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A Refresher Course in Cause

J. Denson Smith*

One of the most significant and perhaps troublesome problems that will confront the drafters of a Projet of a Revised Civil Code, as envisioned by Act 335 of 1948, will be what to do about the doctrine of cause in Louisiana's contract law. This will necessarily involve also deciding what to do about consideration that, aided by a fifth column operating from the code itself, has infiltrated from the common law. Available choices will include whether to retain our traditional doctrine with an infusion of new vigor afforded chiefly by pruning away the confusing admixture of consideration; whether to yield to the latter doctrine as a substitute; or whether simply to undertake to avoid any mention of cause and set up rules designed to make its application unnecessary.

It may be admitted at the outset that we can get along without cause if we want to. Other jurisdictions that have drawn their law from the civilian well presumably have done so.¹ Yet we cannot get away from the problems that must be solved by the application of principles rooted deep in the essence of cause. Not at all likely is it that we will ever believe that all undertakings should be treated alike, whether purely gratuitous or supported by an equivalent, or that no account should be taken of error, fraud, violence or threats.² If this be true, whatever solutions are proposed it will still be necessary to deal with distinctions stemming from such differences in treatment and from the necessity sometimes of granting relief against obligations assumed. To a considerable extent at common law such problems involve the doctrine of consideration. The law we inherited employs the theory of cause. The purpose of this paper is to explore in some detail the manner in which cause operates in the solution of contract problems of the sort indicated in the hope that such an examination may add a degree of understanding to

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the concept so that its proper place in the law of Louisiana may be better understood.

It seems clear that the most fruitful way to get at an understanding of cause is to determine just how it fits into the civilian law of contract and how it operates in the solution of contract problems. Great argument can be discovered among civilian writers insisting in opposition that cause is on the one hand an objective concept and on the other entirely subjective.\(^3\) The effort here will be to point up its controlling influence in characterizing promises so that their proper legal treatment may be known and to explore its application to the problem of deciding what circumstances should be legally sufficient to justify the granting of relief to promisors who have been affected thereby.

Although a detailed comparison of civilian cause and common law consideration is not an object of this discussion, yet, as a consequence of the confusing use of both terms in our Civil Code, and because in many important aspects the two doctrines operate to fulfill much the same purpose, comparison cannot entirely be escaped. For much of this we may give thanks to our exposure to common law influences and learning, the impact upon us of common law practices, customs and habits, and also to the rendition in English of our code by a translator who, one may surmise, had either little regard for or understanding of the French theory of cause as well as manifest misconceptions of Anglo-American consideration, at least as we understand it today.\(^4\)

### CONTRACT IN FRENCH LAW

#### General Principles

As one writer has put it, "The fundamental principle of modern civil law is that conventio without more = contractus. But it must be conventio about a lawful subject matter."\(^5\) On the other hand, the American Law Institute's comment on consideration in its Restatement of Contracts begins, "No duty is

\(^3\) See 2 Planiol, Traité Élémentaire de Droit Civil 391-398, nos 1026-1039 (11 ed. 1939); Louis-Lucas, Volonte et Cause 122-134 (1918).


\(^5\) Walton, Cause and Consideration in Contracts, 41 L.Q. Rev. 306 (1925).
generally imposed on one who makes an informal promise unless the promise is supported by consideration."

The basic difference between civilian cause and common law consideration rests in these principles. In the civil law, agreement without more equals contract, as long as the agreement is a lawful one. In Anglo-American common law, agreement plus consideration equals contract. One theory subscribes to the view that a promise should be enforced because it is a promise, the other holds to the belief that a promise should not be enforced unless the promisor asks for and receives something in return for it.

How the French came to hold their view is not difficult to discover. With the Romans, formality occupied great place in the law of contract. But canonical law, as early as the thirteenth century, taught respect for the will of man. This theory was echoed by the philosophers. Individual liberty and freedom became the rallying call of the French revolution. The drafters of the Code Napoleon recognized this philosophy and gave it life by exalting the will of the individual however expressed. Requirements of form were viewed in general as unnecessary obstacles to free expression. The power to bind oneself merely by expressing a will to do so was accorded full recognition. Given the required capacity, the parties with certain exceptions might contract as to all things, in the most extensive sense of the expression, corporeal or incorporeal, movable or immovable. All agreements legally entered into were given the effect of laws on those who made them. A promise was enforceable because it was a manifestation of the promisor's will to be bound, and no further reason was required.

Cause and Contract Characterization

From a beginning such as this the role of cause in modern civilian law unfolds with reasonable clarity. In consequence of the fact that in French law a promisor can bind himself by his will alone, cause is merely concerned with his reason for doing so. There can be no such thing as a promise without a cause in civilian law in the sense that there can be a promise without

6. Restatement, Contracts § 75, Comment a (1932).
7. 6 Planiol et Ripert, Traité Pratique de Droit Civil Français no 14 (1930).
8. Id. at no 95; 3 Toullier, Le Droit Civil Français no 17 (1833); Planiol, op. cit. supra note 3, at 263-264, 371-374; n° 945, 962-974.
consideration in Anglo-American law, for a manifestation of will must necessarily derive from some motive, reason, or grounds. Whereas consideration is something given for a promise, promise and cause are as inherently joined as the spoken word with the thought creating it.\(^9\) Hence the accurate identification of cause with motive.

The place occupied by cause in French law can be stated in major outline with reasonable brevity. The principle that all promises intended to have legal effect are enforceable is carried out very simply and directly. An expression by one person of a will to bind himself, when concurred in by another, constitutes a concurrence of wills, or contract. The latter term includes, therefore, not only agreements having some commercial significance for the parties but donations as well, since a donation is completed by the concurrence of the will of the donee in accepting, as with any other contract.\(^10\) Contracts, consequently, are given two general classifications based on the motive for making them: contracts of beneficence and contracts under onerous title. Cause is as germane to the former as to the latter; indeed, it is the determining element.\(^11\) Whether a contract is an onerous contract or gratuitous depends in the final analysis on its cause. If a contractant desires to confer a benefit by way of gratuity the resulting contract is gratuitous. Where he is not so moved the contract is onerous. Certain special contracts such as the loan of money without interest, the non-remunerative suretyship, mandate and deposit, and the loan for use are therefore characterized as gratuitous. In all these cases a benefit is conferred without anything being asked for or received in return. But by far the most important gratuitous contract that meets this test is the donation. And there is a very significant difference between it and the others—it occasions a depletion of patrimony on the


M. Houin, "... Il est évident, en outre, qu'à la lumière de cette analyse, l'absence de cause est une chose inconcevable. Il convient, enfin, de noter qu'il n'est pas exact de parler de cause du contrat ou de l'acte juridique; il l'est davantage de parler de cause de l'obligation; mais l'expression la plus correcte serait celle de 'cause de la manifestation de volonté de l'auteur ou de l'un des auteurs de l'acte.'

Billette, La Cause des Obligations et Prestations 65 (1933): "L'acte du donateur n'est pas l'acte d'un insensé. Il a un cause."

\(^10\) 7 Fenet, Recueil Complet des Travaux Préparatoires du Code Civil 595 (1836); Bufnoir, Propriété et Contrat 6 (2 ed. 1924).

\(^11\) Planiol et Ripert, op. cit. supra note 7, at no 32.
part of the donor. Because of this, donations are subjected to special rules (including the requirement of the authentic form) not applicable to onerous contracts or to the special gratuitous contracts mentioned.

