreement will satisfy the requirements of consideration. Business men therefore do not try to reckon with the peculiarities of the law even if they could. The result is that the cases which, for legal reasons but for no business reason, are marginal, make unexpected trouble. Almost always the party protected by the rules of consideration has acted in bad faith. Good results can be reached in these cases only when a judge is courageous enough and short-sighted enough to make bad law, storing up more trouble for more good faith transactions. A pair of New York cases will suffice to illustrate how the doctrine of consideration fails to measure up to the reasonable needs of commerce.

In *Colin v. Levine*⁴⁹ a manufacturer of women's garments made the following arrangement with a selling company. The manufacturer was to supply the selling company with samples of his line, stipulating a price upon each, and was to fill the orders obtained by the latter, remitting to the latter the difference between the price actually obtained and the stipulated price. He further agreed not to solicit the selling company's clientele on his own account. He appears to have agreed also, although this is not entirely certain from the report, to provide desk space in his own office. This arrangement, although of a type not uncommon in business practice, involves promises on one side only. The court therefore declined relief when the promisor ejected the promisee from his offices, declined to fill orders obtained by the latter, retained the full amount of a number of checks already received, refusing to remit the difference, and proceeded to solicit the selling company's clientele on his own account. This result is not only outrageous but is wholly unjustified by the strictest rule of consideration, for at least to the extent of orders already obtained pursuant to the arrangement, consideration

49. 185 App. Div. 529, 173 N. Y. Supp. 289 (1st Dept. 1918)

is plainly present and the promisor should have been held to his agreement, at least with respect to such orders, and with respect to the requirement that he not solicit on his account the selling company's clientele. However, if we remove this factor from our discussion, supposing for example, that no sales had as yet been produced by the promisee, the result is one which must clearly be expected under orthodox consideration doctrine.

In *Wood v. Lucy, Lady Duff-Gordon*⁵⁰ the defendant agreed to confer upon the plaintiff an exclusive power to place her designs and her endorsement upon the designs of others, receiving half the profits. Here again the promisee made no counter promise except the promise to pay half the profits, a promise illusory in character in the orthodox view, if the promisee was not bound to do anything to insure profits to the promisor. Here Judge Cardozo found a promise implied in fact that the promisee would utilize his best efforts and the resources of his organization in achieving profits for the benefit of the promisor. The rule of consideration was thereby satisfied and the promise was enforced, damages being awarded to the plaintiff for the promisor's improper conduct in surreptitiously selling her endorsement to others upon her own account.

Assuming, as did the court, that no similar counterpromise may be implied in the Cohn and Levine transaction, this difference adequately explains the difference in result in the two cases under standard consideration theory. But it is difficult to see how the difference is to be justified. There is no doubt that the promise in *Cohn v. Levine* was as seriously and as reflectively made; there is no suspicion of any defect of consent to be drawn out of the failure of consideration. The transaction is a normal and reasonable one, well calculated to serve the interests of both parties. It is not apparent that any juridical principle is served by compelling such a transaction to be expressed in a formal instrument under seal, or that its enforceability should be affected by the payment, for example, of ten dollars by the promisee for the promise made to him. The payment of such a sum for the promise might well be regarded as a trifling formality to be complied with in order to render the bargain more certain, but it is clear that the formality in question is not one which, in the present state of business custom, seems necessary, desirable or natural.

There may indeed be sufficient reason for not exempting mercantile agreements from the Statute of Frauds, but no adequate reason appears

50. 222 N. Y. 88, 118 N. E. 214 (1917).

to justify not exempting mercantile agreements which satisfy the Statute of Frauds, from the requirement of consideration.

III. SHALL WE CHANGE THE LAW OF CONSIDERATION?

Our law of consideration, in its relationship with the law of formality, is inharmonious and unbalanced. It fails to provide a useable guide to direct the formalities of contract making. It has improperly intruded itself into the domain of tort. It fails to make suitable provision for gratuitous promises of service. Above all, it fails to respect the reasonable requirements of business and does not aid to equitable decisions in commercial cases.

In all these respects, the French law does its work well, and through methods not strikingly different in outline from those of our law. The question therefore presents itself whether we should not change our rules, and particularly whether we should not adopt or imitate some of the French rules. I believe that any such course would be unwise and that the remedy lies in another direction.

