

YALE LAW JOURNAL

Vol. XXVIII

MAY, 1919

No. 7

CAUSA AND CONSIDERATION IN THE LAW OF CONTRACTS

ERNEST G. LORENZEN

Professor of Law, Yale University

Although the common law is the general basis of the law of this country and of the law of the British Empire, and has therefore a claim to the principal interest and attention of the Anglo-American lawyer, he cannot afford wholly to neglect the study of the civil law. Not only are the commercial relations with foreign countries increasing from year to year, but a considerable portion of the territory of the United States and its possessions and of the British Empire are governed wholly or in part by the doctrines of the civil law. One of the most fundamental differences between the common law and the civil law which is of special importance from the standpoint of business is presented by the question of *causa* and consideration in the law of contracts.

In Louisiana,¹ in the Canal Zone,² in Porto Rico,³ in the Philippine Islands⁴ and in certain parts of the British Empire a contract is valid if it has a sufficient *causa*. The meaning of the term *causa* and its relation to the Anglo-American doctrine of consideration has thus been mooted a great deal in the courts—particularly in those of South Africa. Through the influence of Chief Justice de Villiers of the Supreme Court of the colony of the Cape of Good Hope the doctrine became finally established in that colony that the two requirements were in

¹ Civil Code, Arts. 1899-1900.

² Civil Code, Art. 1524.

³ Civil Code, secs. 1228, 1241.

⁴ Civil Code, Arts. 1261, 1274.

effect the same, except as regards donations.⁵ The Supreme Court of Transvaal⁶ and the courts sitting in the other British possessions⁷ whose jurisprudence is based upon the Roman Dutch law have reached the conclusion, on the other hand, that the doctrine of *causa* in their law of contracts is different from the English doctrine of consideration; and this latter view was recently approved by the Privy Council⁸ in a case which came up from the Supreme Court of Ceylon.

It is the object of this article to consider briefly the meaning of the term *causa* so far as it concerns the law of contracts and to compare it with our own law of consideration.⁹

All countries of course require for the validity of a contract capacity, intention to contract, and an object that is physically possible and legally permissible. Some countries demand nothing beyond this in general,¹⁰ although in certain cases some special forms may be prescribed. But another group of countries, in which the English common law prevails, will not enforce an agreement unless it is contained in a sealed instrument or is supported by a valuable consideration. A third group embraces those countries which require the existence of

⁵ See *Alexander v. Perry* (1874) 4 Buch. 59; *Malan & Van der Merwe v. Secretan, Boon & Co.* (1880) Foord, 94; *Tradesmen's Benefit Society v. Du Preez* (1887) 5 Sup. Ct. 269; *Mtembu v. Webster* (1904) 23 Sup. Ct. 323.

The earlier cases held that *causa* and consideration were totally different. *Louisa & Proctor of Slaves v. Van den Berg* (1830) 1 Menzies, 471; *Jacobson v. Norton* (1841) 2 Menzies, 221.

A release also is valid without a consideration. *Malan & Van der Merwe v. Secretan, Boon & Co. supra.*

⁶ *Rood v. Wallach* (1904) T. S. 187.

⁷ For example, Ceylon. *Lipton v. Buchanan* (1904) 8 New L. R. 49.

⁸ *Jayawickreme v. Amarasuriya* (1918, P. C.) 119 L. T. 499.

⁹ Concerning *causa* see the following literature: Artur, *De la cause* (Thesis, Paris, 1878); Brissaud, *De la notion de cause dans les obligations conventionnelles en droit romain et en droit français* (Thesis, Bordeaux, 1879); P. Colin, *Théorie de la cause dans les obligations conventionnelles* (Thesis, Paris, 1897); Cornil, *A propos de la révision du Code Civil; De la cause dans les conventions* Arts. 1108, 1131-1133, Brussels, 1890; Ernst, *La cause est-elle une condition essentielle pour la validité des conventions?* Published in the *Bibliothèque du jurisconsulte et du publiciste*, Liège (1826) pp. 250-264, reprinted in Timbal's thesis, *infra*; Erxleben, *Die Conditiones sine Causa*, 1850; Gneist, *Die formellen Verträge*, 1845; Gradenwitz, *Begriff der Voraussetzung*, 1880; Lotmar, *Ueber Causa im römischen Recht*, 1875; Schlossmann, *Zur Lehre von der Causa obligatorischer Verträge*, 1868; Séfériadès, *Etude critique sur la théorie de la cause* (Thesis, Paris, 1897); Timbal, *De la cause dans les contrats et les obligations en droit romain et en droit français* (Thesis, Toulouse, 1882); Voigt, *Ueber die conditiones ob causam und über causa und titulus im Allgemeinen*, 1862; Windscheid, *Die Lehre des römischen Rechts von der Voraussetzung*, 1850.

¹⁰ For example, Austria (2 Stubenrauch, *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche* (6th ed.) sec. 861, p. 5); Brazil (Art. 145, Civil Code); Germany (1 Planck, *Bürgerliches Gesetzbuch*, sec. 145, note); Japan (2 De Becker, *Annotated Civil Code of Japan*, 120); Mexico (Art. 1279, Civil Code); and Switzerland (Art. 17, Federal Code of Obligations),

a sufficient *causa*, to make a contract valid.¹¹ The French Civil Code, which may be taken as a fair representative of this group, expressly enacts:

"Article 1131. *An obligation without 'cause' or founded on a wrong 'cause' or an illicit 'cause' can have no effect.*"¹²

I

The partisans of the modern doctrine of *causa* generally connect it with the Roman law. Let us inquire therefore into the Roman theory of contracts.

Roman law, even in the last stage of its development, did not enforce an agreement unless it could be brought under certain well-defined heads of *contracts* or *pacts*. In the time of Justinian all agreements would become actionable by being clothed in the form of a *stipulation*, which for practical purposes may be regarded as equivalent to a written form.¹³ Other agreements would create an enforceable obligation only if they belonged to certain recognized classes of contracts known as *real* (nominate or innominate)¹⁴ and *consensual* contracts. In all *real* contracts the obligation arose not from the agreement of the parties but from the delivery of property or the performance of the plaintiff's promise, that is, in our terminology, from an executed consideration.¹⁵ The consensual contracts, although only four in

¹¹ For example, Argentina, Arts. 533, 534, 536, Civil Code; Belgium, Arts. 1108, 1131, 1133, Civil Code; Bolivia, Art. 699, Civil Code; Chile, Arts. 1445, 1467, Civil Code; Colombia, Art. 1524, Civil Code; France, Arts. 1108, 1131-1133; Guatemala, Art. 1375, Civil Code; Holland, Art. 1371, Civil Code; Italy, Arts. 1104, 1119, 1122, Civil Code; and Spain, Arts. 1274-1275, Civil Code.

¹² See also Art. 1108, Civil Code.

¹³ The stipulation was the contract of formal question and answer (originally *spondesne? spondeo*, later *dabis? dabo*, *promittis? promitto*, etc.). Originally the question and answer had to be oral. A stipulation required therefore the presence of the parties and their ability to hear and speak. During the later Empire a stipulation was generally accompanied by a written memorandum (*cautio*). The necessity of question and answer was practically dispensed with, but the presence of the parties was required nevertheless. Justinian created an almost irrebuttable presumption in favor of their presence. See Girard, *Manuel élémentaire de droit romain* (5th ed.) 488-489.

¹⁴ *Real* contracts became actionable from the delivery of property (*res*). The nominate real contracts were the following: loan for consumption (*mutuum*); loan for use (*commodatum*); bailment (*depositum*); and pledge (*pignus*).

The innominate *real* contracts became actionable at a later period. The *Corpus Juris* distinguished four categories, differing according to the nature of the acts to be performed. They were designated: *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*. As the nature of the act to be performed might vary indefinitely no general name applicable to all cases of this kind was adopted. For this reason they are called the "innominate" *real* contracts. See Sohm, *Institutes of Roman Law* (Leslie's translation, 3d ed.) 378-379.