Since of all contracts, donations alone are subjected to these special rules, their identification becomes necessary. A complicating factor is the fact that in French law a donation may consist of a promise of future performance as well as a present delivery of something tangible. This is a natural result of the free scope given to the individual will and the resulting power to bind oneself by making a promise or declaration of intent to do so. With respect to such promises, although it was considered desirable to require the use of an authentic act to guard against ill-considered generosity, as well as attempts to prove the intent to be bound by more questionable evidence, it was not deemed necessary to go further and insist on a present real delivery as an additional safeguard.\(^1\)

The French Code defines a donation inter vivos as “an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it.”\(^3\) The settled view of the courts and the writers is that the word “act” in the text is inexact in that it signifies a juridical result produced by the will of one person acting alone, as a testament.\(^4\) It is also generally agreed that the divestiture spoken of in the article includes the transfer of a “right” to the donee, without regard to its nature. The “thing given” is thus this right. From this it follows that there may be a donation of a right to a sum of money, the real transfer of which is to be made in the future, which amounts to the gratuitous creation of a right in the donee against the donor to a sum equal to the amount promised. In such a case it is considered that the donation does not have for its object the sum of money but rather the right to require payment in the future, that is, an enforceable credit created in the donee. The “thing” then, of which the donor divests himself

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14. The word “act” got into the article without much discussion to meet the objection that a contract imposes mutual charges on the two contracting parties. 7 Fenet, op. cit. supra note 10, at 260. Cf. 8 Oeuvres de Pothier 347 and note (2 ed., Buguet, 1861).
irrevocably in favor of the donee who accepts it, is the right or credit thereby vested in the latter.\textsuperscript{15}

In the final analysis, whether a contract is a donation or an onerous contract depends upon the determining motive that dominated the party. Basically a donation stems from an intent to give as opposed to an intent to secure something in return or to discharge an obligation, hence the statement that the cause of a donation is the \textit{animus donandi}. Its legal character therefore depends upon its cause.

At first blush it would appear to be a simple thing to distinguish between donations and onerous contracts. But the same types of cases are the trouble makers here that keep pounding against the bulwark of bargain in Anglo-American consideration. The real difficulty is bottomed on the fact that underlying every act of man there may be a complexity of motives, so that the final or determining motive may become difficult of discovery. An examination of some of the problem cases will be helpful.

We are all familiar with so-called charitable subscriptions. Common law courts working with the doctrine of consideration were faced with the difficulty of finding some sort of bargain to support promises to subscribe. This was a real difficulty because the subscriber for charitable purposes is not seeking a return performance the receipt of which is his inducement to subscribe. Trying to find something bargained for and given in exchange for the promise required uncommon legal adroitness even for a willing court. But it was done.\textsuperscript{16} From the French point of view, subscriptions for charitable purposes present the question of whether they are donations or onerous contracts. If the former, the use of the authentic form would be required for their enforceability. But such a result would be undesirable because in most cases the amounts promised are small and the subscribers numerous. In applying the concept of cause, inquiry can be made as to whether the promisor acted from a pure spirit of liberality or whether he was trying to achieve a desired end by supporting or perpetuating the organization as an institution beneficial to the society of which he is a part. It has not been difficult for the French to resolve the question by holding that the cause in such

\textsuperscript{15} Id. at 376.
a case is not a will to give or spirit of liberality but rather the intention of arriving at the end sought, the creation or perpetuation of an agency in which the subscriber is interested.\textsuperscript{17} From this the holding follows that the transaction is not a donation requiring an authentic act for enforceability. And it is likely that this comes closer to the substance of the matter than, say, a finding of consideration in the promises of other subscribers. Some similarity can be detected between the foregoing and the approach of common law courts when bargain bent, but the theory of cause is certainly more realistic, even if the final difference is between saying that a subscriber is bargaining as opposed to saying that he is not donating.\textsuperscript{18}

Similar problems are presented by cases involving promises made in recognition of past benefits received, the common law "past consideration" cases. A common law court can hardly find a present bargain for a past benefit, but in civilian law the basic question is whether the promisor is being moved by a spirit of liberality or by a sense of obligation. The resolution of this problem is sometimes dealt with in terms of natural obligations, but, as one would suspect, the Code Napoleon does not define natural obligations. The character they may give to future promises or transfers is left for determination through an application of the theory of cause. And the courts have acted accordingly. It is generally recognized that one who acts in response to a natural obligation is not dominated by an intention to give arising from a spirit of liberality and is, it follows, not donating. One writer has stated the views of the judges as derived from the cases: "Whoever fulfills a moral duty feels himself obligated by his conscience, he feels himself morally bound; he does not act under the influence of a pure sentiment of affection for a third person. He admits himself to be a debtor, thereby excluding on his part any intention to make a liberality. . . . Each time the courts decide to admit the existence of a natural obligation they simply ask whether he who has paid had reason to believe him-

\textsuperscript{17} 2 Colin et Capitant, Droit Civil Francais 59, no 61 (8 ed. '1935); 5 Planiol et Ripert, op. cit. supra note 7, at no 418; Billette, op. cit. supra note 9, at no 190.

\textsuperscript{18} This is a significant difference for although a finding of donation must exclude the possibility of bargain a finding of no bargain does not necessarily mean donation. At common law the promises that fall in between are not supported by consideration and are generally unenforceable whereas at civil law such promises, not being donations, are enforceable without any formal requirements.
self bound by a duty of conscience and to be obligated morally; and when they recognize this duty they say: There was a natural obligation. . . . The act designated as donation must then have no other motive than sentiment of affection."¹⁹ It is in this fashion that the French dispose of the kinds of promises recognized by the American Law Institute as being enforceable without consideration as well as all kinds of "past consideration" cases, whether they involve past receipt of pecuniary benefits or those of a moral nature.²⁰

The similarity of the problem raised by such cases from the civilian and common law viewpoints might here be noticed. The French, being concerned solely with whether they are or are not dealing with a donation, draw the line between pure donations and onerous contracts back at the point where there is a pure spirit of liberality. Anglo-Americans, being concerned with bargain, go up to present exchange and draw it there. The focus of the French is on donation and that of Anglo-Americans on bargain with the result that more simple promises are enforceable in the civilian system than in the common law. And this seems to flow directly from the French emphasis on the legal potency of the expressed will as opposed to the stricter common law view that a man's promise should not bind him unless he asks for and gets something in return. French civilian law was thus drawing its strength from the moral domain to a greater extent than the common law where hard-headed practicality was throwing its weight around.

**CAUSE AND ERROR**

Without giving more detailed consideration to the function of cause in characterizing contractual obligations, the concept plays an important role also in the resolution of questions involving the effect of error, duress and illegality. In this respect it is well to recall to mind the emphasis placed by the French on the


²⁰. A collection of French cases can be found in Schiller, The Counterpart of Consideration in Foreign Legal Systems, Report of New York Law Revision Commission 107 (1936). The cases clearly indicate that solution depends upon (a) whether the services are measurable in money, and (b) the correspondence in value between the services and the promised compensation. It has been held that such a promise under private act is valid up to the value of the services and invalid for the portion that amounts to a pure liberality. S.1893.2.209.
legal efficacy of the will, the great scope given to it and its elevation to the status of law made by the parties for themselves. As a necessary corollary to the principle that an individual should have the utmost freedom to bind himself by willing to do so, it follows that he should not be bound without having so willed. This results in the principle that where consent is given in error—which covers also cases involving consent secured through fraud, or duress, a real will to bind is lacking and the expression of consent is thereby vitiated. Hence the rule that error as to the principal cause of a contract destroys the validity of the consent. Although different categories of error are dealt with, such as error as to the object, or the person, or the cause, it has been said, and with good reason, that error as to the cause comprehends all kinds of error.\(^1\)

If the law had to deal with the effect of error on only that party whose consent was given as a consequence thereof it would suffice simply to say that error will destroy consent only when it is on so material a point it is clear that consent would not have been given if the truth had been known. Such a rule would be in clear consonance with the view that a contract derives from the will to obligate which should be a true or real will. But since there is no measurable limit to the diverse motives that may play upon an individual, the effect of such a rule on the other party must also be considered. The result is that distinctions have to be made to afford proper protection, and this explains the qualification that invalidating error must relate to the principal cause or motive. Considering the nature of the contract, realization of the principal cause or motive is understood to be the basis upon which consent is given and it therefore becomes a tacit condition of the contract. This is because the final and principal motive for assuming an obligation must lie in the obvious end being sought, for example, obtaining ownership, or use, or services, or conferring a benefit. If this cause fails, the will is vitiated and the contract falls. At the same time, if the particular motive is not discernible by the nature of the contract it is subsidiary and does not rise to the status of a tacit condition because the other party is not chargeable with knowledge that the contract is conditioned on its realization. To be effective as a condition, the parties must contract on that basis.\(^2\)

\(^1\) Colin et Capitant, op. cit. supra note 17, at no 38.
\(^2\) See Toullier, op. cit. supra note 8, at nos 37-42; Planiol et Ripert, op. cit. supra note 7, at 229.
of this may be found in the rule that error as to the value of the thing purchased and sold does not vitiate consent. Although a buyer may not have bought if he had known the true value of the thing, it should be presumed that he is taking his chance—and the seller is in like position—unless the agreement is conditioned on value. All that the seller is required to know is that the buyer wants the thing being bought and sold, or supposedly so; why the buyer may want it, whether because of its supposed value or for any other reason is not the seller's concern if the parties do not contract on such basis. As the French writers put it, error will serve to invalidate consent only when it enters the contractual field. It does so tacitly if it relates to the principal cause, that is, the final and determining motive.

