

CONSIDERATION  
IN CONTRACTS:

A Fundamental  
Restatement

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This lecture is an attempt to restate the law relating to consideration in contracts in the light of the actual decisions of the Courts. Study of a large number of English and Australian legal decisions convinced the author that there was a wide gulf between the conventional accounts of the doctrine of consideration and the law actually enforced in the Courts. The conventional accounts give an impression of rigidity and artificiality in the law which is not always borne out in practice.

The general theme of the lecture is that consideration is not an artificial requirement of the law, but merely a search for what appear to the Courts to be good and sufficient reasons for enforcing promises. Although it is directed principally to teachers of law, the lecture also contains a good deal to interest the legal practitioner. Moreover, it will be of particular interest to bodies with responsibility for law reform, as it helps to clarify one area of the law thought by many to be in need of reform.

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It is a constantly recurring phenomenon in all systems of law that generalizations drawn from antecedent experience become insufficient to do justice in the disputes of new times and become too narrow to explain decisions that are actually being made. We are at first tempted to say that the inconsistent decisions are wrong and that 'the law' is otherwise. But, if these 'wrong' decisions continue to seem just and are themselves followed as precedents, they make 'the law' in exactly the same way that former decisions made the former law. A new and corrected generalization is necessary and a new 'Restatement' of the law is in order. So it will always be.<sup>1</sup>

It is appropriate that this lecture should be prefaced with a quotation from Professor Corbin's masterly survey of the law of contract, for the whole lecture has been inspired by Corbin's work. Indeed my purpose is to demonstrate that a close analysis of the actual decisions of the Courts suggests that Anglo-Australian law, no less than American law, is in need of fundamental restatement. My theme is the same as Corbin's, namely that the conventional account of the 'doctrine of consideration' no longer accords with the law actually enforced in the Courts.<sup>2</sup> A few decisions out of harmony with an established current of otherwise harmonious principle can no doubt be explained away as anomalous, or inconsistent with 'pure' doctrine, or even as wrong; but when decision after decision cannot be reconciled with the traditional orthodox treatment of the law, it is time to take a close look at the orthodox treatment itself.

#### THE NATURE AND PURPOSES OF CONSIDERATION

It is desirable to start by taking a preliminary look at the nature and purposes of the law relating to consideration. Although my principal

<sup>1</sup> Corbin on *Contracts* (revised ed., 1963), Vol. 1, p. 533.

<sup>2</sup> I am in this lecture highly critical of the orthodox statement of the law; it is therefore right that I should at once admit to having myself been a completely orthodox lawyer in this respect. The chapter on Consideration in my *Introduction to the Law of Contract* is (I believe) a faithful statement of the orthodox doctrine. The forthcoming new edition of that book will contain major changes.

purpose is to demonstrate by an actual examination of the cases that the conventional account of the law is in need of restatement, it is necessary to begin with a more general discussion. The purpose of this is simply to try to persuade the reader to examine the evidence set out below with an open mind and without preconceived ideas. This is particularly necessary in this area because the need for a restatement arises principally from the fact that for a very long time common lawyers have approached the law of consideration in the belief that there is a 'doctrine of consideration' which can be reduced to a set of fixed rules, and that these rules were arrived at by the Courts over a period of time culminating in some sort of 'final' form or version towards the end of the nineteenth century.<sup>3</sup> It is essential to rid oneself of the presupposition that the law has ever had a 'final' or definitive version. It has, on the contrary, been continually developing up to the present day, and will no doubt go on developing in the future, in so far as it lies in the power of the Courts to mould and adapt the law to changing circumstances and moral values.

The conventional statement of the doctrine of consideration is not perhaps as easily reduced to a simple set of rules as it is often assumed, but few would disagree with the following propositions. Firstly, a promise is not enforceable (if not under seal)<sup>4</sup> unless the promisor obtains some benefit or the promisee incurs some detriment in return for the promise. A subsidiary proposition, whose claim to be regarded as a part of the orthodox doctrine is perhaps less certain, is sometimes put forward,<sup>5</sup> namely that consideration must be of economic value. Secondly, in a bilateral contract the consideration for a promise is a counter-promise, and in a unilateral contract consideration is the performance of the act specified by the promisor. Thirdly, the law of contract only enforces bargains; the consideration must, in short, be (and perhaps even be regarded by the parties as) the 'price' of the promise. Fourthly, past consideration is not sufficient consideration. Fifthly, consideration must move from the promisee. Sixthly (and this is regarded as following from the first three propositions), the law does not enforce gratuitous promises. Seventhly, a limited exception to these propositions is recognised by the *High Trees*<sup>6</sup> principle which, however, only enables certain

<sup>3</sup> See, e.g., Holdsworth, *History of English Law*, Vol. VIII, pp. 34-48.

<sup>4</sup> Throughout this lecture I ignore promises under seal.

<sup>5</sup> See, e.g., Treitel, *Law of Contract*, 3rd ed., p. 70.

<sup>6</sup> [1947] K.B. 130.



promises without consideration to be set up by way of defence.

More generally, it would, I think, be commonly agreed that there is such a concept as a 'doctrine of consideration'. This very phrase carries certain implications. In particular it implies that there is *one* doctrine, and *one* concept. The word 'consideration' is invariably used in the singular. Lawyers do not inquire what are *the considerations* which lead a court to enforce a promise, but whether *there is consideration*. The word 'doctrine' also appears to carry certain implications. In this particular area of the law, it seems to carry the implication that the 'doctrine' is 'artificial', and has no rational foundation except possibly in so far as it may be argued that gratuitous promises should not necessarily be enforceable.

It is my purpose to suggest that the conventional account of the law is unsatisfactory, and that scarcely one of the propositions set out above accurately represents the law. But it is necessary to start by suggesting that one of the principal reasons for the present divergence between the conventional account of the law and its actual operation arises from the more general beliefs about the existence of a set of artificial and irrational rules termed the doctrine of consideration. The truth is that the Courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced. Since it is unthinkable that any legal system could enforce *all* promises it has always been necessary for the Courts to decide which promises they would enforce. When the Courts found a sufficient reason for enforcing a promise they enforced it; and when they found that for one reason or another it was undesirable to enforce a promise, they did not enforce it. It seems highly probable that when the Courts first used the word 'consideration' they meant no more than that there was a 'reason' for the enforcement of a promise. If the consideration was 'good', this meant that the Court found sufficient reason for enforcing the promise. All this is not to suggest that the law was ever unprincipled, or that judges ever decided cases according to personal or idiosyncratic views of what promises it was desirable to enforce. As always in the common law, it was the collective view of the judges, based largely on the conditions and moral values of the community, which prevailed over a period of time. The doctrine of precedent then, as now, was always available as an aid to the Courts in deciding what promises to enforce.

At a relatively early date it was established that the Courts would normally enforce a promise if another promise or an act was given in return for it; and also that they would not normally enforce a promise if it was merely intended as a gift with no return of any kind. In the first class of case it came therefore to be said that there was good consideration; there were good reasons for enforcing the promise. In the second class there was no such reason, and therefore no consideration. But it also became clear from a very early time that the whole law could not be reduced to such very simple terms. There were some cases in which a promise was given in return for another promise or an act, in which for one reason or another it was felt unjust or inexpedient that the promise should be enforced. Such cases could be, and sometimes were explained by saying that there was no consideration for the promise; but as the nineteenth century wore on, an alternative approach began to manifest itself. This was to say that there was good consideration (though perhaps the word 'good' would more usually be omitted) but that nevertheless the promise was unenforceable for *other* reasons, for example, because it had been extorted by duress, or fraud, or because it was illegal. The last type of case was often dealt with by saying that the consideration was unlawful; a judge who formulated his reasons in this way would perhaps, if pressed, have said that there was no 'good' consideration. More recently still, this alternative approach has hardened so that Courts now find nothing inconsistent in holding that there is consideration for a promise, but nevertheless refusing to enforce it because the transaction is illegal. This approach also manifests itself in the relatively modern device of refusing to enforce a promise on the ground that the promisor did not 'intend' to create legal relations by his promise. Where this is done (as it usually is) in a case where there is no *express* disavowal of the intent to create legal relations, it appears to be merely a legal justification for refusing to enforce a promise which the Courts think, for one reason or another, it is unjust or impolitic to enforce. There seems no doubt that a hundred years ago the Courts would have dealt with these problems in terms of consideration. Indeed, the comparison between *Shadwell v. Shadwell*<sup>7</sup> and the very recent case of *Jones v. Padavatton*<sup>8</sup> is striking. In the former case, where an uncle promised to pay his nephew an allowance on his marriage, the whole discussion was

<sup>7</sup> (1860) 9 C.B.N.S. 159.

<sup>8</sup> [1969] 1 W.L.R. 328.

in terms of consideration. In *Jones v. Padavatton*, where a mother promised her daughter an allowance while she studied for the Bar, the whole discussion was in terms of the intent to create legal relations.

This change of approach is symptomatic of the change which has developed in the way lawyers think about consideration. It is no longer thought that consideration is a compendious word simply indicating whether there are good reasons for enforcing a promise; it is assumed that consideration is a technical requirement of the law which has little or nothing to do with the justice or desirability of enforcing a promise. Modern lawyers thus see nothing incongruous in asserting that a promise made for good consideration should nevertheless not be enforced.

Exactly the same development has taken place with regard to those promises which are not normally enforced, i.e. the promise to make a gift with no return of any kind. Since the Courts first decided that such promises were not enforceable, it came to be asserted that gratuitous promises were promises given without consideration. But in course of time, occasions arose when the Courts found that there were sometimes very good reasons for enforcing gratuitous promises in certain cases, and they accordingly enforced them. When cases of this kind arose during the first part of the nineteenth century the natural approach of the Courts was to say that there *was* consideration—which of course merely meant that there were good reasons for enforcing the promise. But here again, as lawyers began to treat consideration as a ‘doctrine’ whose content was a set of fixed and rigid rules tailored to the typical case, these cases came to seem anomalous. It therefore became fashionable to deny that there was consideration; and yet such promises were and still are quite often enforced. Modern lawyers are thus forced to say that some promises may be enforceable even though there is no consideration for them.