¹⁵ Cf. the early common law action of debt, which would lie only where the debtor had received something from the creditor which he was bound to return or pay for (*quid pro quo*).

number—Purchase and Sale, Hire, Partnership, and *Mandatum*—covered as a matter of fact the most important transactions from the standpoint of business. All other agreements were regarded as *nude* pacts and were unenforceable by action, although they could be pleaded as defenses.

In the course of time other agreements became actionable. As the number of consensual contracts was deemed closed, these agreements did not become "contracts" in the Roman terminology but continued to be called "pacts." To distinguish them from the agreements which were not enforceable by action, i. e., from the "nude" pacts, they were called by later writers "*vested*" pacts. Vested pacts might be *pacta adiecta*, *pacta praetoria*, or *pacta legitima*. *Pacta adiecta* were collateral agreements added to transactions of certain kinds.¹⁶ The original agreement being a recognized contract, the good faith on which that contract was based was held to imply a duty to perform whatever was promised in the collateral agreement. *Pacta praetoria*,¹⁷ as the name indicates, were made actionable by praetorian law, where the strict law gave no remedy. The term *pacta legitima* refers to certain pacts which were made actionable by the late imperial law, namely, promises of a gift up to a fixed amount¹⁸ and promises to give a *dos*.¹⁹

Notwithstanding these exceptions, the rule still remained until the end that nude pacts were not actionable. Savigny²⁰ calls this the most characteristic doctrine of the Roman law of contracts. Ulpian expressed this doctrine in the following passage:²¹

"If there is no additional ground (*causa*), in that case it is certain that no obligation can be created, [I mean] on the mere agreement; so that a bare agreement does not produce an obligation. It only produces a defense."

The modern opponents of the doctrine of *causa* contend that *causa* in the Roman law of contracts meant nothing more than any ground or foundation of the action. In the case of formal contracts, that is, of the stipulation in the time of Justinian, the *causa* would thus consist in the observance of the prescribed legal formalities. In the case of consensual contracts it would be the consent of the parties, and in the case of *real* contracts, nominate or innominate, the delivery of the

¹⁶ The transactions referred to were those of good faith, i. e., the *bonae fidei negotia*.

¹⁷ The most important was the *constitutum debiti*.

¹⁸ For gifts above 500 *solidi* Justinian required registration in court. Code XIII, 53, 34, 1; Sohm, *op. cit.*, 202, where it is stated that 500 *solidi* are equivalent to 234 pounds. In *Thorpe's Executors v. Thorpe's Tutors* (1886) 4 Sup. Ct. Cape Colony, 488, the sum of 500 *solidi* is said to represent 500 pounds.

¹⁹ *Dos* = wife's marriage portion. See Sohm, *op. cit.*, 465 ff.

²⁰ Savigny, *Das Obligationenrecht*, 231.

²¹ Digest, II, 14, 7, 4.

chattel or the performance on plaintiff's part. The *causa* of the *pacta adiecta* would be the original contract and that of the *pacta praetoria* and *pacta legitima* would be simply the fact that the case fell within the terms of the particular edict of the praetor or of a particular statute which gave it such actionable character.²²

This is the general interpretation given to Ulpian's words quoted above.

"All that Ulpian means," says Buckland,²³ "is that you cannot in general sue on a mere pact as such: you must show that your agreement is one of those which the law makes actionable. His way of putting the matter expresses the great difference which exists between the Roman attitude towards agreement and that of our law. With us an agreement is actionable unless there is some reason why it should not be so. With the Romans an agreement was not actionable unless there was some reason why it should be so. The result is that, in these texts, *causa* means merely actionability, and does not denote anything else, independent of actionability, which creates that important characteristic."

If *causa* in the Roman law of contracts had no other signification than the above, the want of relationship between the modern doctrine of *causa* and the Roman law could easily be established, for the modern civil law has outgrown the formal Roman law distinctions as to the different classes of contracts and pacts. The supporters of the modern doctrine of *causa* contend, however, that the Roman writers required the presence of a valid *causa* in another sense, in the sense of *juridical reason*.²⁴ We must inquire, therefore, to see whether such a *causa* was in fact necessary as a special element for the creation of a contractual obligation in Roman law.

As regards *bilateral* and *real* contracts obviously no special element is requisite in addition to what the nature of the particular class of contracts demands.²⁵ It goes without saying that if the legal duty of one party to a bilateral contract does not arise the other party is not

²² Planiol, *Traité élémentaire de droit civil* (6th ed.) no. 1031; Arbus, *La cause illicite*, p. 29; Maasdorp, *Institutes of Cape Colony*, Bk. III: *The Law of Obligations*, Pt. 1: *Contracts*, 34.

The above recognized grounds for the enforcement of agreements are often spoken of as *causae civiles*. Sohm, *op. cit.*, 37. Cf. Girard, *op. cit.*, 441-442, note; Petit, *Traité de droit romain* (5th ed.) 275, note. The term *causa civilis* occurs in the *Corpus Juris* only once. Pomponius uses the phrase *ex causa civili computandum est* (Digest XV, 1, 49, 2), and refers evidently to a source productive of a civil obligation just as Ulpian in Digest II, 2, 3, 7, uses the term *causa naturalis* in the sense of a cause productive of a purely natural obligation. See Petit, *op. cit.*, 275, note; 2 Accarias, *Précis de droit romain*, 16, note.

²³ Buckland, *Elementary Principles of the Roman Private Law*, 232.

²⁴ Colin, *Théorie de la cause des obligations conventionnelles*, 270 ff.; see also Girard, *op. cit.*, 456-458.

²⁵ 2 Accarias, *op. cit.*, 16, note; Petit, *op. cit.*, 25.

bound either. Calling the duty of one party the *causa* of the duty of the other adds nothing to what is implied from the nature of the contract.²⁶ The agreement arises from the consensus as such. Speaking of a contract of sale, Planiol²⁷ says:

"Can we say that the obligation of one party is the 'cause' of the obligation of the other? That would involve a *logical impossibility*. Both obligations, springing as they do from the same contract, arise *at the same time*. It is therefore impossible that each of them should be the cause of the other, for effect and cause cannot be exactly contemporaneous. According to the generally accepted view a vicious circle is created, for if each of the two obligations is the effect of the existence of the other neither of them can arise. This phenomenon of mutual production is incomprehensible. The idea is therefore false."

Criticising our doctrine of consideration in its application to bilateral contracts, Street makes the following statement, which is applicable also to *causa*.²⁸

"At the outset it may be noted that the efforts of legal scholars to work out a theory of the bilateral contract along the ancient lines have proved unfruitful . . . The mutuality of the promises gives validity to both. The law simply here recognizes a consensual contract, the only condition being the requirement of mutuality."

In a bilateral contract the respective duties of the parties arise from the consensus as such. To call the consensus itself the *causa* of the contract is tantamount to saying that there is no separable element to be called "*causa*"; for consensus must be present in any case.

In the matter of *real* contracts also, it is apparent that no contract can arise if the property is not delivered. This follows from the very

²⁶ May, *Eléments de droit romain* (9th ed.) 243.

Some of the authors find the notion of *causa* indispensable in this class of cases. Colin & Capitant say: "In bilateral contracts the notion of *causa* is in reality indispensable, for it establishes this elementary truth, that the reciprocal obligations of the contracting parties are strictly interdependent, in the sense that if one of these obligations is not performed, whatever the reason may be, the other has no longer any cause, and should not subsist. And in this way two characteristic traits of bilateral contracts are to be explained, for which it is difficult to account without the notion of *causa*: (a) In these contracts, if one of the parties fails to perform, the other may likewise refuse to perform, and interpose the *exceptio non adimpleti contractus*; (b) In the same class of contracts, if one of the parties fails to perform, whatever the cause of such non-performance may be—whether it result from fault or accident—the other party may demand annulment of the contract (Art. 1184, Civil Code)." 2 Colin & Capitant, *Cours élémentaire de droit civil français*, 314-315.

It is submitted that the above consequences may be derived directly from the nature of bilateral contracts without need of introducing the notion of *causa*.

²⁷ 2 Planiol, *op. cit.*, no. 1038.