Attempts to deal with this kind of problem result in dividing cause into remote and proximate cause, or the cause of the contract as opposed to the cause of the obligation, or in undertaking to separate cause and motive and to define the former, in an abstract way, as the immediate end that a party has in view in contracting. Through such means the French try to accomplish the same sort of thing that is accomplished at common law by means of the principles of materiality and mutuality. It is true also that the legal effect of error may vary depending on how seriously and to what extent each party may be injured by a given solution and also on the presence or absence of negligence.

Although simple error will render a contract invalid only when it affects the principal or final and determining motive, yet when it is occasioned by fraud, its effect is broadened to result in nullity when the fraud practiced is such that it is evident that without it the other party would not have contracted. Here, of course, the party practicing the fraud is in no position

23. The special rules dealing with lesion result from this.
24. This is the basis upon which rest the principles granting relief against redhibitory defects rendering the thing sold either absolutely useless, or its use so inconvenient and imperfect that it must be supposed the buyer would not have purchased it if he had known of the vice. Art. 2520, La. Civil Code of 1870.
27. Art. 1116, French Civil Code.
to ask that the effect on himself of nullifying the contract be considered, hence the broad rule may be applied as long as the resulting error is material, even if it does not relate to the principal cause.\textsuperscript{28} Violence has the same scope.

Beyond these cases cause also enters into the question of legality. It is in this connection that much criticism of the doctrine has been voiced.

One may suppose a case where \( A \) contracts with \( Y \) for the use of an automobile. If the automobile cannot run, no one would contend that \( A \) ought to pay for the hire. The principal motive dominating \( A \) would be presumed to be to secure an automobile that would run, a motive that would obviously enter into the contractual field as a tacit condition. This is clear because the situation would change completely if the auto in question were an immobilized museum piece and \( A \) wanted merely to exhibit it in his showroom. Now if \( A \) contracted for the use of an auto because he wanted to meet his best girl at the railroad station, not knowing that she had left with a sailor at a previous stop, no one would be likely to argue that he should not therefore pay the hire. Nor should it make any difference if he learned of his possible misfortune before going to the station. His principal motive in promising to pay for the use of the auto would be to have its use; meeting his girl at the station would be accessory or subsidiary although obviously material. But at the same time, if \( Y \) knew when \( A \) contracted for the auto that \( A \) was doing so in order to meet his girl at the station and also knew that the trip would be abortive because she had run off with a sailor, then there would probably be agreement that \( A \) should not have to pay \( Y \). He would be protected by the rule that where fraud is practiced it need only be evident that the aggrieved party would not have contracted if he had not been so treated.

Now let us suppose that \( A \) wanted the auto to take his girl out into the country and garrote her for her fickle heart, as \( Y \) knew. Everyone would likely agree that such a contract would be tainted with illegality and unenforceable. But it has been asked: How can the cause be considered illicit in such a case?

\textsuperscript{28} See Restatement, Restitution §§ 8(2), 9(2) (1937); Restatement, Contracts § 470 (1932). N.Y. Life Ins. Co. v. McLaughlin, 112 Vt. 402, 26 A. 2d 108 (1942) using as a test whether the error was "likely to affect the conduct of a reasonable man with reference to the transaction in question." Courts also inquire whether the mistake was as to a basic fact. Note, 46 Mich. L. Rev. 1045 (1948).
This sort of question comes from the view, presented by some writers, that cause is external, or abstract, and always the same in any given contract—that in a contract of hire the cause of the obligation of the one who hires is to secure the use and that there can be nothing illicit, per se, in securing the use of an automobile. But cause is motive and although it may be true that the immediate motive of one who hires may always be to secure use or enjoyment, to restrict cause to immediate motive when dealing with illegality is unnecessary and unsound. This is not done when dealing with fraud and error. And with better reason it should not be done when illegality is the problem. In such event it suffices that a subsidiary, as distinguished from the principal, cause, motive or purpose be illicit. This is entirely consistent with the view that error with respect to a subsidiary but material motive is sufficient if induced by fraud despite the fact that such error does not relate to the principal cause. Fraud and also illegality are thus more far reaching in their consequences than simple error.

There is justification in emphasizing that the term "principal cause" is found in the code itself. This is recognition of the fact that the word "cause" comprehends more than the final or determining motive. Simple error, in order to invalidate, must relate to the final or determining motive, but when fraud is involved, or illegality, no such restriction exists. In effect, when cause is used as a means of characterizing a promise as a donation or onerous contract a similar differentiation may be necessary based on the predominating element of beneficence or exchange. If the principal motive is to give, a donation is indicated; if exchange, an onerous contract may be found.

Although other ramifications of the theory could be explored, enough has been said to indicate the principal functions of cause in the French law of conventional obligations. The discussion also indicates that these functions are consistent with the fundamental principle that agreement without more equals contract. There will be no contract, or legal tie, if the agreement is unlawful or contra bonos mores, which is another way of saying if the cause is illicit; and it is subject to rescission if the cause is false. When the French Code says that an obligation without a cause can have no effect, it is referring to the case where the cause is

false, and invalidity results. An obligation is without a cause when, because of error, fraud or violence, there is lacking a real or true consent, or when the final and determining motive on which consent is founded is doomed to frustration or destruction because of unknown existing facts or future occurrences.  

It has been contended that the theory of cause is not at all necessary to explain why a sale of something is without effect if the thing has been previously destroyed, that the sale fails for lack of an object. But at the same time, insurance has been validly effected on things already destroyed by the occurrence insured against. And nobody suggests lack of an object as a reason for avoiding the insurance contract. The simple reason for this is that the motive is not destroyed; the parties intended to take their chances. Nor is it reasonably arguable that one cannot “sell” a “thing,” the existence of which is then in doubt. The so-called sale of a hope is perfectly valid although the object of the hope never materializes; the motive is clear, no mistake is involved, the will is not vitiated.

It well may be that the civilians could separate donations from other contracts and solve problems involving error, duress and legality without resorting to cause. But at the same time adequately dealing with error necessarily entails dealing with motive. Nor can delving into motive be completely escaped in endeavoring to determine in a close case the existence of a barrier—the test of common law Restatement consideration. When Kirksey wrote Dear Sister Antillico, how can one be sure he was not bargaining without actually dealing with his motive, although, apparently, the common law tries to do just this? It

31. “Pothier, from whom has come our Article 1131, says that an engagement contracted without cause, or of which the cause is false, is the same thing. In effect, when an engagement has been contracted without cause, as in the case of the sale of a house destroyed by fire before the contract, the cause exists in the thoughts of the parties, although it has in reality ceased to exist. They were in error: the cause was, then, false as far as they were concerned, and in this sense one may say that a contract without a cause or with a false cause is the same thing.” 3 Toullier, op. cit. supra note 22, at 106. See also, Bufnoir, op. cit. supra note 10, at 556; 8 Fenet, Discussions 228 (1836).

Suggestions can be found that false cause refers to a recitation of cause that is not the true cause, but this can hardly be the kind of false cause that results in nullity of the obligation under the rule that an obligation with a false cause is null. If the true cause is sufficient to sustain the obligation in its given form nullity will certainly not result. A donation disguised as a sale may yet be given effect as a donation. Cf. 11 Laurent, Principes no 506 (4 ed. 1887).