However, this last proposition is one which lawyers have been much more reluctant to accept than the one previously discussed, that is that even promises supported by consideration may sometimes be unenforceable. There has seemed to be something almost akin to heresy in admitting that a promise may be enforced without consideration. This is fully borne out by the initial reactions to the *High Trees* case which was originally looked on with great scepticism by the legal profession as an instance of Lord Denning’s advanced

and 'unsound' views.<sup>9</sup> But this is by no means the only instance of gratuitous promises being enforced by the Courts. As will be seen below, many gratuitous promises are enforced by the Courts, if the word 'gratuitous' is understood to mean a promise to make a gift, but the difference between most of these instances and the *High Trees* decision is that in the older cases it has traditionally been asserted that there is in fact consideration. To the orthodox lawyer there seems a contradiction in terms in asserting that a gratuitous promise may in fact be supported by consideration, and he has therefore generally adopted the consoling and face-saving device of acknowledging the existence of these cases, but denying that they involve gratuitous promises; or if he is driven to admit that they involve gratuitous promises, he is reduced to the still more desperate expedient of 'explaining' such cases as being anomalous and inconsistent with the 'pure' doctrine of consideration, though he will also admit that they are due to the desire of the judges to do justice in the particular circumstances of the case.

As will be apparent from the above discussion, there has gradually been a hardening of the attitude of the English common lawyer to the whole notion of consideration. From being merely a reason for the enforcement of a promise, it has come to be regarded as a technical doctrine which has little to do with the justice or desirability of enforcing a promise. Thus a promise for consideration may be unenforceable; and a promise without consideration may be enforceable. Interwoven with this development has been another which has also played a large part in leading to the conventional view of the law at the present day. This has been the persistent and apparently compulsive desire of lawyers to concentrate on the typical contractual promise and to draw conclusions of universal validity from that typical case. Thus, because it is often (or indeed usually) a good reason for enforcing a promise that the promisor has received a benefit, or the promisee has incurred a detriment, lawyers appear to have convinced themselves that these are the only good reasons for enforcing a promise. Because most contracts are bargains, lawyers have steadfastly refused to recognise the evidence under their very eyes, that Courts often enforce promises which are not bargains, and that they do so for reasons of justice and good policy. Because a promise to make a gift is not usually recognised as a sufficient reason

<sup>9</sup> See, e.g., *Bennion*, 16 M.L.R. 441. In some quarters this 'old' orthodoxy appears still to survive; see *Gordon* [1963] *Camb. L.J.* 222.

for its enforcement, lawyers have refused to acknowledge that in some circumstances it is particularly desirable to enforce a gratuitous promise and that the Courts in fact do so. Because in most circumstances the consideration must in practice be supplied by the promisee, it was deduced (and even on one occasion stated by the House of Lords) that consideration must always move from the promisee; yet the Courts in fact sometimes enforce promises in which the real ground for enforcing the promise is something done by a third party.

As we shall see below, the restatement of the law which the actual decisions compel us to adopt, differs from the conventional view principally in recognising the importance of the untypical and marginal cases. It is not, however, merely a question of recognising that there are exceptions to the ordinary rules to which adequate attention has not always been paid. If that were all, there would be little need, or justification, for a fundamental restatement of the law. A restatement will require rather more than that; it will require in particular that lawyers start to think of consideration once again in terms of reasons for enforcing a promise; it will require lawyers to recognise that the presence of factors like benefit, detriment, and bargain is taken into account not because they fit some pre-conceived plan or definition, but because they are often very material factors in determining whether it is just or desirable to enforce a promise; and this necessarily involves recognition that these are not the only factors to which attention must be, and is in practice paid by the Courts.

#### BENEFIT AND DETRIMENT

The conventional and classic statements of the law (such as the famous dictum of Lush J. in *Currie v. Misa*<sup>10</sup>) declare that consideration consists of a benefit to the promisor or a detriment to the promisee. There is some doubt about the relative importance of the two. It is universally agreed that detriment to the promisee is sufficient: even though there is no benefit to the promisor; the ordinary promise of a surety or a guarantor is a sufficient illustration of a promise which is commonly given without benefit to the promisor, but is nevertheless clearly enforceable in law. On the other hand it is less certain whether a benefit to the promisor without any corresponding detriment to the promisee will suffice. The reason for

<sup>10</sup> (1875) L.R. 10 Ex. 153, 162.

this doubt is principally the rule, or supposed rule, that consideration must move from the promisee. If the promisee must in fact supply the consideration to the promisor, and if the promisor must benefit by the consideration, there must be few cases indeed in which the promise will be enforceable without detriment to the promisee. But I propose below to suggest that the rule that consideration must move from the promisee is in fact not enforced by the Courts. There are, moreover, some cases in which it is possible for a benefit to be conferred on the promisor by the promisee without any detriment to the promisee himself,<sup>11</sup> and it may therefore be possible for a benefit to be a sufficient consideration without any detriment, even on the orthodox view of the law.

Now I do not doubt for one moment that one of the most common reasons for enforcing a promise, and for thinking it just to enforce a promise, is that the promisor has obtained a benefit in return for his promise, or the promisee has suffered some detriment in reliance on the promise. Indeed, one could go further and assert that the combination of benefit and detriment makes a very much stronger case for the enforcement of a promise than either benefit or detriment taken by itself. That the Courts have often felt uneasy about enforcing promises where there is detriment to promisee but no benefit to promisor is illustrated by the extraordinary shifts and devices invented by nineteenth-century judges for relieving a surety of his liability in a great variety of situations.<sup>12</sup> But it is sufficient to accept that benefit or detriment is normally a good reason for enforcing a promise. It does not in the least follow that the presence of benefit or detriment is always a sufficient reason for enforcing a promise; nor does it follow that there may not be other very good reasons for enforcing a promise. It is in fact quite plain on the authorities that the presence of a benefit or a detriment is neither a *sufficient* nor a *necessary* condition for the enforcement of a promise, and that therefore a *definition* of consideration in terms of benefit and detriment is simply inaccurate. This assertion needs to be justified.

#### *Benefit or detriment are not sufficient*

The presence of a benefit or a detriment or both does not by itself render a promise enforceable. Is it possible to doubt this state-

<sup>11</sup> *Bolton v. Madden* (1873) L.R. 9 Q.B. 55 is cited by Treitel, *op. cit.*, p. 68, as an illustration of such a case, and other cases may be imagined.

<sup>12</sup> See, e.g., Chitty on *Contracts*, 23rd ed., Vol. II, §§ 1688-99.

ment? Plainly all sorts of reasons may render a promise unenforceable at common law even though the promisor receives a benefit, or the promisee incurs a detriment. The promise may be contrary to public policy; it may have been extorted by duress or undue influence; by fraud or misrepresentation; the promisor may be held not to have 'intended' to create legal relations; and so on. To the orthodox lawyer these cases involve no inconsistency with the traditional doctrine because they involve legal rules which in some sense are drawn from outside the law of consideration altogether. But the distinction between a rule 'within' and a rule 'outside' the doctrine of consideration is a purely conceptual distinction. The rules are all part of the law; they all go to determine what promises should be enforceable, and they are all in the last resort applied by judges in the attempt to do what is just—bearing in mind that respect for the doctrine of precedent is itself one aspect of doing justice. So when the Courts declare that a collective bargaining agreement between trade unions and employers is not a legal contract, and that promises contained therein are not legally enforceable, they are giving effect to what they think is required by justice or policy.<sup>13</sup> The fact that they do so under some other head of the law of contract does not alter the fact that in this situation the presence of benefit and detriment is not treated as sufficient reason by itself for the enforcement of the promises. It is neither bad English nor bad law to say that the Courts do not think that the *considerations* for the enforcement of such promises outweigh the arguments against enforcement. Would it not be more rational therefore to say that the promises are unenforceable because they lack *good consideration*, rather than to say, as the orthodox doctrine would have us say, that there is good consideration but the promises will nonetheless not be enforced?

But it is, in any event, unnecessary for me to place my entire case on this point on the arguments set out above: for even if attention is confined to cases which have been argued and discussed within the framework of the law of consideration, it is perfectly plain that there

<sup>13</sup> See *Ford Motor Co. v. A.E.U.* [1969] 2 Q.B. 303. In saying this I do not suggest that Geoffrey Lane J. decided this case according to what he personally thought the desirable rule to be; in fact he did not even pause (in his judgment) to consider what that rule might be. But there are other facets to policy besides giving effect to the most desirable rule. In view of the acute political controversy surrounding the legal enforceability of such agreements it may well have been an act of policy for a puisne judge not to upset the generally accepted view of the law.

are instances in which the presence of benefit or detriment in fact has not been treated as a sufficient ground for the enforcement of a promise. One need scarcely look further than *Foakes v. Beer*,<sup>14</sup> where it will be recalled that Lord Blackburn came close to dissenting on the very ground that commercial men regularly accept part payment of a debt as something more valuable than the right to the whole debt. On this point I cannot do better than quote the words of Corbin:<sup>15</sup>

It is error of fact to suppose that one gets no benefit when he gets only that to which he had an existing right. A bird in the hand is worth much more than a bird in the bush; and that is why the promisor bargains to pay more in order to get it.<sup>16</sup> It is likewise error of fact to suppose that performance of duty is no detriment to the promisee. If this performance is the payment of money, it is money that he might have paid to other persons with greater advantage to himself (and even without doing any legal wrong whatever); if it is the rendition of service, it is the spending of time and effort that might more advantageously have been spent elsewhere. It is true that failure to render the performance would have left the promisee liable in damages for breach of his duty; but it should be obvious that the damages that he could be compelled to pay would have no definite relation to the extent of the advantage that he might have derived from using his time and money otherwise.

One has only to think of the case of a debtor who may labour for years to pay off part of a large debt when he had the choice of filing a bankruptcy petition, and ridding himself of the whole debt with comparative ease, to appreciate the force of these remarks.

