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by

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1885.
As the doctrine of consideration is one of the most important principles peculiar to the common law, it is not strange that there should be many theories put forth as to its origin. One learned writer attempts to prove that consideration is the Roman principle of Causa, filtered through the Court of Chancery (Salmond's History of Contract, 3 L. Q. Rev., 166).

Another traces consideration to the action of debt (Holmes' The Common Law). A third seeks the origin in assumpsit (Hare on Contracts); while still another, declaring that it is, "impossible to refer consideration to a single source," derives the idea of benefit to the promisor from indebitatus assumpsit, and detri-
ment to the promisee from the action on the case for deceit (Ames' History of Assumpsit, 2 Harvard L. Rev. 1).

The theory advanced by Prof. Ames is, it is submitted, the true one. He shows that in the twentieth year of Henry sixth's reign an action was brought where the defendant promised for one hundred pounds to him paid, to sell certain lands to the plaintiff, but thereafter enfeoffed another of the land. A majority of the court thought that the action would lie, and by the time of Henry VII it became settled law that it would. But a traverse of the feoffment to a stranger was held good (Y. B., 2 H. VII. 12, pl. 15). The damage to the plaintiff was clearly as great where the defendant refused to convey as where he conveyed to another; and it
was not long before the judges allowed the action upon refusal to convey: (Keilw., 17, pl. 25). The cause of action was not the promise, but the money paid or act done by the plaintiff in reliance thereupon. The deceit of the defendant and the detriment suffered by the plaintiff were the necessary allegations. The action was in tort but the step from tort to contract was so short that it was taken almost unconsciously. Thus arose one branch of the doctrine of consideration, detriment to the promisee. Judge Hare, writing a little earlier than Prof. Ames, came to the same conclusion (Hare on Contracts, Chap. VII.).

The other branch of the doctrine, benefit to the promisor, is plainly traceable to the action of debt.
Sir Henry Maine has demonstrated, with a clearness
of reasoning and a perspicuity of statement that place
it beyond a doubt, that the theory of Rousseau and his
school (Rousseau's Inquiry, Book I., Chap. C.) as to
the original social contract is false; and that primi-
tive society has little or no idea of contractual re-
lations. It is evident, then, that actions for the
possession of property are of earlier date than actions
to enforce promises. So it is probably true that the
action of debt, which is generally thought to be the
earliest contractual action, was originally, not an ac-
tion for enforcing an executory promise to pay money,
but one for the possession of money passed by grant,
yet remaining in the hands of the grantor' (Maine's
Ancient Law, 311; Langdell's Summary Cont., 99, 100;

2 Harvard L. R., 19, note 2). The essential elements of debt were, that the debtor had received some benefit, and, that that which he gave in exchange remained in his possession. Here then we find the element of benefit to the promisor, and we have but to trace the descent of this idea from debt to consideration.

The defendant in debt could by waging his law escape liability; this proved to be a great hardship, and in the latter part of the sixteenth century we find cases allowing actions on the promise where the defendant, being indebted, promised to pay. (Godb., 13: 2 Leon. 203) and in Slade's case, (4 Rep., 94 B,) decided in 1603, it was held that a debtor could be sued upon an
implied promise to pay the debt, and that, "every con-
tract executory implied an assumpsit." This was the
origin of indebitatus assumpsit. The action was found-
ed, as was debt, on benefit; and from that time to the
present benefit to the promisor has been sufficient con-
sideration to uphold a contract (Ames' Hist. of Assump-
sit, 1 H. L. Rev.).

Mr. Justice Holmes thinks that benefit to the prom-
isor, quid pro quo, though of similar origin, was dif-
ferently developed. He argues that, as tranaction
witnesses were brought in to prove the debt and, as they
were only allowed to testify to that which they had ac-
tually seen, they could be of use only where property
had passed to the debtor. Hence, debts where property
had not passed could not be proven and were consequent-
ly unenforceable. So it became necessary that the
debtor should receive some benefit, in other words,
a consideration for his promise.

The evidence is slight that consideration is a mod-
ification of the causa of Roman law, introduced through
the medium of equity. The principal argument advanced
by those who support that idea, is that consideration
can be traced to no other source; and, for the reason
that the doctrine is applied in equity, it is more like-
ly that the common law has borrowed from equity, than
that equity has borrowed from the common law (3 L. Q.
Rev., 174). But were all positive proof as to the
source wanting, still would the indications point to a
common law origin. Consideration, as applied in equity, was loosely defined; the considerations of love and affection, and moral obligation being included (Brett vs. J. S. & Wife, Cro. Eliz., 756); while the consideration of to-day is substantially that of the early common law; so it is more likely that equity is indebted to law, than law to equity.