An interesting illustration of how civil law rules might be adopted by our law is afforded by the Uniform Written Obligations Act. We have already seen that our system lacks a satisfactory minor formality. The Act attempts to supply that lack with the type of new lesser formality which one might derive directly from the French unilateral instrument with its additional express notation: *good for* so many francs. The device is sound in principle. It affords a simple unambiguous expression of the fact that the promisor is cognizant of the significance of his act and seriously intends to be bound. The French formula however stems from an ancient tradition and is so customary and familiar in France that Frenchmen commonly employ it even where it is not required and has no legal effect, signing a lease for example "good for tenancy" or a power of attorney, "good for power." Moreover as we have seen, the French rules concerning the minor formalities are part of an integrated balanced system of rules. The formula—"and I intend to be legally bound"—of the Uniform Act, on the other hand, has no roots in common law tradition. It will not readily be used and its use will not readily be correctly interpreted, for it will be in each case, a stark fact lacking an ambience of appropriate custom. The Act, moreover, makes no effort to correct the disharmonies of our existing law. It does not even attempt to establish an adjustment between existing rules and the new rule. For example, although the Act creates possibilities of new kinds of abuse, no protection is prepared against any form of abuse not falling within the law of duress.

We must work from what we have. We must indeed recognize the defects of what we have, and we must remedy them. But what we need is not plasters but cures. This requires two kinds of effort. Our law of consideration is a premature crystallization of case-law rules. Decisions, sound in themselves, have been inappropriately generalized into doctrine on the basis of inadequate experience. The cure is to go back to the more fluid state of the law and seek new generalizations which fit our present experience. In other words, the remedy for the practical defects of the law of consideration is more theory—but better theory. We must reexamine the purposes of consideration which were intended to serve, and then reframe the rules to fit their purpose.

We have already seen that the rules of consideration operate as rules of formality. In the typical cases envisaged by the rules, the job is frequently well done, but the non-typical cases are too common. The rules of consideration may also be considered as rules of substance, as rules of proof, as rules of damages. In all these respects, examination will show, the doctrine of consideration seeks to give expression to sound objectives, but does so in ways that do not fully meet the needs of modern contract making. We need, not a restatement of the law, but a restatement of the objectives of the law. Such an effort can be successful if, at the same time that we restate the objectives of the law and reframe the rules to fit the objectives, we also enforce the old rules in the light of the objectives.

We must work from what we have. Starting with the rules we have we must search out the principles that inspired these rules and we must build up new rules to the measure of those principles. At the same time we must cut down the old rules to the same measure; we must avoid applying them in such a manner as will defeat their own purposes. *Cessante ratione cessat ipse lex*. This was Mansfield's approach (in *Pillans v. Van Mierop*,⁵¹ for example). I submit it is the sound method of the common law and the most hopeful one.

MALCOLM S. MASON.

WASHINGTON, D. C.

51. 3 Burr. 1663, 97 Eng. Rep. 1035 (K. B. 1765).

FORMAL CONTRACTS AND CONSIDERATION: A LEGISLATIVE PROGRAM*

In its opinion in *Cochran v. Taylor*¹ in 1937, the New York Court of Appeals said:

Throughout the centuries, the rule as to the binding effect of the seal has been founded in reason and based on necessity. Today, in the face of the tremendous number of business transactions open to investigation by the courts, reason continues to dictate and necessity to require more forcefully than before that a party to a sealed instrument should be estopped to assert want of consideration.²

This impressive attempt of the Court of Appeals to rehabilitate the seal seems even more striking when it is noted that the position taken in the case conflicts not only with the general understanding of what the rule had been for over a hundred years,³ but also with the legislative intent as clearly expressed by successive reenactments, with strengthening amendments, of the statute⁴ which had been universally interpreted as stating that rule.

Following the adoption of the New York statute in 1829, state

* This article is concerned with the line along which consideration law should develop. It does not discuss whether that development should take place in the courts or in the legislature. The statutes enacted and proposed indicate that much of it will be legislative. On the other hand there is no demand for exhaustive codification. The flexibility of the approach advocated, the treatment of particular situations as they appear to require treatment, leaves freedom to "creative" courts.

1. 273 N. Y. 172. (Action for specific performance of an option under seal for the purchase of certain real and personal property. The court held an attempted revocation of the offer ineffectual. A sealed promise is binding regardless of consideration. A statute [§ 342 of the Civil Practice Act as it read in 1934] reading "A seal upon an executory instrument is only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument was not sealed," is only declaratory of the common law. Semble, where consideration is intended, the presence of a seal does not inhibit proof of its insufficiency; where no consideration is intended, the seal alone makes the promise binding.)

2. At page 179.

3. See N. Y. LAW REVISION COMMISSION, 2ND ANNUAL REPORT, *Doctrines Relating to the Seal* (1936) 296-306. (Hereafter referred to as "Law Revision Commission Study.")

4. 2 REV. STAT. (1829) § 77, as amended, N. Y. C. P. A. (1934) § 342. That it was the legislative intent to nullify the effect of a seal in making a promise binding without consideration received further corroboration from the amendment of § 342 in 1936 to read:

Seal on written instruments: evidence of consideration; . . .

1. A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of consideration. . . .

The court, in deciding *Cochran v. Taylor* felt that it was not called upon to determine the "intent and effect" of this amendment.