32. Kirksey v. Kirksey, 8 Ala. 131 (1845).

33. Consider Restatement, Contracts § 84(a) and Comment (1932). Comm-
A REFRESHER COURSE IN CAUSE

seems clear that to deal with motive, in terms of traditional French law, despite expressions to the contrary, is to deal with cause.

Contract Characterization Under the Louisiana Civil Code

Supposedly, since the Louisiana system of contracts is that of the French, cause should occupy the same place with us. An examination of our Civil Code will show that in the main it does; but there are some curious anomalies.

If the propriety of identifying cause with motive may be open to question under French law, no such question can arise under the law of Louisiana. The drafters of our code specifically provided that "by the cause of the contract . . . is meant the consideration or motive for making it," and they also divided contracts "considered in relation to the motive for making them" into gratuitous contracts and onerous contracts. The latter, speaking broadly, were said to involve equivalents. With respect to the former it was provided that to be gratuitous, the object of a contract must be to benefit the person with whom it is made, without any profit or advantage stipulated in favor of the other party. To this was added the further explanation that a contract "is not, however, the less gratuitous, if it proceed either from gratitude for a benefit before received, or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature." Without going into this definition, which will bear later examination, we seem to be consistent with the French. Their contract of beneficence becomes our gratuitous contract, and as with them there is no suggestion that a gratuitous contract is any the less valid than an onerous one. If we start looking for particular kinds of gratuitous contracts they are not difficult to find. As with the French, there is the mandate, the loan for use, the deposit and the non-remunerative suretyship. And then, again like the French, we have donations. Disregarding the special kinds mentioned, our contracts may be said to be

1 Corbin on Contracts § 118 (1950): "If something is 'bargained for' by the promisor, it is evidently 'his conventional motive or inducement.'"
divided into onerous contracts and donations. This again is consistent with the French. Donations are contracts with us as with them—the principal type of gratuitous contract.

Whether gratuitous or onerous all contracts are prima facie enforceable. In addition to the parties, their consent fully given, all that is needed is a lawful purpose. In consequence we may accurately say that all promises are enforceable unless some reason be discovered for not enforcing them. There is no additional ingredient like common law consideration. We begin, then, with these two main divisions and with the realization that to deal with contracts includes dealing with donations.

Although we followed the French in requiring the use of the authentic form in the making of donations, our redactors, instead of leaving to the courts the problem of distinguishing between donations and onerous contracts through the general definitions given, became more specific. They further characterized donations as purely gratuitous, onerous, and remunerative. It was then provided that whereas the purely gratuitous donation, made merely from liberality, would be subject to the formal requirements and other rules applicable to donations, onerous and remunerative donations were not real donations and were not subject to the rules applicable to donations except when the value of the thing given should exceed by one-half the value of the charges imposed or the services rendered. Onerous and remunerative donations, subject to the exception, were thus recognized in effect as onerous contracts.

But there was a degree of inconsistency. A comparison of these provisions with the definitions of gratuitous and onerous contracts demonstrates that whereas a donation subject to a charge falls within the definition of an onerous contract, yet a donation made to recompense for services rendered, although clearly comprehended by the definition of gratuitous contracts in Article 1773, is, by virtue of Article 1526, also treated as an onerous contract unless the value of the thing given is considerably greater than that of the services—or more specifically, unless it exceeds the latter by one-half. A contract gratuitous by defini-
tion becomes onerous by its exclusion from the field of donations. Without relying on Article 1526, the only way that we could hold with any show of justification that a promise made in recognition of beneficial and gratuitous services received is enforceable as an onerous contract would be to construe the words "proceed . . . from gratitude" in Article 1773 as not including such a promise. This would be to say that such a promise does not proceed from gratitude but rather from a sense of duty or obligation. But even if we got over that hurdle in such dubious fashion we would run headlong into the fact that the receipt of beneficial services does not raise a natural obligation in view of the exclusive categories established by Article 175845 but leaves only a moral or imperfect obligation.

This leads to a comparison of other provisions of our code. Article 175746 sets up three kinds of obligations: imperfect, natural, and civil or perfect. Our chief concern is with the first two. They divide obligations into purely moral duties, such as the duty of exercising gratitude or charity, and a special kind of duty that is said to be binding in conscience and according to natural justice, a natural obligation. Neither of these obligations is enforceable. However, the purpose of the division is made apparent by the two following articles, although in a negative sort of way. Article 1758 recognizes four kinds of natural obligations, and Article 175947 provides that no suit will lie to recover what has been paid, or given in compliance with a natural obligation and further, that a natural obligation is sufficient "consideration" for a new contract. The basic purpose of these provisions begins to emerge. A promise based on a natural obligation is said to constitute a new contract although the code does not say what kind. A necessary inference, however, is that the draftsmen meant an onerous contract because a promise based on an imperfect or moral obligation would clearly amount to a gratuitous contract as defined in Article 1773. To find therefore that an obligation is based on a natural obligation is to find that it is not a donation. At the same time if based on a merely moral obligation and a depletion of patrimony is involved it becomes a donation and its character as purely gratuitous, onerous, or remuner-

The concept of natural obligations thus serves as a means for classifying or characterizing the resulting contract.

As has already been seen, the French, without a restricting article like our 1526, have expanded the concept of natural obligations to include any imperious duty of conscience.\textsuperscript{49} Having a transfer made to recompense for service rendered they first determine whether the services lend themselves to an evaluation in money and, having decided this in the affirmative, if they further find a reasonable correspondence between the value of the thing given and the value of the services, their conclusion is that the giver was being moved not by merely a spirit of liberality but by a sense of obligation measurable in money—instead of gratitude—and so conclude that the transfer does not constitute a donation and does not have to be in authentic form. The cause of such a contract is not a will to give but a sense of indebtedness or obligation resting upon the promisor. When he promises, he is promising to pay, not to give. If the services are the kind of services upon which a money value cannot be placed, then the transfer must rest upon a sense of gratitude alone, which is the kind of obligation that gives rise to a donation and not to an onerous contract.\textsuperscript{50}

As a consequence of our Article 1526 we come out at somewhat the same place. In effect, this article is a legislative finding that the cause of a transfer made to recompense for services received, if they can be appreciated in money,\textsuperscript{51} lies in a duty of conscience instead of a spirit of liberality except when the value of the object is so considerably greater than the services rendered that the intention to confer a benefit by way of liberality is apparent. The legislature has, in effect, weighed the value of the thing given against the value of the services and made a determination of the question of whether a sense of duty or a spirit of liberality was the predominant motive. It thus has done for our courts what the French courts do for themselves. And by Article 1526, an imperfect obligation that "has no legal opera-

\textsuperscript{48} Art. 1526, La. Civil Code of 1870.
\textsuperscript{49} Supra, p. 8.
\textsuperscript{50} The terms "moral" or "natural" obligation may be used by the French and they have been liberal in applying the concept so as to find that the authentic form is not necessary. See Pianiol, op. cit. supra note 19, at 157.
\textsuperscript{51} Art. 1525, La. Civil Code of 1870.
tion” becomes an effective natural obligation giving rise to an onerous contract.

Another observation might be justified. Our supreme court has held, and this seems to be in accord with the intention of the redactors, that the kinds of natural obligations recognized in Article 1758 are exclusive. At the same time nobody has ever questioned the legal efficacy of a simple written promise to pay the debt of a third person. Indeed, the court has also recognized that a son may bind himself by promising to pay his deceased father's prescribed debt. Actually, promises of this kind are not intended as donations and the authentic form should not be required but yet such a result is difficult to square with the definitions of natural obligations and onerous and gratuitous contracts. One may wonder whether the redactors had all of this in mind.