That equity should have appropriated the doctrine from the common law rather than from Rome is probable for the resemblance between the Roman causa and the English consideration is very slight indeed (Pollock on Contracts, 152).
Consideration Defined.

Consideration itself, as well as its origin, is in dispute. It would seem at first sight, that a principle which enters so completely into nearly every relation of man with his fellow, would be definitely settled. Yet here again we find the savants at variance.

The definition of consideration most commonly accepted, is that given by Lush, J., in Currie vs. Misa (L. R. 10 Ex., 162) which is: "a valuable consideration in the sense of the law, may consist either in some right, interest, or profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the
other." Prof. Langdell defines it as: "The thing given or done by the promisee in exchange for the promise."

(Langdell's Sum. Cont., 45). He strenuously insists that benefit to the promisor is not a factor, and that the sole requisite is detriment to the promisee (Sum. Cont., 62-65); though he acknowledges that benefit to the promisor was necessary in debt; and says that such a consideration, if fully executed, is still sufficient to support the debt; but denies its ability to uphold other contracts (Sum. Cont., 46).

Coming from such a source, Prof. Langdell's vigorous effort to change the law to what he thought it ought to be, has had no inconsiderable effect upon the minds of the profession (see 3 L. Q. Rev., 172; Harvard Law
It does not appear, however, that any court has as yet sanctioned his doctrine with judicial approval.

Judge Hare follows substantially the definition of Pattison, J., in Thomas vs. Thomas (2 Q. B. 851, 859);
"Consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be some benefit to the defendant, or some detriment to the plaintiff, but in all events, it must be moving from the plaintiff." (see Hare on Contracts, 147).

This latter doctrine, though supported by such eminent authority as Hare and Chitty, is somewhat illogical. It is difficult to conceive of a case where the consideration moving from the promisee is not detrimen-
tal to him, and yet is beneficial to the promisor.

Possibly it was this difficulty which Prof. Langdell perceived and endeavored to obviate, by asserting that consideration rests solely in detriment to the promisee.

And for all practical purposes, the doctrines of Hare and Langdell may be considered as the same.

In this country it is quite universally held that the consideration need not move from the promisor; the courts of several states even going so far as to allow a third person to sue upon a contract made for his benefit, though the promise is not made to him (Lawrence vs. Fox, 20 N. Y. 268; Burr vs. Reers, 24 N. Y. 175). The opposition to this is based, not so much on the ground that the person suing is not a party to
the consideration, as that he is not a party to the agreement. The contract can be altered or rescinded without his consent (dissenting opinion of Comstock, J., in Lawrence vs. Fox).

In Farley vs. Cleveland (4 Cowen, 432) the defendant agreed with plaintiff to pay an overdue note of $100., running from one Moon to plaintiff. The consideration was fifteen tons of hay (value $150.) delivered to defendant by Moon. The Court held that this was sufficient consideration and allowed plaintiff to recover. It seems as if $150. worth of hay was ample consideration for a promise to pay a $100. note. The Court for the Correction of Errors must have so thought, for they affirmed the decision (9 Cowen, 639). Farley
vs. Cleveland has been cited with approval from that
time to the present by the courts of New York and va-
rious other states (69 N. Y. 285: 14 Kas. 497).

In Malone vs. Crescent City Co. (18 Pac. Rep.
858 (Sup. Ct. Cal., 1888)) defendant entered into an
agreement with plaintiff, a creditor of one Murray,
by which defendant was to pay plaintiff $100. for every
run of logs which Murray should deliver to defendant.
It was held that the contract bound defendant to pay
plaintiff that amount for every run so delivered, wheth-
er defendant owed Murray anything or not.

The acceptance of a bill of exchange is not found-
ed on a consideration moving from the promisee. The
consideration moves from the drawer to the acceptor.
It may be set up in opposition to this that, "when sued, the acceptor is estopped from denying a consideration."

That is true.— But what consideration? Not a consideration moving from the promisee, for he knows that there is none moving from him; and the acceptor's denial that there is any such will work no fraud. The acceptor is simply estopped from denying a consideration moving from the drawer, and that is the consideration which is presumed, and which supports the promise.