In order to keep this lecture within reasonable bounds I forbear from going on to consider in detail other cases in which the presence of benefit or detriment has not been held—or at any rate has not been held without difficulty and argument—to be a sufficient consideration for the enforcement of a promise. It is enough for me to refer to the well-known problems concerning the promise of payment in return for the performance, or a promise of performance, of an existing legal or contractual duty. It is, I suggest, plain that doubts about the enforceability of promises in such cases have not arisen from doubts about whether there is benefit or detriment in fact, nor from doubts about whether there is technically some ‘consideration’

<sup>14</sup> (1884) 9 App. Cas. 605.

<sup>15</sup> *Op. cit.*, Vol. 1, § 172.

<sup>16</sup> Corbin is here considering the case of a promise to pay additional remuneration for the performance of an existing duty, rather than the case of acceptance of part payment in full satisfaction, but his reasoning is applicable to both cases.



which complies with the rules of some preconceived definition. The difficulties have arisen because there have been doubts (perhaps often unfounded) as to whether there are sound policy reasons for not enforcing promises in such cases, and therefore as to whether there are *good* considerations for their enforcement.

*Benefit or detriment are not necessary*

Here again I need hardly stress that many promises are given in order to obtain some reciprocal benefit; and that a detriment incurred by a promisee in reliance on the promise is often a very good reason for enforcing a promise. But it is simply incorrect to assert that the presence of benefit or detriment is always a necessary prerequisite for the enforcement of a contract. In the first place, an executory bilateral contract is and has for centuries been enforceable by the Courts, although neither benefit nor detriment usually arises until the contract has been at least partly performed. It is of course true that once the law has begun to enforce bilateral executory contracts, the mere giving and receipt of the promises may be said to involve a benefit and detriment because they are legally enforceable. But enforceability comes first, and benefit and detriment afterwards; it is purely circular to assert that the presence of benefit and detriment can be a ground for the enforcement of such contracts. It is also true that if an executory bilateral contract is in due course performed the promisor may receive a benefit and the promisee may incur a detriment. But where the promisee sues for damages for breach of an executory bilateral contract the promisor has in fact received no benefit, and the promisee has not necessarily incurred any detriment.

It is common for lawyers to apply the benefit-detriment analysis even to bilateral executory contracts; the inquiry then takes the form of asking if performance of the promise would have been beneficial to the promisor or detrimental to the promisee. The fact that the answer may be in the negative may well be a factor which leads the Court to decide that there is no reason (or consideration) for enforcing the promise. But the fact that the answer is in the affirmative does not and cannot demonstrate that the promise is being enforced because of a factual benefit or detriment. The truth is that bilateral executory contracts are enforced for other reasons (or considerations) than the existence of benefit or detriment. They are enforced because in modern societies business and commerce

could scarcely be carried on if they were not enforced. They are enforced because people rely on them to such a degree in the course of daily life that the most intolerable inconvenience and injustice would ensue if they were not enforced.

If we leave aside the problem of bilateral executory contracts, it must be admitted that it is not easy to find many instances of promises being enforced despite the absence of benefit and detriment. There are two reasons for this. Firstly, most contracts which the Courts find worthy of enforcement do in fact involve benefit or detriment or both. And secondly, promises are not usually given for no reason at all; the promisor, it may safely be asserted, always has *some* reason for making a promise. In theory, his reasons are merely a motive, and motive does not itself constitute good consideration. But it is not difficult for a Court to treat the motive as a consideration where the Court thinks it is in the circumstances just to enforce the promise. Alternatively, the Court may find some very indirect benefit accruing to the promisor from his promise, though in fact this benefit may itself be nothing more than the motive. This may be illustrated by the decision of the House of Lords in *Chappell & Co. Ltd. v. Nestlé Co. Ltd.*,<sup>17</sup> the well-known case in which chocolate wrappers were sent to the defendants together with some payment, as the price of gramophone records, offered in the modern fashion as a sales-boosting or advertising device. The actual wrappers in this case were plainly worthless and were thrown away on receipt, and it would be ridiculous to assert that the sending or the receipt of the wrappers necessarily involved an actual detriment to the sender or a benefit to the defendants. But it is also plain that the defendants did not make their offer to the public out of pure generosity; the defendants, like all business concerns, were operating with a view to profit; and they decided, whether rightly or wrongly, that they would derive some indirect benefit in the form of enhanced sales from the whole campaign. But this indirect benefit did not derive from the actual receipt of the wrappers; it was in truth the motive which inspired the promise. The case itself was not, of course, an action for breach of contract, but the decision of the House plainly implies that had it been such an action (and even if there had been no cash payment in addition to the wrappers) the action would have succeeded. This seems to be an instance of a promise which is enforce-

<sup>17</sup> [1960] A.C. 87.

able despite the absence of benefit to the promisee in the sense in which the word 'benefit' is normally used in the orthodox doctrine.

But leaving aside cases such as this in which there may be argued to be some very indirect benefit, there are other promises which are undoubtedly enforceable even where there is (as I would submit) plainly no actual benefit or detriment. The promise for nominal consideration seems an obvious instance. A promise in return for a peppercorn is enforceable, but it is surely clear that the reason why such a promise is enforced is not because the promisee incurs a detriment in delivering a peppercorn, nor because the promisor derives a benefit by receiving a peppercorn. 'A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.'<sup>18</sup> It is surely obvious that in such a case the reasons (or considerations) which lead to the promise being enforced must be found elsewhere. Most probably these reasons are that a promise for nominal consideration is just about the clearest possible indication that the promisor intended his promise seriously and intended to give the promisee a legally enforceable right. In the absence of some countervailing consideration (such as illegality, etc.) this appears to the Courts to be a good reason (or consideration) for the enforcement of the promise. I do not think the correctness of this suggestion is rebutted merely because the Courts have not drawn the general conclusion that *prima facie* any promise clearly intended to give the promisee a legally enforceable right is enforceable. The fact that the Courts have not done this is no doubt a tribute to the strength of orthodox doctrine though not to its logical coherence.

There are still other instances in which promises appear to be enforceable in law despite the absence of benefit to promisor or detriment to promisee. In particular, there are promises in return for a forbearance where the promisor derives no benefit and the promisee incurs no detriment. An uncle promises his nephew \$5,000 if the nephew does not smoke until he is 21. The nephew plainly incurs no detriment in fact by forbearing from smoking (indeed, quite the reverse) and it is hard to see that the uncle derives any benefit from the forbearance. Yet such a promise has been held enforceable in America,<sup>19</sup> and it is generally thought that it would

<sup>18</sup> *Per* Lord Somervell in *Chappell & Co. Ltd. v. Nestlé Co. Ltd.* [1960] A.C. at p. 114.

<sup>19</sup> *Hamer v. Sidway* (1891) 27 N.E. 256. Many English authorities were relied on.

also be enforceable in England. It may, of course, be argued that in such a case there is some indirect benefit to the uncle. No doubt he has reasons for wishing the nephew not to smoke or he would not have made the promise; and no doubt he will be gratified if in fact the nephew forbears for the stated period. But here again, this seems to be a matter of motive rather than benefit. If this were a benefit in the sense in which that word is used in the orthodox doctrine, it would seem that many gratuitous promises would become enforceable simply because the promisor derives a sense of satisfaction from his generosity or from the recognition of it by the promisee or the public. The truth appears to be once again that a promise of this kind may be enforced because if the promisee is induced to act on it it appears to the Courts to be just to enforce it. The fact that in acting on it the promisee incurs no detriment is not by itself a reason for refusing to enforce such a promise; although there is no detriment, it may still require a considerable effort of will and a sacrifice of the promisee's immediate desires, to comply with the terms of the promise. Whether this last factor is the really critical reason is perhaps not wholly clear. It would be material to decide this point only if the promise was given for an act or forbearance which in fact needed no inducement because the promisee never felt the least inclination to do otherwise than perform the act or forbearance. Some promises in consideration of the marriage of the promisee with a third party seem to fall within this category, and there is no doubt of their enforceability at common law. But in these cases it is of course possible to find a detriment to the promisee.

*Need the benefit or detriment be of economic value?*

If I am right in what I have so far said, it is clear that benefit and detriment are not always necessary for the enforcement of promises, and it must therefore follow that it is not always necessary to show a benefit or detriment of economic value. Moreover, if actual benefit and detriment are not always required, it would be extraordinary if, where benefit or detriment is present, the law were to require it to be of economic value. In fact, there are many cases inconsistent with the supposed rule that consideration must always be of economic value. Perhaps the most striking instance is that of mutual promises to marry which have been held enforceable for centuries (although this is no longer so in England) without any inquiry

into the economic state of the parties.<sup>20</sup> Indeed, until quite recently, marriage would normally have been regarded as an economic burden to the husband, and yet the great majority of actions for breach of promise were, of course, brought by the lady concerned.

Other instances of promises which have long been held enforceable despite the absence of any benefit or detriment of economic value are to be found in many separation agreements. For instance, a wife's promise not to 'molest' her husband, or to live a chaste and sober life,<sup>21</sup> or to keep their children 'happy',<sup>22</sup> is accepted as sufficient to justify the enforcement of the husband's promise to pay the wife maintenance. Here again, of course, it would be entirely unreal to regard the benefit derived by the husband as the reason for the enforcement of such a promise. The real reason is doubtless to be found in social policy. It accords with the moral values of our society (or at least it has so accorded until very recently) that a husband should maintain his wife if they separate unless in some very extreme case the wife is regarded as having forfeited her claims on her husband. It is therefore not surprising that the Courts have been very ready to enforce an actual promise by a husband to pay his wife maintenance. It may very well be that a change is taking place in the moral values of our society at the present day in relation to the husband's obligations to a separated wife. Where there are no dependent children, and where the marriage has not lasted for very long, and more particularly, where the wife is capable of earning more than the husband, it is very doubtful whether a husband would today be regarded as under any moral obligation to maintain a separated wife. It is therefore not surprising if the Courts today are less inclined to find sufficient reasons for enforcing such promises.<sup>23</sup>

### *Legal benefit and detriment*

I sense at this stage a growing impatience in the reader. He may be quite willing to concede that I have made out my case that benefit and detriment are not necessary or sufficient prerequisites to

<sup>20</sup> I have already demonstrated that in bilateral executory contracts there is no benefit in fact, and not necessarily any detriment in fact at the time when the promise is enforced. But I am here making the assumption that it is legitimate to inquire whether the promises would in fact have been beneficial or detrimental if performed.