Although generalization is here fraught with danger, one thing does seem to stand out clearly: the purpose of the drafters was to stick with our own principles; they had no intention of importing into our law common law principles foreign to it. It is unimportant whether natural affection might have been recognized as “good consideration” for a conveyance at common law. They thought it was and, believing that such a principle would be contrary to our law, they sought to exclude the possibility by narrowly defining the types of natural obligations. But then, when they provided that a natural obligation is a sufficient consideration for a new contract they were not using the language of the Code Napoleon. Theirs was the customary language of

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55. 1 Louisiana Legal Archives, Projet of the Civil Code of 1825, 226 (1937), explaining Articles 1758 and 1759: “Although this kind of obligation [the imperfect] has no legal effect whatever, its definition is introduced because it is frequently referred to by commentators and sometime with such loose expressions, as might induce a belief that it had the effect of a natural obligation, unless the contrary were declared. In the common law of England, ‘natural affection’ which is an imperfect obligation, is a good consideration for a conveyance. As we do not mean to sanction this principle, it was the more necessary to declare it, because of the danger of introducing from the jurisprudence of our sister states principles inconsistent with that of our own.” See Comment, 12 LOUISIANA LAW REVIEW 79 (1951).
the common law. In their favor is the fact that they used the word "cause" instead of consideration, but the provision does not come off much the better even with the substitution. What they might have said instead is that a promise supported by a natural obligation gives rise to an onerous contract. The American Law Institute may now have told us that we may not speak of "natural obligation" as being "consideration" because consideration is only that which is bargained for. Once the bargain theory be imposed, the statement is perfectly true, since when one makes a promise in response to a natural obligation he surely is not bargaining. But despite this sound logic, the common law courts have for many a long year called a natural obligation sufficient consideration, and to anyone familiar with that learning, what the Louisiana Civil Code says seems to be eminently in accord as the accepted language of the common law. To sum this up, promises supported by natural obligations create onerous contracts since they do not arise from the will to confer a gratuity by way of liberality. Promises supported by moral obligations presumably give rise to gratuitous contracts, but if they are made to remunerate for past services, and there is the required correspondence in value, they will be treated as onerous contracts rather than donations. The French, on the contrary, have only the basic element to deal with in such cases, that is, cause.

The treatment of this problem in our code carries the suggestion that the redactors had a better knowledge of common law consideration than they did of cause. But this is not believed to be true. Perhaps a better conclusion would be that they believed common law consideration was more closely related to cause than we think of its being today. The Projet of the Louisiana Civil Code was submitted by the redactors in the year 1823. It should not be surprising if their understanding of the doctrine of consideration was not comparable to that of a present day scholar of Anglo-American contract law. The source material available to them was doubtless very scanty. When one notices to what extent reliance was placed by the American Law Institute on the writings and opinions of Justice Holmes in resolving

58. An objection to judicial processing on the basis of natural obligations is that this tends to shift the focus away from the basic problem, i.e., whether the court is dealing with a donation, and to give undesirable emphasis to the idea that the natural obligation furnishes a required legal support without which the promise would not be binding.
the meaning of consideration, it is not at all surprising that the drafters of our code, who wrote long before his time, did not have the same idea about it that modern scholars have. There is, too, no lack of evidence that in its English beginnings the word "consideration" was used in a non-technical sense to denote the act or other circumstance leading up to or constituting the "motive" or "cause" for a given transaction. It seems certain that when our redactors spoke of cause and consideration in the same breath, they were thinking that consideration was the same as cause, not the other way around. Enough support for this lies in their definition of cause and consideration as the motive for a contract. A justifiable, if not necessary, deduction should be that when the word consideration is encountered in the Code it should not be taken to mean common law bargain consideration but motive or cause.

61. A brief survey of some related provisions of the Civil Code will be enlightening. In the first place, as we all know, whenever there is any conflict between the French and English versions of the code, the French is controlling. Phelps v. Reinach, 38 La. Ann. 547 (1886). Likewise, if we would know the meaning of a word used in the French version we must determine the French meaning. Referring particularly to the word "consideration," sometimes used in the French version but not as a word of art, the French meaning is "motive," "reason," "grounds." See Heath's New French Dictionary (1932). The translation from the French to the English strongly suggests that the translator was more familiar with common law "consideration" than he was with French cause.

In Article 1759 "consideration" is substituted for "cause." In Article 1773 "stipulated in favor of the other party" becomes "received or promised as a consideration for it." In Article 1774 "as a consideration for" is substituted for "in consideration of." Notice how the French use is consistent with "motive," "reason" or "grounds," whereas the rendition in English suggests something given in return for. In Article 1825 the French "this principal cause is that without which" is distorted into "this principal cause is called the motive and means that consideration." In Article 1875 the French "sufficient price" is rendered "proper consideration" and in Article 1890 "or price" becomes "or consideration." In 1896 "when the consideration that has induced its making" is converted into "when the consideration for making it" and the same thing is again done in 1897. Notice again how much more consonant the original language is with the French meaning of "consideration." In Article 1898 there is no French counterpart at all for the words "the consideration." In Article 1899 there is no French counterpart at all for the words "the consideration." In Article 1900 "in the consideration" is substituted for "in the contract," and "true and sufficient consideration" is substituted for "another true and sufficient cause." There is no counterpart for "or consideration" in the French version of Articles 1981 and 1982, and in the latter "if the only price paid" is twisted into "if the only consideration."

Many are the cases in which the courts talk in terms of common law consideration, and of course consideration is part of the practitioner's language as well. With so much help in the code itself, surely this is not strange. In addition, Louisiana is surrounded by common law jurisdictions and flooded with common law reports, texts and legal writings. Louisiana's schools have been teaching common law contract law and, it may be, not
A critical examination of the jurisprudence would unduly extend the length of this discussion, but reference to a few problem cases may be justified. Pertinent here is the case of Barthe v. Succession of Lacroix. The litigation involved an attempt by plaintiff to recover the amount of a promissory note for $500.00 given to plaintiff by his deceased former employer. The defense was no consideration and an absence of the necessary formalities to constitute a donation. In holding for the plaintiff the court said: "... the conclusion we have reached is that the deceased, Lacroix, being without family, and believing that plaintiff had served him long and faithfully at very small wages, felt that he was under a moral obligation to remunerate him beyond his wages, and executed this $500.00 note for that purpose. In one sense it was a gratuity; i.e., he was under no legal obligation to do so. In another sense it was the fulfillment of a natural obligation. We think that there was a good and valid consideration for the note. Under this view it becomes unnecessary to pass upon the questions raised as to the validity of donations disguised under the form of onerous contracts." From the standpoint of the civilian this method of handling the case is good except for the reference to valid consideration. The court seems to have found something more to support the promise than a mere spirit of liberality. Its discovery of a "natural obligation" is in keeping with a customary way of disposing of such questions by the French courts.

But the difficulty with the court's disposition of the case is that the natural obligation found by it is not comprehended by Article 1758 and the promise also falls clearly within the definition of a gratuitous contract in Article 1773 and seems to be supported by only an imperfect obligation as defined in Article 1756. Furthermore, it falls also within the definition of a remunerative donation in Articles 1523 and 1525. In view of these provisions, plus Article 1526, the true and ultimate question before the court was whether the value of the note exceeded by one-half the value of the services. If it did not, the note was enforceable as an onerous contract; if it did, the note could not be enforced because it was not in authentic form. Consequently,
although the result reached by the court may have been correct the reason in support thereof can hardly be approved.

From another aspect, this case is of further interest. The accepted view of the French that a "promise" or "right" may be the subject of a donation has already been discussed. There has been no definitive holding in Louisiana that the word "act" in Article 1468 should be interpreted as "contract" nor that the words "the thing given" include also an intangible "right" or promise. That is, the Louisiana courts have not yet clearly held that one may donate his own promise. Counsel for defendant in this case seem to have conceded that a promise might be the subject of a gift by arguing that the note in question was unenforceable because it was not in the form required for donations. Nor did the court suggest that one could not donate his own promise. Of course, it may be said that this question was pretermitted by the holding that there was "good and valid consideration" for the note. But the fact that the court seemed to recognize that a donation might be made in the form of a note by authentic act is worth remembering.