²⁸ 2 Street, *Foundations of Legal Liability*, 107, 109.

definition of a *real* contract. Just as in consensual contracts legal consequences are attached by law to the agreement of the parties as such, so in the case of *real* contracts, whether nominate or innominate, they result from the delivery of some *res* or from the performance of some act. We may say, of course, that the delivery of the thing or the performance of the act constitutes the *causa* or consideration of the other party's duty—and in countries in which a doctrine of *causa* or of consideration exists such a statement would of course be entirely proper—but it is manifest that the so-called *causa* or consideration in either case is in reality only an additional designation for the source of the obligation. Thus used *causa* becomes synonymous with *res*, *coze*, *chose*.

The pacts, which were actionable in Roman law only under exceptional circumstances, derived their actionability from the edict of the praetor or from a particular statute, and no general theory of *causa* is applicable to them. The *pacta adiecta* presupposed only the existence of a valid legal transaction "of good faith." The most important one of them, the *constitutum debiti*, was a promise to discharge a subsisting duty, either one's own or another's, but it was sufficient that the prior obligation or *causa* was merely a natural obligation;²⁹ whereas the informal promise of a gift of limited amount presupposed nothing but an intention to confer a gratuity.

In connection with *formal* contracts *causa* did have a special significance. A stipulation might of course be entered into for various purposes. The peculiarity of this contract was that it would create a duty to pay, although the object (*causa*) on account of which it was made failed wholly, for some reason, of ever being attained.³⁰ Unless the *causa* was made expressly a condition of its validity the stipulation was originally binding solely by reason of its form.³¹ The formal declaration as such created the legal duty, without reference to the actual intention of the parties.³² This independence between the will as declared and the actual will did not however maintain itself until the end, but suffered gradual weakening. The praetor paralyzed the effect of the formal stipulation by granting to the *promissor* a defense (*exceptio doli*) which enabled him to escape liability by proving that

²⁹ Seuffert, *Zur Geschichte der obligatorischen Verträge*, 18.

³⁰ Before Justinian this was true also of the literal contract, concerning which see Sohm, *op. cit.*, 391 ff.

³¹ Compare the common law doctrine relating to a promise of gift in an instrument under seal.

³² "If, for instance, I have made you solemnly promise to pay me a sum of money, as a preliminary to my advancing you the money, and then never advanced it; I can sue you for the money, for you are bound by the promise, but it would be iniquitous that you should be compelled to fulfil such a promise, and therefore you are permitted to impeach my claim by the exception of fraud." Gaius IV, 116 a.

the duty assumed was without cause or was based upon an illicit cause.³³

While the validity of a stipulation which satisfied the requirements of form was maintained in the interest of legal security, considerations of equity caused the Roman law to look behind the form and to protect the party stipulating, to the extent that seemed just and proper. It thus considered not only the facts which influenced the content of the will which was expressed in the transaction but also those which as *causa* conditioned the existence of such will.

Where the stipulation called for the repayment of money which had not been advanced in fact, and such stipulation was accompanied by a written memorandum (*cautio*), a defense was allowed called the *exceptio non numeratae pecuniae*. From Caracalla on this defense would shift over to the plaintiff³⁴ the burden of proving the fact that the money had been paid. The defense could be set up, however, only within a certain time from the execution of the contract,³⁵ after which time the writing was incontrovertible evidence that the money had been advanced.³⁶ But Justin provided that these rules should not apply if the *causa* on account of which the stipulation was made was set up in the instrument (*cautio discreta*).³⁷

The strict civil law itself ultimately granted relief to the debtor. While maintaining the validity of the stipulation,³⁸ it allowed him a personal action (*condictio sine causa*)³⁹ for the purpose of liberating

³³ "Ne cui dolus suus per occasionem iuris civilis contra naturalem aequitatem prosit." Digest XLIV, 4, 1, 1.

³⁴ "Si quis sine causa ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiat, exceptio utique doli mali ei nocebit." Digest XLIV, 4, 2, 3.

See Gneist, *Formelle Verträge*, 181 ff.

³⁵ Code IV, 30, 3; Girard, *op. cit.*, 457-458, 504; Gneist, *op. cit.*, 209, 276 ff., 285; Petit, *op. cit.*, 295, note.

The simple declaration of the alleged debtor that the money had not been paid over would impose upon the alleged creditor the burden of proving such fact also in case a *condictio* were brought by the debtor for his liberation from the obligation, or if he denied liability on the *cautio* by addressing a protest (*contestatio*) to that effect to the creditor. Girard, *op. cit.*, 504-505.

³⁶ The period, which was one year before Diocletian, was enlarged to five years by the latter. Justinian reduced it to two years. Institutes III, 21; Code IV, 30, 14; Girard, *op. cit.*, 505.

The same provisions applied to the action for his liberation. Girard, *op. cit.*, 505.

Through the *contestatio* the *exceptio* and *actio* could be made "perpetual." Code IV, 30, 14, 4. But see Gneist, *op. cit.*, 285.

Justinian appears to have applied the above rules or analogous rules also to certain other situations. See Girard, *op. cit.*, 506.

³⁷ Code IV, 30, 14; Girard, *op. cit.*, 505.

³⁸ Code IV, 30, 13; Girard, *op. cit.*, 505; Windscheid, *Die Lehre von der Voraussetzung*, 202.

³⁹ Girard, *op. cit.*, 457; Petit, *op. cit.*, 295; 2 Savigny, *Das Obligationenrecht*, 250-251, 253-254.

⁴⁰ Julian says: "Qui sine causa obligantur, incerti conditione consequi possunt ut liberentur." Digest XII, 7, 3; see also Code IV, 30, 7.

himself from the obligation, or, if he had discharged it, for the recovery of what had been paid or handed over (*condictio indebiti*). If the stipulation had an illicit cause he could recover what he had paid (*condictio ob turpem vel iniustam causam*),⁴⁰ provided the obligation was illicit only with respect to the other party. *Causa* in Roman law became thus intimately connected with the rules relating to unjust enrichment and illegality.⁴¹

From these provisions it would appear that whenever money if paid over, or property if transferred in performance of a contract, could be recovered *ex aequo et bono*, the party who had agreed to pay such money or to transfer such property could have his obligation cancelled or could, if sued, defend on the ground that the obligation was without cause.⁴²

Under what other conditions an *exceptio* or *actio* would lie in Roman law for want of a sufficient cause, does not clearly appear. Paul makes the following statement:⁴³

"But if he [the heir] has sold the thing to the buyer in the false belief that he was bound by the testament to do so, no action will arise against the seller from the contract, because the plaintiff may be warded off with the *exceptio doli*. . . Pomponius says that he [the heir] may also bring the *condictio incerti* for his liberation."

Paul does not say directly that the contract is unenforceable because of the absence of a *causa*, but we may assume that he had this in mind. Whether he did or not, the fact remains that the purchaser cannot hold the seller under the contract of purchase and sale. Why not? The seller intended to enter into a contract of sale with the purchaser. Why should the seller's erroneous belief that he was obligated to sell the property enable him to escape from the obligation incurred? It is difficult to find an explanation except upon the assumption that the purchaser knew that the seller would not have entered into the contract but for the presupposition of an existing duty. In the absence of such knowledge the mistake would affect merely the seller's motive, which would be of no effect according to Roman law.⁴⁴ If the existence of such knowledge is implied by Paul, the passage would seem to mean that a contract entered into in due form would be unenforceable if an essential presupposition or *causa*, with reference to which the contract was concluded by both parties, did not in fact exist.

Windscheid⁴⁵ has tried to show that the Romans recognized a general

⁴⁰ Digest XII, 5, 1, 2; XII, 5, 2; XII, 5, 3. Cf. our own law concerning *in pari delicto*. Woodward, *Quasi-Contracts*, 212 ff.

⁴¹ See Digest XII, 4; XII, 5; XII, 6; XII, 7.

⁴² Where the stipulation was entered into on account of a transaction which was illegal the defendant could resist plaintiff's claim with the *exceptio doli*. Digest XII, 5, 8; Girard, *op. cit.*, 458.

⁴³ Digest XIX, 1, 5, 1.

⁴⁴ Digest XII, 6, 65, 2; 2 Cuq, *Les institutions juridiques des Romains*, 352.