It is submitted that the rule that consideration may move from a third party ought to, and will prevail over that laid down in Thomas vs. Thomas (2 Q. B., 851, 859), though Thomas vs. Thomas is supported by such eminent writers as Chitty, Hare, and Langdell. For it
is evident that injustice would be done in cases sim-
ilar to Farley vs. Cleveland were the contract not up-
held. The whole history of contract, in the English
and in other systems of jurisprudence, shows that the
tendency is to enlarge, rather than to abridge the
scope of promises, until all promises are enforced
which ought, upon grounds of reason and equity, to be
enforced. There is no reason to suppose that the rule
which is founded in equity and good conscience will not,
in this case, prevail.
Classes of Consideration

Consideration was divided by the earlier writers into two classes; good, and valuable. A good consideration being one of natural love and affection (2 Black. Com., 297; Ellis vs. Nimmo, Lloyd and G. Rep., 333).

The equity courts for a time upheld this doctrine, perfecting imperfect conveyances and enforcing contracts based on the meritorious consideration of love and affection (Ellis vs. Nimmo, supra; Pomeroy's Equity Jur., 588 and cases cited). But it is now quite well settled that a meritorious consideration is not sufficient either in equity, or at law (Young vs. Young, 80 N. Y., 422; Phillips vs. Fry, 14 Allen 36; Jefferys vs. Jefferys, 1 Crai. & Phil., 137; Whitaker vs. Whitaker, 52
N. Y., 368). Such a consideration is still, however, upheld in Kentucky. The doctrine was inculcated there by McIntire vs. Hughes (4 Bibb, 136). The courts of that state have ever since been limiting that case, but it has not, as yet, been expressly overruled (Cotton vs. Graham, 2 S. W. Rep., 647).

Lord Mansfield essayed to introduce a third class. In the case of Hawkes vs. Saunders (1 Cowper, 289) he held that if one who was bound in morals, increased the tie by an express promise, that promise might be enforced, the moral obligation being a sufficient consideration. The annotators of Wennall vs. Adney (3 B. & P. 2147) in an exhaustive note combatted the doctrine. They endeavored to show that the so-called moral obli-
The doctrine being that a person can waive any right introduced by the law for his benefit which does not extinguish the original debt, but is merely a bar to the remedy.

The doctrine of moral obligation is fast fading out of view, though it has not, as is stated by one
learned writer, completely disappeared (see Langdell's Sum. Cont., 71). For in Pennsylvania, in which state it is held that a discharge in bankruptcy completely extinguishes the debt, a promise to pay such debt is upheld on the ground of moral obligation. If the original promise is declared on a demurrer will be sustained. The subsequent promise is held to be the cause of action (Murphy vs. Crawford, 114 Pa. St., 496; Bolton vs. King, 105 Pa. St., 78). In Stebbins vs. Crawford vs. (92 Pa. St., 289, 292) a promise to pay a claim settled by judgment was held valid, because the judgment was too small. In other states decisions are based on moral obligations which might well be upheld on better grounds (Craig vs. Seitz, 30 N. W. Rep. (Mich.) 347;
Wizlizenus vs. O'Fallon, 91 Mo., 181).

So we may conclude that there is, except in a few states, but one kind of consideration recognized in the law, namely, valuable consideration.

This valuable consideration must be something which the law deems as of value; thus giving up a contract voidable under the Statute of Frauds (Haigh vs. Brooks, 10 A. & E., 309); but not the relinquishing of a void one (Barnard vs. Simonds, 1 Rolle's Ab., 26, pl. 39); forbearance of suit on a well founded claim (Elting vs. Vanderlyn, 4 John., 237); an assignment (1 Sid., 212); any work or services rendered to a promisor or to a third person; reposing trust or confidence; a promise to do a lawful act; subscriptions to a common
cause may become each a consideration for the others

(Trustees vs. Stetson, 5 Pick., 506); allowing boilers
to be weighed, the giving up of possession being the dete-
riment (Brainbridge vs. Firmistone, 8 A. & E., 743).

Parting with possession is the consideration on
which most writers base the liability of the gratuitous
bailee (Story on Bailments, 171 a; Edwards on Bailments,
73; Schouler on Bailments, 41). To admit this doc-
trine would be to wrest away the foundation and leave
at the mercy of the shifting sands an important branch
of the law of bailments. If there is any considera-
tion at all it will uphold any promise. The bailee
could be held to the greatest care; or as insurer.

His liability would commence before delivery, for a
promise to deliver is, in the eye of the law, as valuable as actual delivery.
Adequacy of Consideration

It is not necessary that the consideration should be equal in value to the promise. The Court will not set itself up as a scale holder to weigh the respective values of the consideration and the subject matter. Each party has received what he bargained for, and so long as it is of value, he will not be heard to say that it is not enough (Earl vs. Peck, 64 N. Y., 596). Though, where the values are conclusively fixed by law, a thing of less value will not be a sufficient consideration for a thing of greater (Bailey vs. Day, 26 Me., 38).