At common law, the possibility of making a gift of one's own promise is not yet recognized. The common law insists on having some "object" that is delivered in consummation of the gift. This has been stretched to include, by way of example, a promissory note of some third person on the basis of the reasoning that a symbolical delivery of the "thing" given is made through the medium of the delivery of the evidence of the debt. This conclusion is supported by the realization that the donor, under such circumstances, makes the only kind of delivery he can make. But when it comes to a donor's attempt to give his own note, then the common law becomes concerned about consideration. This is because one cannot create a duty in himself in such fashion without consideration. The civil law, on the other hand, recognizes that a person can create a duty in himself by promising to do something, and he does not have to get anything in return for it. And it is only when he makes his promise out of a pure spirit of liberality that he must put it in authentic form to enable the other party to enforce it in the courts. Since "consideration" is not a requirement with us, there is no reason we should not recognize that a person may make a donation of

64. Supra, pp. 4 et seq.
65. See Corbin on Contracts § 114 (1950).
his own promise just as he can donate another’s promise to him
if we do not permit the wording of Article 1468 to mislead us.
Even if our courts have not definitely so held, what the French
are doing, as well as the reason of the matter, should be suffi-
ciently persuasive. And besides this the common law gives full
recognition to the binding efficacy of a promise under seal, with-
out being concerned with consideration, which has close analogy
to the civilian promise of a gift by way of authentic act.

The possibility of a person’s making a donation of his own
note was recognized, furthermore, by Judge Porter, in the early
case of *Heirs of Cole v. Cole’s Executors.* In rejecting an effort
to recover on a promissory note for $3,000.00 against the execu-
tors of a succession, the court said: “It has been contended this
was a remuneratory donation, not subject to the rules which
apply to donations strictly such. Admitting the law to be as
stated, the donee should prove the value of the services.... The
note can be considered in no other light than an attempt to dis-
guise under the form of an onerous contract a liberality to the
plaintiff, and is null for want of the formalities prescribed by
law for donations inter vivos.” The significant thing is that the
court plainly recognized, and with good reason, that the note
would be null simply for want of the formalities prescribed by
law for donations.

Our courts have long recognized the rule that a sale of
immovable property, where the price is not paid or intended to
be paid, may yet be sustained as a donation, provided that the
instrument is executed before a notary and two witnesses. This
is merely a recognition of the fact that such a transferor is
moved, not by a desire, to secure an advantage for himself, since
he does not exact a price for his property, but solely by a desire
to confer a benefit upon the transferee by way of gratuity. This,
in turn, constitutes a finding that the cause of the transaction is
the *animus donandi* and, this being so, the transaction is a dona-
tion. This principle, indeed, is explicitly recognized in Article
2464 of the code which provides that the price “ought not to be
out of all proportion with the value of the thing; for instance

66. 7 Mart. (N.S.) 414 (La. 1829). But see Succession of Rabasse, 49 La.
Ann. 1405, 22 So. 767 (1897) where the court, about 70 years later, declined to
express an opinion on the point.
67. D’Orgenoy v. Droz, 13 La. 382 (1839); McWilliams v. McWilliams, 39
277 (1900).
the sale of a plantation for a dollar could not be considered as a fair sale; it 'would be considered a donation disguised.' Obviously enough, as a donation the transfer would be subject to all of the qualifications applicable to donations but they are of no interest in the present discussion. A holding of this kind is not normally stated in terms of cause, but this is probably because it is too obvious that a person intends to donate if he transfers his property to another without seeking anything in return.\textsuperscript{68}

Our charitable subscription cases are also intriguing. In the leading case of \textit{Louisiana College v. Keller}\textsuperscript{69} the court concluded, in holding for the college: "An obligation, according to the Code is not the less binding, though its consideration or cause is not expressed. We are not informed as to the consideration of this promise, by anything on the face of the papers. It may have been the advantage the defendant expected to derive from the establishment of a college at his own door, by which he would save great expense in the education of his children, or it may have been a spirit of liberality and a desire to be distinguished as the patron of letters. Whatever it may have been, we see nothing illicit in it; nothing forbidden by law, and the promise binds him, if he consented freely, and the contract had a lawful object. In contracts of beneficence, the intention to confer a benefit is a sufficient consideration."\textsuperscript{70}

The conclusion that the subscriber must pay is certainly acceptable. But the method the court employed in reaching it is another thing. The court seemed to think that it had to find consideration and it found it in the intention to confer a benefit. But an intention to confer a benefit, as the cause of a promise, makes the promise a donation. And, if a donation, it must be in authentic form to be enforceable. Yet this seemingly did not occur to the court. Also Article 1765 says that the duty of exercising charity is an imperfect obligation that has no legal operation. The sequel is that if this was an exercise of charity then the resulting contract would have to be gratuitous, and not onerous. This was apparently the court's conclusion because it referred to the contract as one of beneficence. But yet the court did not seem to feel that a pure liberality was intended. It spoke

\textsuperscript{68} For an interesting comparison see Restatement, Contracts § 84, Comment \textit{a} (1932).
\textsuperscript{69} 10 La. 164 (1836).
\textsuperscript{70} Id. at 167.
of the advantage of having a college nearby and of the money
to be saved by the subscriber in educating his children. With
the proper emphasis on this sort of thing it could easily have
gone on to the conclusion that in making the subscription the
subscriber was not actuated by a pure spirit of liberality but
offered his subscription for the purpose of attaining the end he
was seeking, namely, the establishment of the college in his com-

munity, and so have held that it was not dealing with a donation
and that the promise was enforceable although it was not in
authentic form.71 This would have put it in line with the French
and would not have resulted in the anomaly of a contract of
beneficence supported by consideration found in the intention to
confer a benefit and enforceable because it was so supported.
Actually the court's reasoning ended completely in the air be-
cause, having found that this was a contract of beneficence result-
ing from an intention to confer a benefit, it did not explain why
the use of the authentic form was not required. Nevertheless,
cases such as this reflect basic acceptance of the doctrine of
cause, although the use of consideration may have produced a
partial eclipse.

The Louisiana cases involving the release, in whole or in
part, of obligations, present a curious admixture of civil and
common law theories.

The release of the whole of a debt has occasioned no serious
difficulty. Such a release constitutes a voluntary remission of
the debt, the effectiveness of which is adequately provided for
by the articles of the Code. A voluntary remission is recognized
as constituting a liberality extended by the creditor to his debtor
that might well be subjected to the form required for donations
except that the law is otherwise, at least with respect to remis-
sion inter vivos.72 If a creditor sees fit to release his debtor, his
freedom to do so is embraced in the freedom he enjoys to affect
his legal relations by manifesting a will to do so. The remission
is his voluntary act and it should follow that he has like power
to remit a portion of the debt due if he does not wish to remit
the whole.

71. Of course Articles 1756 and 1773 would complicate such an approach.
noted in 9 Tulane L. Rev. 615 (1936); Colin et Capitant, op. cit. supra note 17,
at 384, n° 333 et seq.; Planiol et Ripert, Droit Civil Francais 605 (1930).
Difficulty arises, however, when a debtor tenders to his creditor a portion of the debt in satisfaction of the whole. There has been much talk in the cases about liquidated and unliquidated claims, and common law principles applicable thereto, justified by supposed differences in legal result depending on the character of the claim. Common law authorities have been relied on to justify application of a rule that where the amount involved is unliquidated or disputed and the creditor accepts a part payment in full satisfaction, the entire debt is discharged. Such an approach is hardly consistent with civilian theory.

Since a creditor may voluntarily remit a portion of a debt, the only question in any case, whether the debt is liquidated or unliquidated, is, has he done so? Surely, having a liquidated debt, if the debtor sends part payment accompanied by an expression of hope that the creditor will accept it in full, and the creditor replies saying that he will gladly do so, it would not likely be argued that a remission of the remainder had not taken place. If, again, the debtor sends such a payment bearing the simple notation that it is tendered in full of the entire claim, acceptance of the payment will likewise constitute a remission of the remainder. That is, a tacit consent to remit can be found. Now, if the creditor receiving, say, a check with such a notation, strikes out the notation and nevertheless cashes the check there will definitely be absent an actual consent to remit. The only question remaining will be whether or not, despite the creditor's action in negating an intention to remit, he should be held, as a matter of law, to have remitted the remainder. This will depend simply on whether he would or should be held estopped to accept the payment and reject the condition on which it is offered. This is, of course, precisely the question the courts come to when the debt is unliquidated, and they hold, supposedly following the common law, that the creditor is estopped, that he will not be heard to say he was not also accepting the condition. This means, of course, that the consent to release is thereby supplied. The ultimate question when the debt is liquidated (as well as when unliquidated) is whether a creditor should be privileged to accept


part payment and reject the condition that it be accepted in full satisfaction. The reason why a common law court says that a condition of acceptance in full satisfaction is not binding on the creditor who accepts the payment when the debt is liquidated is that there is no consideration to support the creditor's release of the unpaid remainder. But our courts must find some other reason for holding the creditor not bound since he has the power to make a gratuitous remission. This should not be too difficult.