⁴⁵ Windscheid, *Die Lehre von der Voraussetzung*, 1850; *Pandekten* (7th ed.) sec. 98.

doctrine of "presupposition" (*causa*), which was applicable to all juristic acts. According to him any declaration of will could be avoided in Roman law by means of an *exceptio* and *actio* if the presupposition (*causa*) under which such declaration was apparently made, did not exist. In order to be legally effective, the presupposition of a declaration of will must, however, as regards transactions *inter vivos*, be recognizable by the other party.⁴⁶ Most of the writers are satisfied, however, that such a general doctrine is not supported by the Roman law texts.⁴⁷ Referring to this doctrine Regelsberger adds the following criticism:⁴⁸

"It must be rejected all the more readily because it contains a danger for the security of legal transactions. The supporters of the doctrine have not succeeded in assigning definite limits to the notion of presupposition so far as it is of legal consequence. Under the wide mantle of presupposition it is possible to introduce as causes for annulment all the motives which may produce the intention to enter into a legal transaction . . . It will be found upon closer examination that the desired object can be attained in some other way—frequently in proving the existence of an implied condition, and in case of testamentary dispositions also in proving a mistake in motive."

From what precedes it is apparent that the word *causa* in its application to the law of contracts had in Roman law proper a number of different meanings. No general theory can be deduced from the Roman texts. The following words from Bry summarize as accurately as is possible the Roman law of *causa*. He says:

"The Romans had no theory of *causa*, nor did they consider it an essential condition for the validity of contracts, but they have often applied the principles of *causa*."⁴⁹

II

Let us turn our attention now to the development of the modern notion of *causa*.

The abandonment of the Roman theory concerning nude pacts came only through a slow process of development. Seuffert⁵⁰ has traced the story of this development. From his account it appears that the new doctrine did not become the prevailing view until the seventeenth century,⁵¹ although it was recognized before that time by eminent writers. It was finally established in the eighteenth century.⁵² The change came

⁴⁶ Windscheid, *Pandekten*, sec. 98.

⁴⁷ For the literature see *ibid.*, sec. 98, note; 1 Regelsberger, *Pandekten*, 606, note.

⁴⁸ Regelsberger, *op. cit.*, 607.

⁴⁹ Bry, *Principes de droit romain* (5th ed.) 502.

⁵⁰ Seuffert, *Zur Geschichte der obligatorischen Verträge*, 1881.

⁵¹ *Ibid.*, 130.

⁵² *Ibid.*, 138.

about in part through the influence of the canon law,⁵³ which regarded the breach of a promise as a lie and therefore as a sin, the penalty for which was excommunication. The natural law jurists also contributed largely to the establishment of the new doctrine.⁵⁴ They taught that the enforceable quality of all agreements was demanded by natural law and that the non-enforceability of pacts was a specific Roman doctrine which was opposed to natural law. The idea arose in the seventeenth century⁵⁵ that the enforceability of all formal contracts was connected with the old Germanic law because of the high regard in which they held the duty of keeping faith, but it has been shown since⁵⁶ that the Germanic law recognized only formal and *real*, and not consensual contracts.

Notwithstanding the change of view just outlined the jurists continued to use the phraseology of the Roman law. This fact makes it particularly difficult to trace the origin and development of the modern doctrine of *causa*. For example: Ulrich Zasius,⁵⁷ the greatest German jurist of the sixteenth century, still subscribed to the rule that nude pacts are unenforceable by action, but he attached a new meaning to the term, connecting it with the *condictio sine causa* of the Roman law. Jurists in other countries appear to have done the same thing.⁵⁸ It is interesting to note that just as the formalistic requirements of the Roman law were giving way to more liberal doctrines, the existence of a *causa* was being insisted upon as a condition precedent to the creation of obligations. In Grotius⁵⁹ we find the following language:

"It was the rule and practice (amongst the Germans) that all promises made for any *reasonable cause* (*redelyke oorzaak*) gave a right both of action and of exception." "By reasonable cause is meant whenever the promise (*toezegging of belofte*) is made by way of gift, or is auxiliary to any other transaction, whether it be made at the same time as such transaction or afterwards."

And Huber⁶⁰ states laconically in 1699:

"All promises must have a cause (*oorzaak*), and without it can have no effect."

⁵³ *Liber Extra*, I, 35, 143; Seuffert, *op. cit.*, 4.

⁵⁴ Seuffert, *op. cit.*, 130-131, 137.

⁵⁵ *Ibid.*, 130.

⁵⁶ Sohm, *Das Recht der Eheschliessung*, 1875, 226 ff.; Stobbe, *Reurecht und Vertragsschluss nach älterem deutschen Recht*, 13 *Zeitschrift für Rechtsgeschichte*, 209 ff.

⁵⁷ Zasius, *Digestum Vetus*, XII, 1, 41; cited by Seuffert, *op. cit.*, 97.

⁵⁸ Seuffert, *op. cit.*, 97.

⁵⁹ Grotius, *Inleiding tot de hollandsche Rechtsgeleerdheid*, Bk. III, part 1, sec. 52. (Maasdorp, *op. cit.*, 39.)

⁶⁰ Huber, *Hedensdaegse Rechtsgeleertheit*, Bk. III, ch. 21, secs. 6, 7, cited by Maasdorp, *op. cit.*, 40.

Brissaud states that the principle of the necessity of a *causa* was accepted in France all the more readily because it harmonized in many instances with the older theory according to which at least part performance of a contract was necessary for the creation of a contractual obligation.⁶¹

In Germany, on the other hand, the notion erroneously attributed to the older Germanic law that "every lawful agreement entered into with the serious intention of being legally binding would directly produce of its own force obligatory effect, without regard to the form in which it was expressed,"⁶² ultimately prevailed; which left no room for the requirement of a *causa* as a necessary element for the enforceability of contracts.⁶³

The authorship of the doctrine of *causa* in the modern French law is ascribed to Domat.⁶⁴ Domat's views were accepted by Pothier⁶⁵ and through Pothier found their way into the Code Napoleon.⁶⁶ Domat distinguished between bilateral, *real*, and gratuitous contracts. The cause of the obligation of each party in a bilateral contract consisted according to him in the obligation assumed by the other. In the case of *real* contracts, in which there is but one legal or executory duty, its cause is the executed consideration of the other party. In the case of donations, which include agreements to make a gift, the purpose (*motif*) for which the gift is made was regarded by him as the *causa* of the donor's obligation.⁶⁷

Many attempts have been made to find a general definition of *causa*, but none of them has met with approval. Baudry-Lacantinerie and Barde define it as "the immediate, hence the essential, purpose on account of which the contract is made."⁶⁸ Great difficulty seems to be experienced by the French writers in distinguishing the *causa* of a contract on the one hand from its object and on the other hand from motive in general.

According to the Civil Code a contract is invalid if it has no cause or if it has a false or an illicit cause.⁶⁹ Illustrations may serve to indicate

⁶¹ Brissaud, *History of French Private Law*, 516.

⁶² 2 Erxleben, *Die Conditiones sine causa*, 463.

⁶³ According to Erxleben it was an undisputed doctrine that the simple obligatory agreement was equivalent in practical respects to the stipulation. All that was necessary for the actionability of such an agreement was the existence of a consensus sufficiently expressed regarding all the essential points. 2 Erxleben, *op. cit.*, 464.

⁶⁴ 1 Domat, *Lois civiles*, (ed. Rémy) 122, 124.

⁶⁵ Pothier, *Obligations*, nos. 42-46.

⁶⁶ Arts. 1108, 1131, 1133, Civil Code.

⁶⁷ The French courts have on many occasions annulled gifts on the ground that the object (*motif*) of the donor was inconsistent with law or sound policy. Dalloz, *Codes annotés, Nouveau Code civil*, art. 1133.

⁶⁸ 1 Baudry-Lacantinerie & Barde, *Traité théorique et pratique de droit civil: Des Obligations*, 235.