In equity, inadequacy of consideration may be a badge of fraud. Here inadequacy alone will not, ac-
cording to the better opinion, be a ground for recission or for refusing specific performance; unless the inad-
equacy be so gross as to amount to positive fraud (Pom. Equity Jur., 926, 927).
Where Consideration is Necessary

Contracts in our law are of two kinds: formal, and simple; the former depending upon form, the latter upon consideration, for their validity.

Were the above statements strictly true, formal contracts might be eliminated from the discussion.

But formal contracts belong to a comparatively early stage of civilization. They are the first class of contracts, originating when the conception of contracts is as yet in embryo. With the onward march of human progress more and more attention is paid to substance and less to form, until finally form is entirely disregarded. We have not reached that stage at present, though it seems that we are quite rapidly nearing the
Contracts under seal did not, at first, require any consideration. The general rule is now that in a sealed instrument the law conclusively presumes a consideration; but if the actual consideration is illegal, or immoral, the presence of a seal will not save the contract (Cooch vs. Goodman, 2 A. & E., n.s., 580). In many states the seal is but presumptive evidence of consideration; and in others all distinction between sealed and unsealed instruments is abolished (Pom. Equity Jur., 70; Stimson's Am. Stat. Law, 1564).

Contracts of record, being entered into before the court, do not require a consideration.

It is a general rule that all simple contracts
require, and are upheld by, a consideration. Lord Mansfield is responsible for an attempt to take contracts in writing out of the rule. In Pillans vs VanMierop (3 Burr., 1663) he gave it as his opinion that consideration was not necessary to a contract in writing. This novel doctrine was not allowed to stand unchallenged for any length of time; and thirteen years later in Rann vs. Hughes (7 Term Rep., 350, note a) it was decided that the rule of Pillans vs. VanMierop was unsound, and that contracts in writing stood upon the same footing as oral contracts. Rann vs. Hughes has since been universally followed by the courts (Cook vs. Bradley, 7 Conn., 57; Burnett vs. Bisco, 4 John., 235; Bishop on Contracts, 24).
The last decade has shown us another endeavor to take a certain class of contracts out of the scope of consideration. For this attempt we are indebted to Prof. Langdell (Langdell's Sum. Cont., 53). He insists that consideration is not necessary to contracts governed by the law merchant: bills of exchange, policies of insurance, and promissory notes. The reasons he gives as to promissory notes and bills of exchange are:

1. That in declaring on them the making of the instrument is stated, then that defendant became liable, and in consideration of being so liable he promised.

2. That a promissory note for a pre-existing debt would be invalid if it required a consideration.

3. That a payee of a bill of exchange could not sue
the acceptor if a consideration was necessary.

4. That if they were mere parol promises the holder could only sue upon the original consideration.

5. That a bill or note, if paid at maturity, operates as payment of a debt.

To his first premise, it is sufficient answer that proof of no consideration is a defence. As to reason for thus declaring on promissory notes, see Hare on Contracts, p. 256. Regarding his second proposition, the payee has put it out of his power, by accepting the note, to collect the debt during the interval. That is surely sufficient consideration on his part. And the making of a note which the payee can negotiate, and on which the maker is liable to
third persons regardless of any set off or defence between the parties, is a good consideration for forbearance. In answer to the third proposition, the funds of the drawer in the drawee's hands are the consideration. That the acceptor is bound, whether he has funds or not, is to be accounted for on the ground of estoppel. A bona fide holder of a promissory note, for which there was no consideration, is allowed to sue for the following reason: The maker, by placing his name on a negotiable note, is estopped from denying, to the injury of innocent purchasers, that there was no consideration. It is not that a note is made valid without consideration, but that a party will not be allowed to work a fraud upon innocent third parties.
Prof. Langdell's last proposition does not help to prove that a bill or note is valid without consideration. Though he says, "it is very clear upon principle that these contracts do not require any consideration." The simple fact that want of consideration is a complete defence shows that consideration is necessary. The same answer may be given to his arguments that insurance policies do not require consideration.

There are certain quasi-contracts which do not require a consideration, these are estoppel and waiver. Estoppel is based on the prevention of fraud, and waiver on the reasoning that a person is not obliged to accept a benefit tendered to him by the law.

What has heretofore been said as to the necessity
for consideration, applies to executory contracts only.