Pothier has suggested that when the debtor obliges the creditor to make a promise in return for the performance by the former of his existing legal duty, the promise has an illicit cause. This is based on the theory that it is an exaction on the debtor's part to require of his creditor anything for doing what the law obliges him to do. If it be reasoned that a tender of part payment on condition that a full remittance be given constitutes an exaction, then the rule might apply, but it is believed that this would be an unwarranted extension of Pothier's theory, short of finding a degree of duress that deprives the creditor of his free will. But there is another approach that perhaps has more merit. That is, the code is specific that obligations must be performed in good faith. Fairly applied this can mean that good faith requires a debtor to pay the whole of a debt that is due and payable and not to undertake to trap or coerce his creditor into releasing the remainder of the debt by taking a portion sent to him with a condition attached to the effect that if he does he will thereby remit the whole. It is certainly arguable that if the creditor does not wish to insist on payment of the whole at the time he might yet accept the part payment, as such, without being held estopped to claim the remainder. An application of the theory of estoppel would be in effect to condone the debtor's breach of good faith in not performing his obligation by tendering payment in full. Hence, whereas the common law might say when dealing with a creditor's acceptance of part payment of a liquidated debt, tendered in full settlement, that the creditor is not bound by the condition because, granting that he accepts the condition in accepting the payment yet there is no consideration to support his release of the remainder, we could simply say that the creditor is not estopped to insist that he negatived the intention to remit by striking out the condition

75. 1 Pothier, Obligations 126, p. 46 (Evans, 1853).
because the condition was not lawfully imposed since the debtor was guilty of violating his own obligation to perform in good faith.

The theory here dealt with is applicable to all cases where an obligation is assumed in return for the performance by another of a pre-existing legal duty. The obligation, where voluntarily assumed, would be binding; its normal effect would be destroyed only where it was exacted under circumstances that would support the conclusion that the promisor did not actually have a living choice.

Practically speaking this rule puts the civil law just about where the decided cases in Anglo-American jurisdictions put the common law. A study of the common law cases will make apparent that the issue of enforceability turns largely on the good or bad faith of the promisee, whether the promise be by the other contracting party or by a third party. Common law courts accomplish this end by employing dubiously such concepts as waiver, voluntary rescission, new contract. The civil law, guided by the will of the party, can call a spade a spade.

CAUSE AND ERROR UNDER THE LOUISIANA CIVIL CODE

The provisions of the Louisiana Civil Code concerning the meaning and effect of error, fraud, violence and threats, indicate faithful adherence to the French method of resolving problems involving these characteristics through application of the concept of cause. The code specifically recognizes that when reference is made to an obligation "without a cause" what is meant is an obligation "with a false cause." The expression is an unhappy one, particularly for anyone schooled in common law consideration, because it suggests that cause is something received for an obligation, instead of the reason, or purpose, or motive itself. Error is spoken of in the civil law as a vice of consent because consent given on the basis of error is not a true consent if it would not have been given except for such error. Our code is very clear that when simple error alone is involved it must relate to the principal cause, not a secondary or subsidiary cause.

or motive. But it also shows that when fraud is involved, the error does not have to relate to the principal cause but need be only on a material part of the contract. Violence has in effect the same scope because it is destructive of consent.

Reasoning similar to the foregoing is applicable also to the case where there is a failure of performance by one of the parties to a bilateral contract. Since the motive of each party is to secure that which he is promised in return, it follows that he would not give his own promise if he should know that the return performance would not be rendered. Consequently, if this happens the consent of the aggrieved party has derived from error and its effectiveness is destroyed. This principle supports the oft-repeated but poorly stated rule that a contract subject to a potestative condition is unenforceable. The code provides that an obligation subject to a potestative condition on the part of him who binds himself is null. Actually a so-called obligation subject to a purely potestative condition is not an obligation at all. Just as a promise of this character at common law is called an illusory promise, we may call such an obligation an illusory obligation. Indeed, this term was used to describe an obligation subject to a potestative condition when the French projet of the Code Civil was being presented to the Conseil d'Etat. It is in fact no obligation because the language used does not state an obligation; because it does not commit the user to any future course of conduct. But at the moment, this is not the important point. What we are concerned with is the effect such an illusory obligation has on the obligation of the other party in a bilateral and commutative contract. The answer is, of course, that he is not bound. Thinking tends to stop with the thought that if one party is not bound

82. It is often said that the theory of cause is not needed to explain the equivalence between promises in a bilateral contract; yet the very nature of the contract itself is determined by the will or motive of the parties.
84. The significance of the word "purely" lies in the fact that although the duty to perform an obligation may rest in a choice to be made by the obligor, nullity will not result if the obligor's freedom is limited in a substantial way. If the choice is between, say, raising his hand or not raising it, such a condition, not involving a substantial limitation of freedom, is said to be purely potestative.
85. S Fenet, Discussions 423 (1836).
86. Id. at 240. "Si la condition depend de l'une des parties contractantes, qui est la maîtrise de rompre ou de maintenir le lien que l'acte semble former, il n'y a point redélelement d'obligation; elle est nulle."
the other should not be bound. But a further examination of this may be helpful.

Emphasis has already been given to the point that a man may bind himself without receiving anything in return simply by manifesting a will to be bound. At the same time, if a party binds himself in order to get something in return then it should follow that if he does not get it he should be released. Hence, basically, when the supposed obligation of one of the parties to a bilateral contract in fact leaves him free to perform or not perform, the other party, although seeking a return obligation, does not get one. Whereas he believes that he is getting something of value, a conclusion justified by the fact that he has entered into a contract characterized by an exchange of equivalents, it turns out that he is not. Consequently, that which induces him to give his promise is a false belief that the return obligation will be equally efficacious to assure his receiving the return performance. Since it is not, his motive is founded in error and the cause of his undertaking is false.

This is sufficient to explain also the view that when an obligation subject to a potestative condition has been fulfilled, the other party is no longer free to demand his release. This is but saying that when that which induces the promisor to give his promise has been received by him, the fact that the other party was not obligated to furnish it ceases to be of consequence. Although error may have been present initially the promisor's purpose or motive has nevertheless been realized and he has no cause for complaint. This is, of course, true only as to performance rendered, and as long as the promisor must depend solely upon the will of the other party without recourse he is entitled to be discharged from his own undertaking that he intended to assume only for an equivalent one. If it be said that all of this merely flows from the fact that the promises in a bilateral contract are mutually dependent, it may be remembered that this is so only because the parties intend them to be, that the motive of each is to secure the obligation of the other, and this brings us back to cause.

THE WILL AND REVOCABILITY OF OFFERS

The theory of cause is also implicit in the problem of revocability of offers to contract. According to the common law an

87. See Owens v. Muslow, 166 La. 423, 117 So. 449 (1928).
offer is revocable unless it is supported by consideration. The
view that an offeror should not lose his legal freedom to revoke
his offer before acceptance unless he has asked for and received
something in return for the offer itself is, of course, consistent
with the common law's insistence on a consideration to support
a contract. But since French civilian law gives recognition to the
binding efficacy of a manifestation of will although nothing
may be asked in return, it should follow that an offeror may bind
himself not to revoke his offer for a period of time merely by
manifesting a will to do so. And it does.