⁶⁹ Art. 1133.

what is meant by these terms. A contract is deemed *without* cause if the parties did not have a serious intent to enter into a binding legal relationship, for example, if they were merely playing or joking. The transaction would be without cause also if the parties meant to bind themselves legally but the contemplated object of the contract failed. The obligation of the purchaser of a chattel which has perished prior to the making of the contract is regarded as without cause. An obligation is said to have a *false* cause if the parties believed that a certain legal foundation for the promise existed when it did not exist in fact. An agreement on the part of A to pay to B a certain sum of money which he erroneously believed that he owed B would be an agreement based upon a false cause.⁷⁰ Not frequently the terms "without cause" and "false cause" are used interchangeably. A contract has an *illegal* cause if the object contemplated is condemned by law. Article 1133 of the French Civil Code expresses this rule in the following words:

"The 'cause' is unlawful when it is prohibited by law, when it is contrary to good morals, or is against the public interests."

If the *causa* of the modern civil law has the above meaning, the question may be fairly raised whether it has a proper place in the law of contracts. May not the same results be attained through the ordinary rules governing reality of consent, legality of object, etc.? Planiol has forcefully summarized the arguments against the French doctrine of *causa*. In regard to its origin he points out that Domat in constructing the theory of *causa* out of Roman elements perverted the Roman law. He admits that the Romans named the motive prompting the donor to make a gift *causa* (*causa donandi*), but he criticizes Domat for attaching a decisive importance to something which the Roman jurists did not consider of any moment.⁷¹ Planiol charges Domat with departing completely from Roman law in the matter of bilateral contracts. Domat here borrowed his ideas from the Roman theory underlying the *condictio sine causa*. Planiol points out, however, that the Roman law never required the existence of a real and lawful cause for the *creation* of an obligation, that the obligation arose from the use of the prescribed words in the stipulation, from the executed consideration in the case of *real* contracts and from the consent of the parties in the case of consensual contracts; although the existence of such a *causa* was necessary for the *retention* of property or its value which one party had acquired at the expense of the other.⁷²

Planiol concludes that the doctrine of *causa* of the French Civil Code is both "false" and "useless."⁷³

⁷⁰ See Dalloz, *op. cit.*, art. 1133, nos. 63 ff.

⁷¹ Planiol, *op. cit.*, no. 1031.

⁷² *Ibid.*, no. 1031.

⁷³ *Ibid.*, nos. 1038, 1039.

The champions of *causa* seem to feel that the notion is necessary to explain the existing law in a number of situations. Suppose, for example, that A has sold to B a chattel which has been destroyed. They are ready to concede in this case that A's legal duty is void for want of an object; but they maintain that B's legal duty fails for want of cause, A's legal duty which was to be the cause of B's legal duty not having arisen. To these authors Planiol⁷⁴ makes the reply that the legal duty of the buyer is a conditional duty, being subject to the condition that the seller becomes obligated to him. If this condition does not exist the buyer's obligation likewise fails to arise.

Many of the French writers of the present day agree with Planiol.⁷⁵ They regard the requirement of *causa* for the validity of contracts as an abstract and metaphysical notion calling for subtle distinctions, and creating confusion instead of serving a useful purpose.

Speaking of the modern Dutch law, Van der Linden says:⁷⁶

"Besides the invalidity of contracts on the ground of absence of free consent, they are also null and void whenever they have no cause (*oorzaak*) at all, or a false cause or a cause which offends against justice, good faith or good morals."

It is expressed in the same manner in Article 1371 of the Dutch Civil Code.⁷⁷

The following statements will serve to show what is meant by *causa* in the Roman Dutch law:

"There must be a reason for a contract," says Morice,⁷⁸ "a rational motive for it, whether that motive is benevolence, friendship, or other proper feeling, or, on the other hand, of a commercial or business nature. In other words, the agreement must be a deliberate, serious act, not one that is irrational or motiveless."

Maasdorp⁷⁹ expresses it in the following words:

"All that is meant by a reasonable cause (*redelyke oorzaak*) in our law is that an agreement, in order to afford a right of action, shall have

⁷⁴ *Ibid.*, no. 1039.

⁷⁵ See Baudrie-Lacantinerie & Barde, *op. cit.*, nos. 321-327 and the authors there cited. See also 2 Colin & Capitant, *Cours élémentaire de droit civil français*, 313. Of the French monographs on *causa* (see *ante*, note 9) those by Artur, Conril, Ernst, Séfériadès and Timbal take this view. Those of Brissaud and P. Colin take the contrary view.

⁷⁶ Van der Linden, *Institutes*, Bk. I, ch. 14, sec. 2.

⁷⁷ Art. 1371, which reads as follows: "*Eene overeenkomst zonder oorzaak, of uit eene valsche of ongeoorloofde oorzaak, aangegaan, is krachteloos.*"

⁷⁸ Morice, *English and Roman Dutch Law* (2d ed.) 79. See also Dalloz, *op. cit.*, art. 1131, nos. 23, 38-39, 41, 44-46.

⁷⁹ Maasdorp, *The Institutes of Cape Law*, Bk. III: *The Law of Obligations*. Part I: *Contracts*, 36.

been entered into with a serious mind and intent, from or upon some motive, ground, reason or cause, which induced the person entering into it 'to bind his own will for the benefit of another.'"

"It is probable," says Lee,⁸⁰ "that when Grotius, Van Leeuwen, Huber and Van der Keessel require that a contract should have a reasonable or just cause, they imply little more than Voet and Vinnius when they say that an agreement to be legally enforceable must be entered upon with a serious and deliberate mind. Decker, then, is quite correct when he makes reasonable cause equivalent to 'physical and moral possibility.' . . . The doctrine of *causa* is in fact a juristic figment."

A number of codes indicate specifically what they mean by *causa*. Art. 1274 of the Spanish Civil Code contains the following provision:

"In onerous contracts the prestation or promise of a thing or services by the other party is understood as a *causa* for each contracting party; in remuneratory contracts, the services or benefits remunerated, and in those of pure beneficence, the mere liberality of the benefactor."

Art. 1467 of the Chilean Civil Code, after stating that pure liberality is a sufficient *causa*, gives the following definition:

"By *causa* is meant the motive which induces the act or contract."

The Civil Code of Louisiana enacts as follows:⁸¹

"Art. 1896. By the *cause* of the contract, in this section, is meant the consideration or motive for making it; and a contract is said to be without a cause, whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed, or had ceased to exist before the contract was made.

"Art. 1897. The contract is also considered as being without cause when the consideration for making it was something which, in the contemplation of the parties, was thereafter expected to exist or take place, and which did not take place or exist. A gift in consideration of a future marriage is void by this rule, if the marriage do not take place."

The provision of the Spanish Civil Code above quoted is in force in Porto Rico⁸² and in the Philippine Islands.⁸³ The definition of the Chilean Code was adopted by the Civil Code of Colombia,⁸⁴ whence it passed into the Civil Codes of Panama and of the Canal Zone.⁸⁵

⁸⁰ Lee, *Introduction to Roman Dutch Law*, 198, and note.

⁸¹ See also Arts. 1898-1900, Civil Code; *Mouton v. Noble* (1846) 1 La. Ann. 192; cf. *Broadus v. Nolley* (1873) 25 La. Ann. 184.

⁸² Civil Code, sec. 1241.

⁸³ Civil Code, Art. 1274.

⁸⁴ Civil Code, Art. 1524.

⁸⁵ Civil Code, Art. 1524.

III

The statement is sometimes made that *causa* is perhaps the germ of the English doctrine of consideration.⁸⁶ Salmond⁸⁷ has attempted to show that our doctrine of consideration was a modification of the Roman *causa* which was adopted by equity and was then borrowed by the common law courts. It is now established,⁸⁸ however, that the doctrine is of common law growth and remained uninfluenced by the principles of Roman or continental law. All that was borrowed from the Roman law was the phrase "*ex nudo pacto non oritur actio*," which came to denote in English law something quite different from what it did at Rome.⁸⁹ It was applied originally to those agreements on which an action of debt could not be brought for want of a *quid pro quo*, and later when the action of assumpsit was developed it designated those agreements which were unenforceable because they lacked consideration.