<sup>21</sup> *Dunton v. Dunton* (1892) 18 V.R. 114.

<sup>22</sup> *Ward v. Byham* [1956] 1 W.L.R. 496.

<sup>23</sup> See the discussion of *Combe v. Combe* [1951] 2 K.B. 215, pp. 50-1.

the enforcement of a promise. But he is likely to respond that I have underestimated the subtlety of the doctrine of consideration. It is not, he may assert, benefit or detriment *in fact* which the law is concerned with, but benefit or detriment *in law*. These, he may insist, are both necessary and sufficient for the enforcement of promises. Even if there is a factual benefit or detriment, there must also be a legal benefit or detriment before the promise will be enforced; and equally if there is a legal benefit or detriment, the promise will always be enforced despite the absence of factual benefit or detriment. This is, I believe, a statement of the orthodox doctrine, and there are undoubtedly many references in the Law Reports and the books to consideration 'in the eye of the law'. But as a rational argument this will not pass muster. Once again I cannot put the point more clearly than by quoting the words of Corbin:<sup>24</sup>

Such statements not only abandon the requirement of actual detriment; they tell us nothing at all as to the nature of this 'detriment' that is said to be required. To say that it must be a 'legal detriment' says no more than that the detriment must be one that the law recognizes as sufficient, a prime illustration of begging the question. What kind of consideration will make a promise binding? Why, it must be a consideration that is legally sufficient. Obviously, a true statement; also, obviously, one that gives not the slightest help in determining whether a consideration that is before us is a sufficient one. . . .

. . . The very common statement that consideration must be a 'legal detriment', or that it must have 'value in the eye of the law' was induced by the discovery that courts were holding considerations to be sufficient even though they were not 'detriments' in fact and had no 'value' in the market place, and were holding other considerations to be insufficient even though they were such detriments and had such value. We must abandon the term 'legal detriment' because it does not serve the desired purpose; we must separate the good from the bad considerations on some basis other than 'detriment' or 'market place value'.

These arguments appear to me to be irrefutable. When a Court refuses to enforce a promise despite actual benefit or detriment on the ground that there is no benefit or detriment 'in the eye of the law', it is merely asserting that there are other reasons for refusing to enforce the promise. A restatement of the law must make it its business to try to find out what those other reasons are. Equally, when a Court does enforce a promise despite the absence of factual

<sup>24</sup> *Op. cit.*, Vol. 1, pp. 530-1. Corbin writes of detriment only because he takes the orthodox version to be that which regards detriment as the crucial factor.

benefit or detriment, on the ground that there is a benefit or detriment, 'in the eye of the law', the Court is plainly enforcing the promise for some other reasons. Again a search for these other reasons must be a necessary part of a restatement of the law.

#### UNILATERAL CONTRACTS AND CONSIDERATION

I have suggested above that the second proposition of the orthodox doctrine is that in a bilateral contract the promises are consideration for each other, while in a unilateral contract the performance of the acts specified (or on some versions, requested)<sup>25</sup> by the promisor is the consideration. I have nothing to add here to what I have said in the previous section concerning consideration in bilateral contracts. But I wish to examine one aspect of the orthodox position with regard to unilateral contracts.

The problem I wish to examine is usually discussed in the books under some such heading as 'Revocation of offers in unilateral contracts', and it concerns the famous and age-old problem whether a promisor can revoke his promise (or withdraw his offer) after the promisee has commenced performance of the act but before he has completed performance of it. Orthodoxy tells us that this case presents a difficult problem. It is said that the usual principle is that the complete performance of the act specified is necessary to complete the contract; that until the act is completed there is, therefore, no consideration (there being of course no return promise), and that it therefore appears to follow that the promisor can revoke his offer at any time before completion. It is acknowledged that this might seem unjust in some cases, and that it might therefore be desirable to 'circumvent' the ordinary results of the doctrine, and two possible methods of circumvention are offered. According to the first, a distinction should be drawn between the acceptance of the offer and the performance of the act. Commencement of performance is said to be the acceptance of the offer, though the whole act must be completed before the promisee can claim enforcement of the promise.<sup>26</sup> The second method of escape is said to lie in the possible implication of a subsidiary promise by the promisor not to revoke his primary offer once the promisee has commenced performance; the consideration for this promise would be the commencement of the performance, though the consideration for the

<sup>25</sup> As to this, see p. 33.

<sup>26</sup> See, e.g., Treitel, *op. cit.*, p. 37.

primary promise would remain the complete performance. This solution is usually criticised because of its artificiality. As to authority, it is generally agreed that there is nothing very helpful. Apart from some inconclusive dicta in *Offord v. Davies*,<sup>27</sup> and a recently discovered dictum by Lord Haldane in *Morrison Steamship Co., Ltd. v. The Crown*,<sup>28</sup> there is only the authority of Denning L.J. in *Errington v. Errington*.<sup>29</sup> And (without intending any disrespect to Lord Denning) orthodoxy tends to look askance at his dicta in view of his well-known radical and unorthodox views.

It is my contention that the orthodox position here is just about as wrong as it could be. The theoretical foundation of the orthodox position is hopelessly confused, and the discussion on authority has unaccountably failed to notice that the whole of this question was discussed with great care by the House of Lords in a case well known in another branch of the law, namely, *Luxor, Ltd. v. Cooper*.<sup>30</sup> Let us look at the theory of the matter first.

I must start by observing that the orthodox position here (as so often elsewhere) begins by begging the whole question. It is assumed that there is somewhere a definition of the doctrine of consideration from which it logically follows that, in a unilateral contract, the consideration for the promise must be the complete performance of the acts specified by the promisee. Yet this assumption is found to be consistent with the fact there is no actual authority which says that this is always the case. If we refuse to beg the question, we must begin by asking whether complete performance must always be treated as the consideration. And bearing in mind what I have already said earlier, what this means is whether there are ever any good reasons for preventing a promisor from revoking his promise even though performance of the act is not completed.

The second fallacy in the orthodox position is to assume that the two methods proposed for circumventing the supposed normal rule are alternatives. This is not so. The first method (as we saw above) suggests that the commencement of the performance should

<sup>27</sup> (1862) 12 C.B.N.S. 748, 753.

<sup>28</sup> (1924) 20 Ll.L.R. 283, 287.

<sup>29</sup> [1952] 1 K.B. 290, 295.

<sup>30</sup> [1941] A.C. 108. Smith & Thomas's *Casebook on Contract* deserves an honourable mention for drawing attention to this case in this context. So too, Mr Reynolds in Bowstead on *Agency*, 13th ed., pp. 184-5, suggests that this case is hardly consistent with orthodox discussions of consideration, and that some restatement may be needed. See also now Treitel, op. cit., 3rd ed., pp. 40-1.



be treated as acceptance of the offer; but even if this can be so, it will not help the promisee if he is unable to complete the act specified by the promisor.<sup>31</sup> The reason for this is not logical necessity but consistency with other parts of the law of contract. Prima facie the promisee cannot enforce the promise until he has completed the act requested because it is only upon completion that the promisor has promised to pay anything. Now if the promisor revokes his offer, he may in a sense be said to have waived the need for completion of the performance; and it would be perfectly possible for a rational legal system to take the view that in such a case the promise should become enforceable although the performance has never been completed. But this is not the solution adopted by English law of many analogous problems. A promisee may be entitled to claim damages where the promisor waives performance on his part, but he is not entitled to sue for the sum promised. Such an action is a claim for the price promised, and it is very well established that the price is not claimable unless performance is completed. Accordingly, the promisee's commencement of performance may be a good reason (or consideration) for enforcing some promise (if any) other than the principal promise to pay on completion. The question therefore arises whether there is any other promise which the promisee can enforce. Plainly, if there is any express promise not to revoke the offer, that promise would, on ordinary principles, become enforceable when the promisee has acted on it to his detriment by commencing performance; equally, if it is possible to imply such a promise, that promise could be enforced. But if the promisor has made no such express promise, and if there is no sufficient reason for implying a promise, the position is simply that the promisor has reserved his freedom of action. The promisee may have acted on the promise by commencing performance but he has simply taken the risk that the promisor may revoke before performance is completed.

It will be seen, therefore, that the first method of circumventing the supposed rule is insufficient by itself. Unless the promisor has promised not to revoke his promise, there is no promise which the promisee can enforce despite his 'acceptance' of the offer. But equally the second method of circumvention cannot stand by itself, for it suggests that the way out of the difficulty is to imply a promise

<sup>31</sup> It is true that this analysis might work where the promisee is able to complete the act without the promisor's concurrence; but then difficulties are encountered in connection with the rule in *White & Carter v. McGregor* [1962] A.C. 413.

that the offer will not be revoked, and that the commencement of performance will be a consideration for that promise. But this also begs many questions. It appears to assume that the commencement of performance is always a good reason for preventing revocation, and therefore for implying a promise not to revoke. But this is not necessarily the case. There may well be situations in which the promisee customarily takes the risk of revocation before completion of performance. Business practices often require risks of this kind to be assumed, and where this is the case the commencement of performance is not a good reason or consideration for implying and enforcing a promise.

I turn now to an examination of the decision in *Luxor, Ltd. v. Cooper*. The facts were simple. The defendants wished to sell some properties and they engaged an estate agent to find them a purchaser. They promised to pay the agent a commission of £10,000 if he found a purchaser for at least £185,000, on the completion of the sale. The agent found a purchaser willing to complete the sale but the defendants changed their minds and eventually disposed of the properties by a method which did not involve their sale.

The first question was whether the contract alleged was unilateral or bilateral. It might have been thought that such a contract was bilateral, the consideration being a promise by the estate agent to use his best endeavours to find a purchaser, but the House of Lords decided that it was a unilateral promise in which the agent himself undertook to do nothing. The promise was a promise to pay on the occurrence of the specified event, namely, completion of the sale at not less than the price specified. In so construing the promise it is thought that their Lordships were being realistic. It may be true that the understanding in such a transaction is that the agent will use his best endeavours to sell the property, but such an understanding may well arise because it is naturally assumed that the agent will be anxious to earn his commission. It does not necessarily indicate that he is promising to do anything. Moreover, a promise by an agent to use his best endeavours to find a purchaser would be of exceedingly little value to the client, which is why he does not normally promise to pay the agent merely for use of his best endeavours, but only in the event of those endeavours being successful. A client would find it very hard to sue an agent for breach of any such promise, and perhaps harder still to prove any damage resulting therefrom.