The Louisiana Civil Code, adhering closely to its civilian
source, expressly provides that although the contract proposed
in an offer does not come into existence until the acceptance of
the one to whom it is made yet the party making the offer may
not withdraw it without allowing such reasonable time as from
the terms of the offer he has given or from the circumstances
of the case he may be supposed to have intended to give to the
acceptor to communicate his determination. 88

The Louisiana cases manifest a definite reluctance to apply
this clear provision of the code. 89 This is probably due to the
influence of the doctrine of common law consideration. It might
be believed that it is also due to a judicial reluctance to hold
an offeror bound despite a revocation before acceptance when he
has not received anything to compensate him for his surrender
of legal freedom. But there is no good reason to believe that the
courts have been so moved, despite the clear language of the
code, and so the easy conclusion seems to be that a real doubt
concerning the meaning of the code, and rooted in the doctrine
of consideration, has not been dissipated.

Some justification for the existence of doubt can be found
in a legislative amendment to Article 2462 so as to add thereto
a provision providing for the "purchase" of an option to accept
an offer or promise to sell for any "consideration" therein stipu-

88. Art. 1809, La. Civil Code of 1870. Since this is a limitation on the
power of revocation imposed by the offeror himself the code further provides
for the termination of an unaccepted offer by the death of the offerrer. Art.
89. Consider Boyd v. Cox, 15 La. Ann. 609 (1860); Miller v. Douville, 45
La. Ann. 214, 12 So. 132 (1885); Blanks v. Sutcliffe, 122 La. 448, 47 So. 765
(1908); Albert v. Farnsworth & Co., Inc., 176 F. 2d 198 (5th Cir. 1949); Miller
v. Oden, 149 La. 771, 90 So. 167 (1921).
lated and adding that in such event the "offer or promise cannot be withdrawn before the time agreed upon."

It seems hardly necessary to say that such an amendment was unsoundly conceived. It must have sprung from a belief that an offer to sell containing a stated time for acceptance was revocable at any time before acceptance. Yet Article 1809 is flatly contradictory of such a proposition. Nevertheless, our supreme court solemnly declared that before the amendment to Article 2462 there was an hiatus in our law and then went further to add that common law precedents must govern since, theretofore, options were unknown to our law.

If an option is a power of acceptance for a period of time that is paid for by the offeree it may be accepted without cavil that the code originally contained no mention of options. But it is only a fair question to ask why it should have. It did specifically provide that an offeror is not free to revoke his offer within the time allowed by him to the offeree for his acceptance. And beyond this, under the broad recognition given by the code to the principle of freedom of contract there is no reason to believe that if an offeree paid an offeror for conferring upon him the power to accept an offer to sell within a stipulated time the latter would not be contractually bound. Surely if "all things that are not forbidden by law" may legally become the subject of contracts we do not need the common law to tell us the legal effect of an offer bought and paid for by an offeree—surely not if contracts have the force of law on those who make them.

As a way out of this it could be believed, at first blush, that perhaps the purpose of the amendment was merely to provide for an offer that would survive the death of the offeror since generally offers terminate at such time. But plausible as this may be, the answer is that contract obligations generally do not terminate with the death of the obligor and the grant of a power of acceptance for a period of time made in return for a payment received is characterized by a concurrence of the wills of both parties and therefore has the status of contract.

The substance of this is that the amendment simply constitutes another unnecessary surrender to the common law doctrine of consideration that might be considered as a tacit legislative recognition that offers unsupported by "consideration" may be withdrawn before acceptance. Yet one may well raise an eyebrow over Louisiana's curious conduct in doing an about face to follow the common law when the advanced thinkers at common law are eyeing the French recognition of the binding efficacy of an offeror's expression of will with unabashed admiration.

General Observations

The French Commission to revise the Code Civil has had a lively time dealing with cause and its relationship to liberalities and to problems involving error. Differences of opinion have been marked. The principal controversy has been over whether to accept cause as an abstract concept, to be carefully distinguished from motive, or to recognize it as the determining motive. The discussions make it plain that the primary objection to treating cause as an abstract equivalent, always the same for any given contract, lies in the fact that the result would be that liberalities have no cause. At the same time it was argued that if cause be identified with the determining motive its effect in cases involving error would be too broad. Discussions of this kind have resulted in the adoption by the Commission, despite the holding of a contrary opinion by its President, de la Morandière, of articles treating separately of cause and motive and providing that error as to the cause entails the nullity of the juridical act but that error as to the motive has no effect on its validity. But at the same time the commissioners seemed to agree that the cause of a liberality resides in the intention to confer a benefit by way of gratuity.

With due deference to the decision reached by the majority of the commission, the difficulties they voiced are believed to

95. Id. at 275. "M. le President.—Tout en étant personnellement opposé à la division en deux paragraphes traitant de la cause et des motifs, je crois que ces deux articles sous cette présentation traduisent l'opinion dominante. Ils sont adoptés."
96. Id. at 270, 271.
result directly from undertaking to make a distinction that does not exist, that is, between cause and motive, coupled with a failure to distinguish properly between the final determining motive and subsidiary motives. This resulted in the adoption of the rule that error as to the motive does not affect the validity of a juridical act. This difference is sometimes referred to as the difference between the cause of the obligation or cause "abstraite" and the cause of the contract or the motive. Even M. de la Morandiere himself had to ask a colleague "Qu'entendez-vous par 'cause abstraite'?" And the answer by M. Niboyet was, "Elle est la même, toujours, dans le même type d'opérations juridiques. Dans un contrat synallagmatique, la cause de l'obligation d'un contractant est l'exécution de l'obligation de l'autre contractant. Voyez ce que disait Capitant: dans la vente, s'il n'y a pas deux obligations que se font équilibre, il n'y a pas de cause." But to set cause up as something abstract, existing independently of the motive of the contracting party, is to press strongly in the direction of common law consideration, whereas the real beauty of the civilian theory of cause is that it is not artificial but deals with the very substance of agreement, the will itself.

The British Law Revision Committee in its Sixth Interim Report moved unmistakably in the opposite direction in recommending (1) that an agreement shall be enforceable if the promise or offer has been made in writing by the promisor or his agent, or if it be supported by valuable consideration past or present. This position was supported by reasoning that, "The only justification for the doctrine of consideration at the present day, it is said, is that it furnishes persuasive evidence of the intention of the parties concerned to create a binding obligation, but it does not follow that consideration should be accepted as the

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97. Cf. Billette, op. cit. supra note 9, at no 238.
99. Id. at 272.
100. Id. at 273.
101. This is usually said to be Domat's theory, although he actually recognized cause in liberalities. See Domat, The Civil Law in its Natural Order 147-149 (Strahan, Cushing's ed. 1850). Cause abstraite and consideration are at one in supposedly being completely objective and taking no account of motive.

The view attributed to Capitant actually begs the question. The cause of a transaction does not result from, but determines, its type. If the quoted statement means anything it is that if a person obligates himself to transfer his property to another in return for a supposed obligation of the other to pay a price for it but actually does not get such an obligation, or the price itself, his own obligation is based on a false cause.

sole test of such situations. This situation ought to be provable by other and equally persuasive evidence such as, e.g. the fact that the promisor has put his promise in writing. We agree with this view, and we therefore recommend that consideration should not be required in those cases in which the promise is in writing.

—This recommendation does not mean that a promise in writing will be binding in every case. It will still be necessary for the Court to find that the parties intended to create a binding obligation. Just as the presence of consideration today does not convert a social engagement into a legal contract, so the presence of writing will not convert a gratuitous promise into a legally binding one unless the Court determines that the parties intended it to be legally binding.”\(^{103}\)

Other expressions of similar views are not wanting,\(^{104}\) and it is particularly interesting to find that the draftsmen of the proposed Uniform Commercial Code have provided, “An offer by a merchant to buy or sell goods expressed in a signed writing to be ‘firm’ or otherwise irrevocable for a period not exceeding three months needs no consideration to be irrevocable during that period.” And by way of explanation it is said, “The purpose of the section is to give effect to the deliberate intention of a merchant to make a current firm offer binding.”\(^{105}\)

The emphasis in these proposals is laid unmistakably upon giving greater effect to the will of the contractant—the basic principle of French civilian law, and a principle clearly adopted by the Civil Code of Louisiana. Upon the drafters of the proposed revision will rest the responsibility for giving this principle the utmost consideration, whether they want to deal with it in terms of cause or otherwise.

\(^{103}\) Law Revision Committee, Sixth Interim Report 18, 31 (1937).