The characteristic features of the modern doctrine of consideration are the following: 1. An agreement which is not contained in a sealed instrument is inoperative unless it is supported by a consideration. 2. According to the traditional statement consideration may consist either in some benefit to the promisor or in some detriment to the promisee.⁹⁰ A moral obligation is not sufficient. 3. Consideration is a fact which operates as one of the conventional causes or inducements of a promise. This statement does not cover acts in subsequent reliance upon a promise unless they were requested as the expected and agreed return. 4. Adequacy of consideration is not required. The value of the act or forbearance may be entirely out of proportion to the value of the promise of the other party.

Although the term "consideration" came in the course of time to mean something quite distinct from *causa*, they were used interchangeably over a considerable period of time in the English law. In *Calthorpe's Case*⁹¹ consideration is still defined as a "cause or meritorious occasion, requiring a mutual recompense, in fact or in law."

That agreements in order to be enforceable in the English law must be either under seal or be supported by a valuable consideration was not definitely settled until the end of the eighteenth century. In *Pillans*

⁸⁶ Morice, *op. cit.*, 78.

⁸⁷ Salmond (1887) 3 L. QUART. REV. 166, 178; *Essays on Jurisprudence and Legal History*, no. 4.

⁸⁸ Ames, *Lectures on Legal History*, 129, 147-148; Wald's Pollock, *Contracts* (ed. Williston) 191. See also Hare, *Contracts*, chs. 7 and 8; Holmes, *Common Law*, 253, 254; 3 Holdsworth, *History of English Law*, 319.

⁸⁹ Wald's Pollock, *Contracts* (ed. Williston) 192, note. *Causa* in the sense of "clothing" or "vesture" of the agreement was adopted by the early English writers. Maitland, *Bracton & Azo*, 143; Bracton, 99a; Britton, 1, 156.

⁹⁰ *Currie v. Misa* (1875) L. R. 10 Exch. 163.

⁹¹ (1574, K. B.) 3 Dyer, 336b.

v. Van Mierop,⁹² decided in 1765, Lord Mansfield and the other judges held that a bill of exchange was valid without a consideration according to the law merchant. Lord Mansfield added, however:

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

In Lord Mansfield's opinion, therefore, any agreement required by law to be in writing could be valid without a consideration if it satisfied that requirement. The House of Lords did not accept this view, however, but in *Rann v. Hughes*,⁹³ a case involving the statute of frauds, held that the writing was not a substitute for consideration in English law.

"It is undoubtedly true," says the learned court, "that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. . . . All contracts are by the law of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved."⁹⁴

From what precedes it is apparent that the distinction in English law between agreements based upon consideration and contracts without a consideration does not correspond to the Roman division of contracts and enforceable pacts on the one hand and nude pacts on the other. Not all agreements based upon a sufficient consideration within the meaning of the English law would fall within the recognized classes of contracts or vested pacts in Roman law.⁹⁵ An agreement without consideration in the English sense, on the other hand, would be enforceable in Roman law if it was a wholly gratuitous commission (*mandatum*)⁹⁶ or a *constitutum*⁹⁷ or an agreement to make a gift (*donatio*) within the limits fixed.⁹⁸

⁹² (1765, K. B.) 3 Burr. 1663.

⁹³ (1778, K. B.) 7 T. R. 350, note. According to the theory of the early French law a writing dispensed with the need of a *causa*. Brissaud, *History of French Private Law*, 516, note.

⁹⁴ (1778, K. B.) 7 T. R. 350, note.

⁹⁵ See, *supra*, pp. 623-4.

⁹⁶ Sohm, *op. cit.*, 407.

⁹⁷ *Ibid.*, 416.

⁹⁸ *Ibid.*, 212.

The difference between the English doctrine of consideration and the modern continental doctrine of *causa* will appear more clearly after we have mentioned the cases which seem to lend color to the doctrine that a moral obligation is a sufficient consideration. The origin of this doctrine goes back to the case of *Hawkes v. Saunders*,⁹⁹ decided in 1782, in which Lord Mansfield said:

"Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori* a legal or equitable *duty* is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations: Or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debt; or if a man promise to perform a secret trust, or a trust void for want of writing, by the statute of frauds.

"In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration."

For almost half a century the sufficiency of a moral consideration to support a contract was recognized in England and in this country. Under the influence of this doctrine the following agreements were held binding:¹⁰⁰ (1) the promise of a bankrupt to pay a debt discharged through bankruptcy proceedings; (2) the promise to pay a debt barred by the statute of limitations; (3) the promise after majority to pay a debt incurred during infancy; (4) the promise after the repeal of the usury laws to pay money lent at usury; (5) the promise by a woman after she is discover to pay a debt which she had assumed during coverture. The doctrine last mentioned has not been generally approved, however, in the United States.

To this list might be added also the doctrine accepted by a number of courts that a promise is enforceable if it is supported by a consideration previously executed upon request.¹⁰¹

Although the broad doctrine of moral duty as a sufficient consideration has long since been repudiated in England¹⁰² and by most of our courts,¹⁰³ the particular rules of the above cases are still followed in

⁹⁹ (1782, K. B.) 1 Cowp. 289.

¹⁰⁰ Anson, *Contracts* (3d Am. ed. by Corbin, 1919) secs. 148-152.

¹⁰¹ *Ibid.*, sec. 149.

¹⁰² *Eastwood v. Kenyon* (1840, K. B.) 11 A. & E. 438; Anson, *Contracts* (3d Am. ed. by Corbin, 1919) sec. 151.

¹⁰³ *Mills v. Wyman* (1825, Mass.) 3 Pick. 207; Wald's Pollock, *Contracts* (ed. Williston) 199, note; Anson, *Contracts* (3d Am. ed. by Corbin, 1919) sec. 151.

the United States. They must be taken today as exceptions to the rule that a past consideration will not support a promise.

The rule in bills and notes also that a drawer or indorser may waive presentment, protest and notice after maturity is another clear exception to the rule concerning consideration.¹⁰⁴

If we contrast for a moment the English doctrine of consideration and the continental doctrine of *causa* it is apparent that the doctrine developed by the English courts is narrower than that of the continental courts. Whenever there is a valuable consideration in the Anglo-American sense, except perhaps the peppercorn kind, the contract will be valid also under the doctrine of *causa*. But many agreements which cannot be supported in English law for want of consideration can be enforced under the broader doctrine of *causa*. Suppose, for example, that A gives to B a written guarantee without a valuable consideration and without any intention to make a donation to B, but merely from a desire on A's part to act fairly and generously by B in the execution of a contract which had previously been entered into between them. This would be a sufficient *causa* for the guarantee,¹⁰⁵ but it would not constitute consideration in the sense of our law.

Again, if A should promise to B, the guardian of his illegitimate child, that he will contribute a certain sum toward the support of such child, the natural obligation originally existing would make the agreement enforceable as one based upon a sufficient cause and would take it out of the class of donations.¹⁰⁶

The same result would be reached on like grounds if A should promise such a sum to his former wife, B, who had obtained a divorce from him owing to wrongful conduct on his part,¹⁰⁷ or if he should agree to pay to B a legacy which is void.¹⁰⁸

Under the doctrine of *causa* there is no difficulty, either, in recognizing that part payment accepted in satisfaction of a debt will discharge the debt. Even an oral agreement to make a gift up to a fixed amount is actionable, the motive of liberality (*causa donandi*) being regarded as constituting a sufficient *causa*.¹⁰⁹ Agreements conferring a gratuity are generally subject, however, under the modern codes to special requirements of form.¹¹⁰

¹⁰⁴ Daniel, *Negotiable Instruments* (6th ed.) sec. 1107; Norton, *Bills and Notes* (4th ed.) 566-567.

¹⁰⁵ *Rood v. Wallach* (1904, Sup. Ct. Transvaal) T. S. 187.

¹⁰⁶ Cass. Jan. 15, 1873, D. 73, 1, 180.

¹⁰⁷ App. Bordeaux, June 16, 1896, D. 97, 2, 314.

¹⁰⁸ App. Montpellier, Jan. 30, 1893, D. 94, 2, 15.

¹⁰⁹ The legislation of Justinian on the subject of gifts (*supra*, p. 624, n. 18) appears to be still law in South Africa. See Lee, *op. cit.*, 249.

¹¹⁰ The form generally adopted is authentication by a notary or judge. Cf. the common-law doctrine of promises under seal.