Since the promise was therefore a promise in return for an act, the application of the orthodox rules about consideration would seem to have suggested that the client could revoke his promise at any time before completion of the act, and this is indeed what the House of Lords held that the client was entitled to do. But the important thing is not the result itself but the reasoning by which that result was reached. The House did not arrive at their conclusion by any mechanical application of the supposed rules about consideration. Indeed, consideration was not discussed at all, which no doubt explains why the case has not generally figured in conventional discussions of the law of consideration. The whole case turned on the possibility of implying a promise by the clients that they would not do anything to prevent the agent earning his commission—which seems to be identical in effect with an implied term not to revoke the offer. The Court of Appeal, applying earlier decisions of its own, had held that such a promise could be implied, but had also treated the contract as bilateral and not unilateral. The House of Lords held that such a promise should not be implied, but the reasons for not implying such a promise were all firmly based on sound considerations of policy. It was first pointed out, most clearly by Lord Wright, that the agent's acts in finding a purchaser and introducing him to the defendants could not be treated as completion of the act requested by the defendants so as to entitle them to their commission. The defendants had promised to pay on completion of the sale and they were not bound to pay unless the sale was completed.

There remained, however, the question whether the agent was entitled to claim, not the agreed commission, but damages for breach. It was pointed out very firmly that a claim for damages must be based on a breach of a promise by the defendants; the fact that the defendants had changed their minds was no ground for awarding damages against them unless they had promised not to do so. There was certainly no express promise. Was it right to imply a promise? The House held that it was not. Briefly, their reasons seem to have been three. First, the transaction was for a sale of real property. In such a case the vendor is not normally legally committed until the exchange of contracts; accordingly it would be undesirable to treat the vendor as committed to the estate agent before he becomes committed to the purchaser. The vendor usually understands that he is free to change his mind *vis-à-vis* the purchaser until contracts are exchanged; and he would normally expect to be

free to change his mind without commitment to the estate agent before that time. Secondly, the estate agent takes many risks in his business. He normally takes the risk that he may find no purchaser at all, or that the purchaser may renege before he is legally bound, or even after he is legally bound. There is, therefore, little reason why he should not be required to carry the additional risk that the vendor may change his mind; this risk is a small one compared to the others, for the vendor has himself approached the agent, and may be assumed to be desirous of selling. Thirdly, and this is very much tied up with the second reason, the agent expects to earn a very substantial remuneration in the event of success. In this case the agent's commission was no less than £10,000. As Lord Russell pointed out,<sup>32</sup> this was the equivalent of the remuneration of a year's work by a Lord Chancellor (at that time) for work done within a period of eight or nine days, and was 'well worth a risk'.

It will be seen, therefore, that the reasons for the decision were firmly grounded on their Lordships' views of the justice of the case—and they are very convincing reasons. There is not the slightest suggestion in the judgments that there was any technical difficulty about consideration; had the House felt that it was just to imply a promise such as was contended for by the plaintiff, there is no reason to doubt that it would have been implied, and enforced. It is true that their Lordships suggested that such promises should rarely be implied in unilateral contracts, but this is a perfectly natural view when contracts of a recognised commercial character are under consideration. In such contracts the absence of any express promise (or perhaps custom) to pay remuneration except on completion of the act specified is itself a strong indication that the promisee takes the risk of the promisor changing his mind before completion. But it does not at all follow that in special circumstances—particularly outside the commercial sphere—there may not be very good reasons for implying and enforcing such a promise. *Errington v. Errington* seems to have been just such a case. Here a man bought a house for his son and daughter-in-law, gave them possession, and told them that the house would be theirs if they paid all the mortgage instalments. A majority of the Court of Appeal held that the son and daughter-in-law had not promised to pay the instalments which seems to have been clearly right; yet it was held that the promise was enforceable in the sense that the son and daughter-in-law were entitled to remain

<sup>32</sup> [1941] A.C. at p. 126.

in possession, and would be entitled to the house on payment of the mortgage instalments. Clearly there was in this case a very good reason for implying a promise not to revoke the offer; it would have been unreasonable to say that the son and daughter-in-law 'took the risk' of the father changing his mind. There was therefore a promise and a sufficient reason (or consideration) for enforcement of that promise.

#### CONSIDERATION AND BARGAINS

The third proposition which I suggested above forms a central part of the orthodox doctrine is that the law enforces only bargains; that all contracts are bargains;<sup>33</sup> that consideration is not an artificial or accidental requirement of the law, but merely a recognition of the law's concern with bargains;<sup>34</sup> and that accordingly nothing can be consideration which is not regarded as such by the parties;<sup>35</sup> consideration, in short, is the 'price' of the promise.<sup>36</sup> It is my contention that this part of the orthodox doctrine, like the ones already considered, simply does not represent the law.

Before I consider the validity of the orthodox view it seems necessary to devote some consideration to an examination of what precisely is meant by a bargain. English writers and judges who make frequent reference to the concept of a bargain always appear to assume that the meaning of the concept is self-evident. I cannot recollect ever having seen any discussion in English legal literature of what precisely is meant by the concept. The American Restatement (§ 4) defines a bargain as 'an agreement of two or more persons to exchange promises or to exchange a promise for a performance', but Corbin adopts a narrower definition for the purposes of his great work. He regards a bargain as involving not merely an exchange, but an exchange of equivalents.<sup>37</sup> I think that Corbin's definition is nearer to the meaning of the term in ordinary usage, but whichever definition is adopted, I propose to demonstrate that there are many contracts recognised and enforced by the Courts which do not

<sup>33</sup> See, e.g., Cheshire & Fifoot, *Law of Contract*, 7th ed., p. 60.

<sup>34</sup> See Hamson's well-known article in 54 L.Q.R. 233.

<sup>35</sup> A proposition stated by Holmes, *The Common Law*, p. 292, and frequently cited by modern writers; see, e.g., Odgers, 86 L.Q.R. 69, 79. Perhaps it goes too far to regard this as having been received as part of the orthodox doctrine; it never seems to have received judicial support.

<sup>36</sup> Pollock's definition, adopted by Lord Dunedin in *Dunlop v. Selfridge* [1915] A.C. at p. 855.

<sup>37</sup> Op. cit., Vol. 1, § 10.

involve a bargain in either of these senses. I will refer to the Restatement's definition as the wider sense, and Corbin's as the narrower sense of the term. Both agree that the essential element of a bargain is that there should be an *exchange* of promise for promise, or promise for act. The consideration must be given *in return for* the promise. Now it cannot be doubted that most contracts are bargains, both in the narrow sense and the wide sense; but once again one sees here the apparent compulsion to generalise from the typical case. Because bargains are the most common form of contract, it is simply assumed, without examination of the evidence, that *all* contracts are bargains. Let us now examine the evidence, which in this context consists of the actual decisions of the Courts. Naturally, there are more cases which do not fit the narrower sense than the wider sense.

#### *Nominal consideration*

A promise given for nominal consideration is perhaps a bargain in the wide sense, but not in the narrow sense. I doubt if the ordinary person would call such a contract a bargain which is one reason why the narrow definition of the term seems more accurate.

#### *Collateral contracts*

A collateral contract is sometimes a bargain in the wide sense, and perhaps arguably even in the narrow sense. For example, if a car dealer says to a prospective buyer, 'If you enter into a hire purchase agreement to acquire this car from the X Finance Co., I promise to repair the brakes', or 'I warrant that the brakes are in good order', this is arguably a bargain even in the narrow sense. But even here it seems to stretch the meaning of the term to say that here is an exchange of *equivalents*, and I would prefer to regard this as a bargain only in the wider sense.

But it must be recognised that there are a large number of collateral contracts which cannot possibly be regarded as bargains in either the narrow or the wide sense. An auctioneer promises to sell goods without reserve; this promise is enforceable by the highest bidder, his bid being treated as a sufficient consideration for the promise.<sup>38</sup> There is clearly no bargain here in any sense of the word; the auctioneer does not *exchange* his promise for the bid; the bid merely follows the promise in natural reliance thereon. Orthodox

<sup>38</sup> *Warlow v. Harrison* (1859) 1 E. & E. 309.

lawyers have indeed looked askance at the decision holding the auctioneer's promise binding,<sup>39</sup> but if we rid ourselves of the preconceived assumption that all considerations must fall within some predetermined pattern, is there any reason for doubting the decision? Orthodoxy finds difficulty in the decision because the consideration found in that case does not fit the typical pattern. But let us rephrase the issue facing the Court in that case, and ask: Is there a sufficient reason for enforcing the auctioneer's promise? Can there be any doubt that the Court's answer was correct?

Another well-known instance of the collateral contract, and the first to emerge historically, is the agent's warranty of authority. The consideration for this warranty is the mere act of entering into the transaction (which is otherwise void) by the promisee.<sup>40</sup> Here again there is plainly no bargain in any sense of the word. There is an implied promise or representation followed by natural reliance thereon. The agent does not *exchange* his promise for the promisee's conduct. This is still more true of recent extensions of the implied warranty of authority such as may be found in *V/O Rasnoimport v. Guthrie & Co. Ltd.*<sup>41</sup> In this case a shipping company's agents were held liable for a false statement in a bill of lading acknowledging the receipt of more goods than were in fact shipped. The plaintiffs were indorsees for value of the bill, and the consideration was found in the mere fact that they relied on the statements in the bill of lading in accordance with normal commercial practice. Any attempt to spell a bargain out of this situation is clearly doomed to failure.