As a general rule executed contracts do not require a consideration (Casey's Appeal, 36 Conn., 88). But where property has been transferred to the injury of creditors, the consideration may be inquired into, and absence of consideration will be evidence of fraud (Young vs. Heermans, 66 N. Y. 374).
Past Consideration

In contradistinction to cases where the receipt of the consideration is cotemporary with the promise, are cases where the consideration is executed, or more properly speaking, past. These cases have given rise to many fine distinctions and a vast quantity of dicta; though in latter years the litigated cases seem not to be very frequent.

It was early held that a past consideration would not support a promise. The same case, however, which established that doctrine, mentioned an exception to the rule. The exception was, that wherever the past consideration ensued at the request of the defendant, it would support a promise on his part (Hunt vs. Bate,
Dyer, 272 a). The rule of Hunt vs. Bate has been the accepted doctrine ever since (Lampleigh vs. Brathwaite, Hob., 105; Chaffee vs. Thomas, 7 Cowen, 358; Comstock vs. Smith, 7 John., 87; Parsons on Cont., 391). The reason given for the exception to the rule is, that the promise relates back to the consideration, and the request, the act, and the promise thus form one connected transaction (Bishop on Cont., 91).

The soundness of the doctrine, it seems with reason, has been questioned (Anson on Cont., 85-90: Langdell's Sum. Cont., 90-98). If we cast aside the worn-thread-bare doctrine of moral obligation, it is difficult to see any reason why a promise founded on past consideration should ever be enforced. The law implies a prom-
ise to pay for a benefit rendered on request. The subsequent express promise is but evidence as to value. The cases of Roscorla vs. Thomas (3 Q. B., 234) and Kaye vs. Dutton (7 M. & G., 807) hold that the only promise which will be upheld by a past consideration, is that which the law implies. Roscorla vs. Thomas appears not to have been questioned, except in one Irish case (Bradford vs. Roulston, 8 Ir. Com. Law, 468).

Upon the authority of Roscorla vs. Thomas it may truthfully be said that, in legal effect, past consideration is no consideration. Were any consideration present it would support any promise. Thus has consideration been freed from one more clinging barnacle.
Failure of Consideration

Where there is a failure of consideration the promisor is released. He has not received that in return for which the promise was made. The effect is the same as if there never was a consideration (Parsons on Cont., 386; Essery vs. Cowland, 26 Ch. Div., 191).

The difficulty is encountered where there is a failure of part of the consideration. Where part is illegal or immoral, and the illegal part cannot be separated from the good, its illegality will taint the entire contract (Best vs. Jolly, 1 Sid., 38; Widoe vs. Webb, 20 0. St., 431; Gerlach vs. Skinner, 34 Kas., 86; Barton vs. Plank Road, 17 Barb., 337; Perkins vs. Cummings, 2 Gray, 258). Where the illegal can be separ-
olated from the good, the contract will be avoided pro
tanto, and valid so far as the good consideration ex-
tends (Chase's Ex'rs vs. Burkholder, 18 Pa. St., 48).

So far the sky is comparatively clear, but clouds
soon obscure the light. Where there is simply a fail-
ure of part of the consideration is the contract a-
voided? Clearly there is no meeting of minds, but,
nevertheless, it has been held that the contract is bind-
ing. Leaving the promisor to his cross action (Par-
sons on Cont., 386; Franklin vs. Miller, 4 A. & E., 599;
Hall vs. Minturn, 55 N. Y., 676; Jenness vs. Parker,
24 Me., 289). This doctrine is founded on the rule
that, so long as there is any consideration, the courts
will not enquire into its adequacy (Bishop on Cont.,
74); but the reason of the rule fails here. The promisor has not received that which he bargained for. He has not agreed to the inadequate consideration.

It seems to be the better doctrine that where the failure is of a substantial part of the consideration the promisor is entitled to treat the contract as rescinded (Giles vs. Edward, 7 Term Rep., 18; Bowes vs. Shand, L. R., 1 Q. B. Div., 470; s.c., 2 App. Cases, 455, 467; Norrington vs. Right, 115 U. S., 188, 204).

In the words of a learned writer: "An entire consideration which fails partially, fails wholly: and the court has no jurisdiction to enquire into the extent of the difference, or whether justice would be done by allowing plaintiff to recover with an allowance for
the loss." (Hare on Contracts, 561).

The subject is a complicated one, involving a large part of the law of sales. A complete discussion of it would necessitate more space than can here be given; and the writer leaves it for the "consideration" of wiser heads than his.