IV

We are now in a position to consider the real merits of *causa* and consideration and to inquire whether either of these doctrines has a proper place in the law of contracts. Anglo-American lawyers are so accustomed to the idea that a contract not under seal must be supported by a consideration that it is difficult for them to conceive of a rational system of contracts without such a doctrine. The lawyers brought up in a civil law country feel, however, that a doctrine under which an engagement deliberately and solemnly made with the intention of incurring a binding legal obligation can be enforced only if a peppercorn is given in return for such promise is absurd indeed. And in the estimation of some of the English and American writers the doctrine of consideration in its present form is not wholly satisfactory. Sir Frederick Pollock¹¹¹ admits that "its application to various unusual but not uncommon cases has been made subtle and obscure by excessive dialectic refinement." Speaking of the fact that the doctrine of consideration has been grafted on the Roman Dutch law in the Cape Colony, Sir Frederick expressed his doubt concerning the usefulness of the change.¹¹² Jenks¹¹³ refers to the doctrine of consideration as a "purely native idiosyncrasy." Salmond says that the English law was "too scrupulous" in demanding the guarantee of a solemn form or a valuable consideration, that no such requirement exists in the continental legal systems and that notwithstanding their absence no ill results have followed.¹¹⁴ Markby¹¹⁵ contends that it is impossible to apply the English doctrine of consideration as a test of legal liability with consistency and with justice. He says:

"What then is the real explanation of these three things: (1) that a contract under seal is enforceable without consideration; (2) that a contract not under seal is not enforceable without consideration; (3) that it is entirely indifferent whether the consideration be of any [actual] value or not?

"The only rational and consistent explanation of these three things is that the question is really one of form. The being under seal or not is as pure a matter of form as can be. And how can it be a matter of substance to require as a consideration that which may be of absolutely no value? of course bearing in mind that these things have nothing to do with the contract being gratuitous. As a matter of form these things are both important. The form of a deed is a sure indication that the parties contemplated a legal relation: the form of a bargain, or giving a *quid pro quo*, is not conclusive, but it is, certainly, useful

¹¹¹ Pollock, *The Genius of the Common Law*, 91.

¹¹² *Ibid.*, 91.

¹¹³ Jenks, *Law and Politics during the Middle Ages*, 286.

¹¹⁴ Salmond, *Jurisprudence* (2d ed.) 320.

¹¹⁵ Markby, *Elements of Law* (6th ed.) 309-310, 315.

as an indication that the parties contemplated a legal relation: but no one would deny that there are many cases where a legal relation is contemplated, in which, nevertheless, there is no consideration.

"Where, therefore, the English law seems to me to have gone wrong is this: that which is a mere matter of form has been used for a wrong purpose; that which is only one out of several possible indications has been used as if it were the sole test. Consequently the judges are every now and then thrown into the greatest difficulty; they are either driven to results which are obviously, even to themselves, unsatisfactory, or they have to avoid these objectionable results by reasoning which would not be accepted under any other circumstances. . . .

"The result which I have arrived at from a perusal of the decisions of English judges upon the question of consideration is that it is impossible to apply it as a test of legal liability with consistency and with justice: that it can only properly be treated, not as a test, but as an indication: an indication, but an indication only, amongst many others, that the parties entering into a transaction had in contemplation their legal relations to each other."

Assuming that Markby is right in regarding the doctrine of consideration, as it actually exists in England and in this country, as inconsistent and unjust, and that Planiol's criticisms of the actual French doctrine of cause are justified, the problem still remains whether the law of contracts can dispense with these notions in some form. The fundamental question is, what agreements shall be enforced? What operative facts must exist before the law will say that a party must perform? From what precedes we find that the answer varies not only in the different systems of law that have reached the same degree of development but also in the different stages of the legal development of the same system. And this may be regarded as inevitable, because law is the expression of the *mores* of the times and must therefore to appear reasonable and just satisfy the sense of the particular community. In all primitive law a legal obligation arises only from the use of symbols and forms which because of their connection with religion or tradition are regarded as sacred. In Rome the principal formal contract was the stipulation; in English law it was the deed. With the progress of civilization society regards it as reasonable that a legal obligation should also under certain circumstances result from the delivery of an article. Thereupon the notion of a *real* contract develops. Ultimately the idea gains ground that the law ought to attach legal consequences to agreements as such. In Roman law this idea never found a logical and consistent development. We have seen that in theory only four contracts were recognized as based upon consent as such, but that at the time of Justinian by reason of the recognition of enforceable pacts this theory was actually breaking down.

Under the influence of scholasticism there arose during the Middle Ages the belief in the power of the human will to create law. In the field of private law the doctrine of the omnipotence of the human will

became on the continent a veritable dogma. The notion arose, therefore, that all agreements should be enforceable without reference to any form, from the very fact that the parties intended such a result. The earlier continental codifications of the last century still require, however, as an additional element, the presence of a sufficient *causa*, while the Anglo-American law to this day insists that the agreement must be supported by a valuable consideration or be clothed in a solemn form, that is, embodied in a sealed instrument.

But the dogma of the omnipotence of the human will, the development of which was powerfully assisted by the natural law jurists, survived on the continent of Europe until the present time, in spite of a reaction against it which has arisen more recently.¹¹⁶ The entire conception of the juristic act which plays such an important rôle in the theory of the civil law of the present day, is based largely upon the above doctrine.¹¹⁷ It is not strange, then, that the most recent civil codes—those of Brazil,¹¹⁸ Germany,¹¹⁹ Japan¹²⁰ and Switzerland¹²¹—omit all reference to the requirement of a *causa* or a consideration for the validity of contracts.

Meanwhile the complex and multiform business relations of modern times have increased the opportunities for fraud and error to such a degree that it has seemed advisable in the eyes of certain legislators to require certain contracts to be in writing. In England such a requirement was introduced as early as 1677 by the Statute of Frauds. In France¹²² also contracts involving a sum exceeding 150 francs cannot be proved generally unless they are in writing. In Germany, on the other hand, there is no similar requirement.

In other instances the legislator has prescribed particular formalities

¹¹⁶ See Windscheid, *Voraussetzung*, 199, note.

¹¹⁷ Concerning the importance and meaning of "juristic acts" (*actes juridiques*, *Rechtsgeschäfte*) see Holland, *Jurisprudence* (12th ed.) 116 ff.; Markby, *op. cit.*, 125; Schuster, *The Principles of German Civil Law*, p. 80 ff.

Holland approves the following definition of the juristic act given by Windscheid: "A manifestation of the will of a private individual directed to the origin, termination, or alteration of rights." He approves also the following definition given by Jhering: "The form in which the Subjective Will develops its activity in creating rights, within the limits assigned to it by the law." Holland, *op. cit.*, 117.

Regelsberger states that the term "juristic act" was used first by Hugo, *Lehrbuch der Pandekten* (3d ed.) 1805. The Romans had names only for the principal legal transactions (*mancipatio*, *stipulatio*, etc.). The term *negotium* is on the one hand narrower, inasmuch as donations were not *negotia* (Digest XXIV, 1, 58), and wider on the other hand, since it includes also procedural acts (Gaius, IV, 84, 141, 184). See 1 Regelsberger, *op. cit.*, 488, note.

¹¹⁸ Art. 145, Civil Code.

¹¹⁹ 1 Planck, *Bürgerliches Gesetzbuch*, sec. 145, note.

¹²⁰ 2 De Becker, *Annotated Civil Code of Japan*, 120.

¹²¹ Art. 17, Federal Code of Obligations.

¹²² Art. 1341, Civil Code. Compare Art. 1347, Civil Code.

as a guarantee that the juristic act represents the deliberate will of the parties in question. Considerations of this kind have caused most countries to abandon the Roman rule concerning informal promises of gifts, and to require for the validity of all executory agreements of this character that they be authenticated by a notary or judge.¹²³

The dogma of the omnipotence of the human will overlooks, of course, the fact that the human will cannot have any legal effect without the sanction of law. It can in the nature of things operate only so far as the law permits it to do so. The question is, therefore, under what circumstances should a legal system give effect to the human will under the conditions prevailing to-day?