It is sometimes argued that cases of implied warranty are not 'really' contractual at all; such cases are in fact actions for misrepresentation and would have been brought in tort if the law of torts had been more willing to recognise liability for misrepresentation at an earlier date. There is a germ of truth in this inasmuch as the 'promise' in many actions of this kind is plainly a fiction; the desired result is to impose liability on the agent and this is done by implying a promise. But the explanation is nevertheless not wholly acceptable. For one thing, the liability of the agent is strict; he is

<sup>39</sup> Slade, 68 L.Q.R. 238; cf. Gower, *ibid.*, 457, and Slade's reply, 69 L.Q.R. 21.

<sup>40</sup> *Collen v. Wright* (1857) 8 E. & B. 647. Another line of cases on the agent's warranty of authority which is exemplified by *Starkey v. Bank of England* [1903] A.C. 114 is arguably reconcilable with the notion of bargain in the wide sense, but certainly not in the narrow sense.

<sup>41</sup> [1966] 1 Lloyd's Rep. 1, noted by Reynolds, 83 L.Q.R. 189.

liable as for a warranty, and not merely for negligence.<sup>42</sup> Secondly, the measure of damages awarded in these cases is plainly the measure appropriate to contract and not tort; for instance, the plaintiff can recover for loss of his profit in the *Collen v. Wright* situation.<sup>43</sup> Thirdly, even if there was a real and genuine promise in such a case, there would still be no bargain.

#### *Bailments without reward*

A asks B to lend him a chattel for purposes of his own; B complies. A expressly or impliedly promises to return the chattel. This promise is undoubtedly enforceable, and a sufficient consideration (or reason) for enforcing the promise is the mere fact that B has voluntarily handed over his property to A for A's benefit.<sup>44</sup> There is plainly no bargain. Here again, it is sometimes argued that such cases are not genuinely contractual. If the bailee damages the goods he is liable in tort, and therefore there is no need to invoke the law of contracts. This is true, but there may often be situations where it is necessary to rely on the bailee's promise. For example, the bailee may promise to return the chattel on a specified date, and may return it late. No action would lie in tort for this, but it can hardly be doubted that an action would lie on the promise, and that there is good reason (or consideration) for such an action.

#### *Conditional gift promises*

A whole range of cases in which promises are enforced though there is no bargain is to be found in those cases in which the Courts have enforced conditional gift promises. This group of cases may come as a surprise to the orthodox lawyer because orthodoxy insists that a promise to make a gift is not enforceable as a contract at all. The fact that the promise is conditional does not, according to orthodox doctrine, render the promise enforceable; and it is in fact necessary to distinguish very carefully between a conditional gift promise and a contractual promise. Nevertheless, the fact is that many such contracts have been enforced; or have been refused enforcement only on other grounds than absence of consideration.

One type of case in which a conditional gift promise may be

<sup>42</sup> *Yonge v. Toynbee* [1910] 1 K.B. 215.

<sup>43</sup> See *Re National Coffee Palace Co.* (1883) 24 Ch.D. 367, 374-5; Mayne & McGregor on Damages, §§ 634-7.

<sup>44</sup> *Bainbridge v. Firmstone* (1838) 8 Ad. & E. 743.



enforced is exemplified by *Wyatt v. Kreglinger*.<sup>45</sup> The plaintiff retires from the defendant's employment and the defendant promises to pay him a pension in consideration of a promise by the plaintiff not to compete or otherwise damage the defendant's interests. These promises are exchanged, but they are certainly not exchanged as equivalents; there is therefore a bargain in the wide sense, but none in the narrow sense. It is true that in this case there was considerable doubt about the enforceability of the contract, and the decision indeed went against the plaintiff on the ground (which was later much criticised) that the consideration was in restraint of trade. But this is not surprising. By 1933 orthodoxy had acquired such strength with regard to the doctrine of consideration that it is not surprising that even the judges sometimes found difficulty in enforcing a promise in flat defiance of orthodox doctrine. It is of course pretty plain that the real reason (or consideration) for enforcing such a promise is the plaintiff's past services but it is also part of the orthodox doctrine that past consideration is bad.

In other similar cases, orthodoxy seems to have been defied by the Courts with less difficulty. For example, there are cases in which a person has desired to make a gift of a house to another, and has persuaded the donee to enter into a contract to buy the property from a third party on the strength of a definite promise that he will himself pay the price. Such promises have been enforced,<sup>46</sup> though they are plainly gift promises, and there is equally plainly no bargain in any sense of the term. Perhaps the Courts have felt less difficulty about such a case because the promisee clearly incurs a detriment in reliance on the promise by entering into the contract to purchase and pay for the property. Orthodoxy thereby seems to be complied with in so far as detriment is present; but orthodoxy is not complied with inasmuch as no bargain is involved.

Then there is the well-known line of cases beginning with *Dillwyn v. Llewellyn*,<sup>47</sup> and continuing up to the present day in *Inwards v. Baker*<sup>48</sup> in which a person promises another to give him some land, and allows the promisee to build a property on the land

<sup>45</sup> [1933] 1 K.B. 793.

<sup>46</sup> *Crosbie v. M'Doual* (1806) 13 Ves.Jr. 148; *Skidmore v. Bradford* (1869) L.R. 8 Eq. 134; *Coles v. Pilkington* (1874) L.R. 19 Eq. 174; *Hohler v. Aston* [1920] 2 Ch. 420.

<sup>47</sup> (1862) 4 De G.F. & J. 517; *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129; *Plimmer v. Mayor of Wellington* (1884) 9 App. Cas. 699; *Chalmers v. Pardoe* [1963] 1 W.L.R. 677.

<sup>48</sup> [1965] 2 Q.B. 29.

in reliance on the promise. Here again (need one repeat it?) there is plainly no bargain. It is true that here also orthodoxy has caused the Courts and commentators some uncomfortable moments. The promise in such a case is so obviously a promise to make a gift that the orthodox lawyer is unwilling to believe the evidence in front of him when he sees that the Courts actually enforce such promises. Explanations are therefore put forward to show that the cases are not really contractual. Perhaps they are based on some 'equity';<sup>49</sup> perhaps they are based on estoppel of some kind or another;<sup>50</sup> perhaps the promise was not really enforced, but the Courts were merely concerned to prevent unjust enrichment<sup>51</sup> (though this does not explain why the promisee gets the land as well as the house). Thus, for instance, we find Professor Allan criticising Lord Westbury for not making it clear in his judgment in *Dillwyn v. Llewellyn* 'whether the right of the plaintiff was contractual in nature or whether it was a right bestowed *ex aequo et bono* by the court to compel completion of a gift'.<sup>52</sup> This criticism would have been unintelligible to Lord Westbury who would probably have replied that of course the plaintiff's right was both. It was the right to enforce a promise (and to that extent contractual) because in the particular circumstances there was good reason (or consideration—and Lord Westbury uses this word in his judgment) to enforce the promise although it was a promise to make a gift. Professor Allan's criticism is only intelligible to the modern lawyer because orthodoxy appears to require a distinction to be drawn between a contractual promise and a promise to make a gift.

Another similar case—though admittedly an isolated decision—is *Re Soames*<sup>53</sup> where a promise to make a gift to a school was enforced on the ground that the school governors had entered into various commitments in reliance on her promise, which the promisor must have anticipated. Once again, an enforceable promise though no bargain.

Finally, mention may be made of two more recent decisions which show that the Courts are still not deterred by orthodoxy from enforcing promises where there is no bargain. In *Alder v. Moore*<sup>54</sup> the

<sup>49</sup> Lord Denning in *Inwards v. Baker*, at p. 37.

<sup>50</sup> Maudsley, 81 L.Q.R. 183.

<sup>51</sup> Treitel, *op. cit.*, p. 108, n. 84.

<sup>52</sup> 79 L.Q.R. 238, 241.

<sup>53</sup> (1897) 13 T.L.R. 439; cf. *Re Hudson* (1885) 54 L.J.Ch. 811 which is to more orthodox tastes.

<sup>54</sup> [1961] 2 Q.B. 57.

defendant, a professional footballer, was insured by his union against disablement from playing professional football. He suffered an injury for which the insurers paid him £500, but extracted from him (as they were entitled under the policy) a promise to repay the money if he should ever play professional football again. This promise was held enforceable, though there was plainly no bargain in the narrow sense, and probably no bargain in the wide sense either. The promise to repay was in truth a condition of the payment by the insurers; it was not *exchanged* for the payment. The second case is *Gore v. Van Der Lann*<sup>55</sup> in which the plaintiff was issued with a free pass to ride on the Liverpool Corporation's buses. She signed a written application for the pass which stated that in consideration of her being granted the pass she would undertake and agree that the pass should be subject to certain conditions—in particular that she would not hold the corporation or their servants liable for personal injury. Clearly the plaintiff's promise was not *exchanged* for the pass, and, predictably, the decision has been criticised on this very ground. The 'pure doctrine is, or should be that of Holmes'<sup>56</sup> we are told; in other words, nothing should be treated as consideration if it is not regarded as such. The belief that all contracts are bargains has been unconscionably long in dying; indeed, it may be premature to say that it is dying even now, but it is certainly time that it was buried.

#### *The need for a request in unilateral contracts*

Associated with the belief that all contracts are bargains is the argument sometimes put forward that a promise for an act is not enforceable unless the performance of the act has been expressly or impliedly *requested* by the promisor.<sup>57</sup> Naturally if there is a genuine bargain, the act will be requested. The whole notion of an exchange of promise for promise or for act involves that the promisor has requested the counter-promise or act in exchange for his promise. But it will be seen that the need for a request could be reconciled with the actual fact that not all contracts are bargains. Even if an exchange, or a bargain, is not a requirement of an enforceable con-

<sup>55</sup> [1967] 2 Q.B. 31.

<sup>56</sup> Odgers, 86 L.Q.R. 69, 79. The veneration accorded Holmes's views in England would surprise lawyers in America where his views on constitutional matters are treated with much more respect than his views on the common law.

<sup>57</sup> See Smith, 69 L.Q.R. 99; Goodhart, *ibid.*, 106.

tract, it might be argued that the consideration must still be requested by the promisor, and it must be admitted that in some cases the Courts have used the absence of a request as a ground for not enforcing the promise, as in *Combe v. Combe*. I shall return to this and other relevant cases later. For the moment I wish merely to inquire what rational purpose is served by the supposed rule that the promisee must request (and not merely specify) the act to be performed. Request as a part of a requirement of a bargain would make sense, but once the requirement of bargain is abandoned I cannot see any virtue in the element of request standing by itself. The only distinction between the case where the promisor requests the consideration, and the case where he merely specifies it, appears to be that in the former case it is more likely that the promisor will derive some benefit from the consideration. But now that I have (I hope) demonstrated that benefit is also not a prerequisite for the enforcement of a promise, this distinction does not appear to be of crucial significance.<sup>58</sup> Accordingly I would expect a Court to enforce a promise for a specified act even though it is clear that performance of the act is not requested by the promisor. But I would only expect this to be so where the act is performed in reliance on the promise. I have not here considered the case where the act performed by the promisee is not specified at all. This is precisely the point which (according to orthodoxy) marks the frontier between consideration and quasi or promissory estoppel. If the promisee acts on the promise (or perhaps if he acts to his detriment) then the promise will not be treated as supported by consideration where the act is not specified by the promisor; but it may nonetheless be enforceable to the limited extent recognised by promissory estoppel. I return to this question later.

#### PAST CONSIDERATION

Orthodoxy asserts that 'past consideration is no consideration'. Apart from the case of the bill of exchange, now embodied in statute, it is generally thought that there is no real exception to this rule. The apparent exception recognised in *Lampleigh v. Braithwait*<sup>59</sup> is ex-

<sup>58</sup> Naturally it is of *some* significance in that an act which benefits the promisor is more likely to make it just to enforce the promise. It also seems that the element of 'request' is more important in cases of representation rather than promises.

<sup>59</sup> (1615) Hob. 105.

plained along the lines suggested in *Re Casey*,<sup>60</sup> if the promisee has rendered some service for which payment was expected and could have been enforced on an implied promise, then the express promise of the promisor to pay for those services is enforceable. This merely fixes the amount of the reasonable remuneration which the promisor was already bound to pay. Otherwise no exceptions to the rule are recognised.

Clearly, there is an association between this rule and the belief that all contracts are bargains. If it were indeed true that all contracts were bargains it would logically follow that something done before the promise and without reference to it could not constitute consideration. But now that it is (I hope) clear that not all contracts are bargains, a less rigid rule might be more appropriate. There are, as I have shown, cases in which a promise has been held enforceable because in the particular circumstances some act or promise by the promisee has been thought to be a good reason (or consideration) for its enforcement even though there is no bargain. It would, therefore, be strange and illogical if the fact that the act or promise was past was by itself sufficient to prevent the promise being enforced. In fact this does not seem to be the case. Although orthodoxy here seems a good deal stronger than in the areas previously discussed, I believe that even the rule about past consideration is too strongly stated. The true position seems to be that something done or promised *before* the promise sued on is not *by itself* treated as a sufficient reason for the enforcement of the promise. But in particular circumstances it may be held sufficient. It is, however, a tribute to the strength of orthodox doctrine that the particular circumstances recognised as sufficient to justify the enforcement of a promise given for some past act or promise are relatively few in number. Perhaps the law here would have developed further if some other exceptions recognised by the common law to the rule about past consideration had not been taken over or reversed by statute. I have already mentioned the case of bills of exchange. Two other cases recognised by the common law were the enforceability of a promise to pay a statute-barred debt, and the enforceability of a promise to carry out a promise previously given for a consideration during infancy. The former has been superseded by the provisions of the Limitation Acts, while the latter rule was reversed by the Infants Relief Act 1874. As these cases disappeared from the com-

<sup>60</sup> [1892] 1 Ch. 104.

mon law, the rule itself appeared to acquire a greater generality of application; and this may partly explain why there seems to have been such reluctance to recognise circumstances in which a past service or promise may be a very good reason for the enforcement of a promise. As it is, the Courts have recognised few such circumstances. I can think of only three such situations.

First, a promise given by an employer to an employee in respect of past services may be enforceable if the employee gives some undertaking in respect of his future conduct, for example that he will not compete with or damage his employer's interests. I have mentioned the case of *Wyatt v. Kreglinger*, which exemplifies such a case, though it is a weak authority, for reasons already given. Of course orthodoxy is satisfied in this sort of case because the promisee has given a counter-promise, and this means that the Courts do not have to acknowledge openly that the promise is enforceable though given for a past consideration. But it seems clear that in fact 'golden handshakes' are not given *in exchange* for promises not to compete, etc. They are given in recognition of past services; the U.K. Parliament certainly takes this realistic view because it taxes golden handshakes as *earned* income.<sup>61</sup> A similar case is *Bell v. Lever Bros.*,<sup>62</sup> though this question was not there discussed. In this famous case the defendant gave up his position as manager of the plaintiff company in return for a very handsome golden handshake. There was no doubt that a substantial part of this promise was intended as a reward for past services, because the amount promised (and paid) substantially exceeded the total income which the defendant would have earned even if he had served out his whole contract. Here again, of course, orthodoxy is well satisfied by the fact that the defendant gave up something of value in that his contract had still some period to run.

Secondly, in contracts of suretyship it has often been held that a promise to pay some *existing* debt is enforceable provided that the promisee renders or promises to render some future performance as well.<sup>63</sup> This proviso, of course, derives from the orthodox requirement, but it seems that in some cases it would be merely a case of paying lip service to orthodoxy. Where, for instance, the services

<sup>61</sup> Income and Corporation Taxes Act 1970, s. 580. For an unusual case of this kind, see *Higgs v. Olivier* [1952] Ch. 311 where there clearly was a bargain in both senses.

<sup>62</sup> [1932] A.C. 161.

<sup>63</sup> See Chitty on *Contracts*, 23rd ed., Vol. II, § 1661.

rendered or promised *after* the promise are trifling in comparison with the size of the existing debt shouldered by the surety, there is an element of unreality in treating the former as a good consideration, and dismissing the latter as no consideration for the enforcement of the promise. At least it may be said that one reason (or consideration) for enforcing the *whole* promise must be the pre-existing debt.

Thirdly, the rule relating to the enforcement of compromises, or forbearance to sue, means that past consideration may be sufficient not merely (as orthodoxy would say) where the promisee was already entitled to sue for some remuneration in respect of the past service, but also *where he honestly thinks he is so entitled*. For instance X finds some lost property and returns it to the owner Y who promises X a reward. If X honestly thinks that a finder is entitled by law to a reward (although he plainly is not in the absence of express promise) it seems that X may be able to sue Y on his promise, though given *after* the service is rendered. That this seems to be the law may be inferred from *Horton v. Horton*,<sup>64</sup> where a husband promised in a separation agreement to pay his wife £30 a month and later signed an amending agreement in which he promised to pay her £30 a month tax free. This was held to be enforceable despite the absence of any fresh consideration. The Court paid lip service to orthodoxy by holding that there was some doubt as to what the parties had intended in the original agreement, and that the wife might have applied for rectification of it, though with uncertain result. That the wife forbore so to apply was therefore a good new consideration. Doubtless, this sort of reasoning will continue so long as there are laws and lawyers, but it seems exceedingly artificial. The substance of the case was that the husband first promised to pay his wife £30 after tax, and later promised to pay her £30 tax free. The consideration in both cases was the same—namely the social desirability of a husband maintaining his wife after they are separated.

It will be apparent from the above discussion that orthodoxy in this area has been stronger than elsewhere. There are no clear examples of actual decisions which cannot be reconciled with orthodox reasoning. It is therefore not surprising that the law here seems capable of producing greater injustice than elsewhere. Much of the

<sup>64</sup> [1961] 1 Q.B. 215.

difficulty about past consideration can be traced back to *Eastwood v. Kenyon*<sup>65</sup> which seems to modern eyes to be an extraordinarily perverse and unjust decision. But I doubt whether the judges who decided that case thought that the result was impolitic though they may have thought it unjust. It will be recalled that the plaintiff in this case was the executor of one Sutcliffe who had left some cottages and a daughter, Sarah, not adequately provided for. The plaintiff had laid out money (borrowed from one Blackburn) in expenditure on Sutcliffe's cottages and in maintaining Sarah. When she came of age Sarah herself promised the plaintiff to pay off Blackburn, and on her marriage her husband did likewise. The husband's promise was held unenforceable because the consideration was past. I do not think that it is unreasonable to deduce that the Court felt that there were policy reasons against enforcing the promise, thought it may not be easy today to understand precisely what they were. But the Court seems to have been concerned at the conduct of the plaintiff in borrowing money to spend on Sarah and the cottages. Thus Lord Denman C.J. said:<sup>66</sup>

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

It is, unfortunately, only too common that the policy reasons underlying decisions are forgotten, and that the decisions themselves come to be treated as authority in entirely different circumstances. Good cases, as well as hard cases, can make bad law.

#### CONSIDERATION MUST MOVE FROM THE PROMISEE

No rule is more often repeated as a part of orthodox doctrine than that the consideration must move from the promisee. Yet the actual decisions of the Courts seem to be quite inconsistent with this rule. Again, of course, I must stress that in the great majority of contracts, the consideration will move from the promisee; again, the fact that the promisee has himself supplied the consideration is

<sup>65</sup> (1840) 11 Ad. & E. 438.

<sup>66</sup> At pp. 450-1.



often a very good reason for enforcing the promise. But again, there is often very good reason in justice and policy for enforcing a promise even where the promisor has received some return from a third party.

The history of this part of the doctrine of consideration is a strange one. The rule that consideration must move from the promisee was first clearly stated in *Tweddle v. Atkinson*,<sup>67</sup> but this case has ever since been explained by the Courts as the *fons et origo* of the modern rule of privity, and not as depending on the rule about consideration. In *West Yorkshire Darracq Agency Ltd. v. Cole-ridge*,<sup>68</sup> in 1911, a puisne judge was able to brush aside the rule that consideration must move from the promisee, and distinguish *Tweddle v. Atkinson* on the ground that in that case the plaintiff was no party to the contract. In the very next case in the King's Bench volume of the Law Reports, *Hirachand Punamchand v. Temple*,<sup>69</sup> the Court of Appeal also declined to apply the supposed rule. In this case X owed money to Y. X's father paid part of the debt and Y (in the view of the Court) promised that he would not sue X for the balance. This promise was held to be a good defence to X in an action for the balance of the debt. The case certainly caused the Court some difficulty because not only had X not supplied the consideration; he was not even a party to the promise. Yet by one means or another the promise was held enforceable by X. It is true that this decision may be thought to have been shaken by the recent decision of the Court of Appeal in *Gore v. Van Der Lann*.<sup>70</sup> In this case, it was held that a promise by the holder of a free bus pass of the Liverpool Corporation not to sue the Corporation's servants in certain events, was not enforceable by the servant. But it is perfectly clear that the two fact situations are poles apart and that the policy considerations applicable to them differ greatly. Few would doubt the justice of permitting a debtor to enforce a

<sup>67</sup> (1861) 1 B. & S. 393.