That the capacity to do a juristic act is determined finally and solely by law is not doubted. All would also admit today that the so-called doctrine of the omnipotence of the human will cannot be carried so far as to override positive and mandatory provisions of the law. It must yield whenever it conflicts with paramount general interests; any transaction which is prohibited by law or which is contrary to good morals or public policy is therefore void.

That the will in order to be legally effective must have in view an object that is physically possible is also self-evident.

Granted, however, that the parties have capacity and that they contemplate an object that is physically possible and legally permissible, should not the intent to create a legal relationship be regarded as sufficient to constitute a binding contract in every case in which that intent is so evidenced that it is reasonably susceptible of being understood, and of being proved before the court? The existence of a consideration of real value indicates no doubt in the great majority of cases that the parties seriously contemplated a legal relation; but the lack of such a consideration, as Markby¹²⁴ has pointed out, does not prove necessarily the absence of such an intention. As the Anglo-American law stands today, the will of the parties to create a legal relation, however clearly expressed, will be ignored by the courts in the absence of a technical consideration to support the agreement. Why, it may be asked, does our law refuse to enforce a promise solemnly made in writing but give effect to a mere informal promise if a peppercorn be given in consideration? It is submitted that there is no rational reason for this result, and that the matter can be explained only historically—from the fact that the doctrine of consideration, as detriment to the

¹²³ France, Art. 931, Civil Code; Germany, sec. 518, Civil Code; Italy, Art. 1056, Civil Code.

The following are held in France not to be subject to the above requisites of form: (1) executed gifts; (2) indirect gifts (e. g., a release, 2 Planiol, *op. cit.*, no. 608); (3) gifts incidental to other contracts (e. g., a stipulation for the benefit of a third party in connection with a contract of sale); (4) disguised gifts. Planiol, *op. cit.*, nos. 2533 ff.

¹²⁴ Markby, *op. cit.*, 309-310.

promisee, developed in our law from the action of *assumpsit*. The doctrine—which exists only in countries belonging to the Anglo-American group—cannot be said in all of its abnormalities to represent the legal sense of the English-speaking peoples as to what is right.

Nor can the requirement of consideration in the Anglo-American sense be justified as a guarantee of the reasonableness of the particular transaction. No such guarantee can be furnished by any law. All the law can do is to set up certain limits in the interest of society or of certain classes of persons, beyond which parties cannot go in contracting. It may also require certain formalities for the prevention of fraud, or as a guarantee, so far as it is legally possible to provide such, that the contract in question represents the serious and deliberate will of the parties. But within the limits so outlined it is submitted the will of the parties to assume legal relations should control. To what extent the actual will, on the one hand, or the declared will, on the other, should prevail in case of divergence between the two need not be ascertained in this place. We must assume for the purpose of this discussion that the declared will expresses the real intention of the parties.

But does the will of the parties to create legal relations not imply the presence of a *causa*? Does not its presence serve to identify the transaction as creating legal duties, as distinct from mere social and moral obligations? How are we to determine whether the parties contemplated *juridical* relationships or must be deemed to have dealt with each other on that basis, and not merely on a social or any other non-juridical basis? The question is primarily one of fact which must be left to the appreciation of the court or jury. It can cause difficulty only where the parties have not clearly indicated their intention and where the facts of the case leave a doubt as to what the intention of the parties must be reasonably deemed to be. The legal or non-legal character of a promise may depend entirely upon the manner in which or the circumstances under which such promise was given. The matter cannot be resolved by means of technical rules of law. To say that the presence of a *causa* distinguishes agreements that are enforceable by law from all non-legal agreements is to use a phrase which merely restates that some agreements will be so enforced and others not—a phrase which therefore has no legal significance.

We must conclude, therefore, that the intention of competent parties to create legal relations which are physically possible and legally permissible, evidenced in any form reasonably to be recognized by law, should be sufficient to constitute a contract. The codes of Brazil, Germany, Japan and Switzerland, in omitting the requirement of a *causa* or consideration as an essential element of a contract, have in the estimation of the writer placed the subject of contracts upon a proper scientific basis and have freed it from doctrines which lead either to great confusion or to arbitrary and irrational results.

But, say the champions of *causa*, how will you explain from the

standpoint of the juristic act the non-liability of the purchaser of a chattel which has perished, or the non-liability of the party who agrees to pay a certain sum to X in the erroneous belief that he was under a duty to pay such sum? In these cases it must be admitted that the notion of *causa* in the sense of "presupposition" affords an easy explanation of a result which on grounds of equity must be reached, and which cannot be explained very readily in any other way. The explanation generally offered is that the promise was given upon the implied condition that the chattel and the duty to pay existed. This is evidently only an expedient to justify a conclusion which justice dictates. But in view of the impossibility of giving an exact definition of the term *causa* or "presupposition," and of distinguishing it from motive—a fact which abundantly appears from the discussion of this subject in Roman and continental law—the inconvenience resulting from the absence of the notion of *causa* in the law of contracts must be regarded as trifling, as compared with the uncertainty which the recognition of *causa* would necessarily introduce into the law.

Parties contemplating legal relations have in mind, of course, some particular purpose, and they may be actuated by a great variety of motives.¹²⁵ The particular juristic act may be done *credendi*, *solvendi* or *donandi causa*, i. e., with reference to some consideration past, present or future, or for the purpose of conferring a gratuity upon someone. A promises to pay a certain sum to B *because* B has already promised to give something to A, or *because* B now agrees to do something for A, or *because* A believes that he is indebted to B. Now if the purpose for which A makes the promise cannot be realized or is not realized in a particular case, considerations of fairness and equity demand that A shall be freed from his duty to perform.¹²⁶ We may explain this result technically in terms of *causa* or consideration, but we may equally well dispense with these and operate with the notion of implied conditions, etc. The fact is that A would not have promised but for B's counter promise, or if A had known that he was not indebted to B. All the law does is to give effect to A's real will. All juristic acts may be qualified in various directions either expressly or impliedly by the parties, or by construction of the courts. But to

¹²⁵ The motive with which a party does a particular juristic act has generally no legal effect. *Falsa causa non nocet*. See Digest XXXV, 1, 72.

¹²⁶ In France the contract is said not to come into existence without a *causa*. The plaintiff must prove this *causa* as a part of his cause of action. But where the promise to pay is in writing the burden of proving the absence of a *causa* is upon the party executing the instrument. (Art. 1132, Civil Code; Cass. Oct. 28, 1885, D. 1886, 1, 69; Feb. 25, 1896, D. 1896, 1, 199). According to the German theory governing "abstract agreements" the defendant's promise in writing is deemed sufficient to "create" the obligation. The defendant may resist liability, however, in accordance with the doctrines relating to unjust enrichment (secs. 780-781, Civil Code; 2 Planck, *Bürgerliches Gesetzbuch*, sec. 780, note; see also Saleilles, *Théorie de l'obligation*, nos. 259-265).

explain the legal consequences which the law attaches to these various qualifications in terms of *causa*, instead of using legal terms that have a definite and precise meaning, can serve no proper object.

The foregoing study leads to the following conclusions:

1. Subject to certain qualifications relating to form, it should suffice for the formation of contracts that there exist: (1) capacity; (2) an intention to contract; (3) and a possible and lawful object.

2. The Anglo-American doctrine that an agreement, in order to be enforceable, must be clothed in a solemn form or be supported by a consideration, cannot, at least as regards the element of *consideration*, be justified on theory. Agreements which are physically possible and legally permissible should, on principle, be enforceable, although there is no valuable consideration, if it was the intention of the parties to assume *legal* relations. But the Anglo-American doctrine limits the test of validity to either of two forms of evidence only, out of a greater number of possible and rational forms of evidence of true intent to assume an obligation—with results which have been found to be unsatisfactory.

3. The question whether the parties actually contemplated a *juristic* act or dealt with each other on a non-juridical basis, cannot be determined from any doctrine of consideration or of a *causa*, but must be ascertained from the facts of each particular case.

4. There is in reality no definable "doctrine" of *causa*. The term "*causa*" includes a variety of notions which may equally well be derived from the nature of a juristic act and from considerations of equity.