<sup>68</sup> [1911] 2 K.B. 326.

<sup>69</sup> [1911] 2 K.B. 330. There is also a long line of cases (whose relationship to privity and consideration has been ignored) holding that a promise to release a joint tortfeasor may be relied on by another tortfeasor if it was intended for his benefit too: see my *Vicarious Liability*, p. 405.

<sup>70</sup> It is arguable that *Gore* is inconsistent with *Beswick* in one major respect. In *Beswick* it was held that the promisee could specifically enforce the promise though she would suffer no loss if it was broken; in *Gore* the promisee was refused the equivalent of specific performance (a stay) on just this ground. Yet plainly the policy issues in the two cases are entirely different.

promise given by his creditor to a third party not to sue the debtor. But the *Gore* case illustrates the determined desire of English Courts to see that a person suffering personal injury by negligence should not be deprived by contractual exemption clauses of his right to damages.

The rule that consideration must move from the promisee was restated by the House of Lords in *Dunlop v. Selfridge*,<sup>71</sup> and is arguably part of the ratio of that case. Yet, the Courts have continued to treat *Tweddle v. Atkinson*, and now *Dunlop v. Selfridge* itself, as based on privity, and not on the rule about consideration. In both *Scruttons, Ltd. v. Midland Silicones, Ltd.*,<sup>72</sup> and *Beswick v. Beswick*<sup>73</sup> the House of Lords appears to have ignored the supposed rule that consideration must move from the promisee: the whole discussion was in terms of privity. In recent times the suggestion has been made,<sup>74</sup> and has gained powerful converts,<sup>75</sup> that there is no distinction between the rule that consideration must move from the promisee, and the rule of privity of contract. The assertion is made that these two rules are merely different facets of the same question. I do not agree with this argument, and it is necessary to digress a little in order to consider this point.

Let it first be noted that in point of *fact* it is possible for a person to be a promisee (i.e. for a promise to be made *to him*), and yet for the consideration for that promise to be supplied by some other person. A promises B and C that he will pay £100 to B if C renders him some service. B is in point of fact a promisee; the consideration (or reason) for enforcing this promise (if sufficient) is supplied by C. It is argued that it is erroneous to regard B as a party to this contract at all; but the whole argument seems to be based on circular reasoning. It starts by assuming that only a person who supplies consideration can properly be treated as a party to the contract; it is then deduced (correctly, if the premises are sound) that therefore B cannot be treated as party to the contract because he supplies no consideration. The circularity of the reasoning is evident. In point of fact, as I have stressed, B is a promisee. Moreover, the policy and justice of the two situations are not necessarily the same. A person who supplies no consideration for a promise has

<sup>71</sup> [1915] A.C. 847.

<sup>72</sup> [1962] A.C. 446.

<sup>73</sup> [1968] A.C. 58.

<sup>74</sup> *Furmston* (1960) 23 M.L.R. at pp. 383-4.

<sup>75</sup> *Cheshire & Fifoot*, op. cit., p. 65.

a better claim for enforcing the promise if he was at least a promisee. As a matter of logic, therefore, it appears that there are here two distinct questions. Examination of the actual cases also suggests that the two questions are distinct, because although the privity rule is now a firmly established part of the law, promises are in fact often enforced by the Courts at the hands of a promisee who has supplied no consideration.

I have already referred to the *Darracq Agency* case,<sup>76</sup> and to *Hirachand Punamchand v. Temple*. Similar to these cases is the well-established rule that a composition with creditors is binding and enforceable even at the hands of the debtor. Orthodox lawyers naturally find this a hard case to explain. Yet it is perfectly evident that there are very good reasons (or considerations) for the enforcement of the promise by the debtor even though he himself gives up nothing of value.<sup>77</sup> There are other cases too.

### *Joint promisees*

A makes a promise to B and C jointly in return for an act or a promise by B alone. There seems no doubt that C can enforce A's promise. Lord Atkin said so in *McEvoy v. Belfast Banking Corporation*.<sup>78</sup> Predictably, this dictum has been criticised as a departure from orthodoxy.<sup>79</sup> But more recently the same view has also been taken by the High Court of Australia. In *Coulls v. Bagot's Executor & Trustee Co.*<sup>80</sup> the whole Court seems to have taken the view that the promise is enforceable in such a case though only a minority found that the plaintiff actually was a promisee. Barwick C.J. and Windeyer J. put the point quite explicitly.<sup>81</sup> In the case of a promise to joint promisees it is necessary that the consideration must be supplied by the promisees jointly, but the promisor is not concerned in how the promisees provide the consideration as between them-

<sup>76</sup> Anyone wishing to argue that this case was impliedly overruled by *Dunlop v. Selfridge* must explain why it was cited without disapproval in *Re William Porter* [1937] 2 All E.R. 361 by Simonds J., a judge not noted for unorthodox views.

<sup>77</sup> Corbin, however, is prepared to argue that the debtor does in fact give up the opportunity of treating his creditors unequally; op. cit., Vol. 2, § 190.

<sup>78</sup> [1935] A.C. 24, 43, 52.

<sup>79</sup> 51 L.Q.R. 419; Treitel, op. cit., pp. 529-30.

<sup>80</sup> (1966-1967) 40 A.L.J.R. 471.

<sup>81</sup> At pp. 477 and 483 respectively; the majority opinion also concurs on this point, at p. 480. See also the judgment of Windeyer J. in *Olsson v. Dyson* (1969) 43 A.L.J.R. 77, at pp. 86-7, where he points out that many cases of novation are inconsistent with the rule that consideration must move from the promisee.

selves. This new formulation may satisfy even orthodox opinion since it continues to affirm the principle that consideration must move from the promisee as a matter of theory while disregarding it in practice.

### *Bankers' commercial credits*

Every first-year law student knows that there is something mysterious about bankers' commercial credits and the law of consideration. A bank promises to open a credit in favour of a seller of goods; on the presentation of shipping documents the credit must be honoured by the bank. It is unthinkable that a Court could declare such a promise to be unenforceable in modern times. Millions of pounds' worth of business depend on the smooth operation of bankers' credits every year, and an adverse judicial decision could only result in immediate legislative reversal. Although no appellate Court has had to pronounce on the enforceability of these promises there are certainly dicta which appear to put the law beyond doubt.<sup>82</sup> It is said that if these promises are enforceable without action in reliance by the promisee, this is a clear exception to the doctrine of consideration.<sup>83</sup> It is (with respect) no such thing. There is excellent consideration for the enforcement of the promise, but it is supplied by a third party. It is the buyer who instructs the bank to open the credit in favour of the seller, and the buyer who will have to pay the bank's charges for this facility. Since the buyer does so in fulfilment of his contractual obligations to the seller, there are very good reasons why the promise should be enforceable by the seller.

### *The Motor Insurers' Bureau Agreement*

In *Gurtner v. Circuit*<sup>84</sup> there are dicta by the Court of Appeal suggesting that the Minister of Transport could obtain an order for specific performance to compel the performance of the agreement between him and the Motor Insurers' Bureau. There appears to be no consideration moving from the Minister for this agreement, though perhaps this is immaterial in view of the fact that the agreement is under seal.<sup>85</sup>

<sup>82</sup> *Hamzeh Malas & Sons v. British Imex Industries* [1958] 2 Q.B. 127, 129.

<sup>83</sup> Treitel, *op. cit.*, p. 111.

<sup>84</sup> [1968] 2 Q.B. 587.

<sup>85</sup> But it is to be noted that the equitable remedy of specific performance is traditionally said not to be available if there is no consideration.

*Cases where a fictitious consideration by the promisee has been found*

There are a number of cases in which the promisor expects to receive a substantial and real consideration from a third party, and yet the promise has been held enforceable by the promisee on the ground that he has supplied some fictitious consideration. *Charnock v. Liverpool Corporation*<sup>86</sup> is a striking instance of such a case. Here the plaintiff took his damaged car to the defendants' garage for repair. It was understood and agreed that the bill would be paid by the insurers who promised the defendants to do just this. The Court held that the plaintiff was entitled to enforce an implied promise that the work would be done within a reasonable time. Clearly the real consideration was supplied by the insurers, and not by the plaintiff. But it was said that the mere fact of the plaintiff's leaving his car with the defendants was a sufficient consideration. This attempt to conform with orthodoxy seems even thinner than usual, for it would suggest that the plaintiff would still have been entitled to succeed even if the garage had promised to do the repairs without any reward at all. This seems unlikely; although I have suggested above that a promise by a gratuitous bailee will be enforceable where the bailment confers a benefit on him, it seems unlikely that the Courts would go so far as to enforce such a promise where the only beneficiary is the bailor. If, however, they are prepared to go thus far, then one must recognise another instance of a gratuitous promise being enforced by way of contract.

Somewhat similar to this case are those in which a person is treated or examined by a medical practitioner engaged and paid by some third party. In *Gladwell v. Steggal*,<sup>87</sup> in 1839, it was said that the mere submission to treatment by the infant plaintiff was a sufficient consideration for the defendant's undertaking to treat her with all due care and skill. Yet if the facts are looked at realistically, it is plain that the real consideration moved from the plaintiff's father who engaged the doctor and would have had to pay him. Certainly, the only *bargain* was between the father and the doctor. The same point was taken by Scrutton L.J. in *Everett v. Griffiths*.<sup>88</sup> In more modern times it has been found unnecessary to construct a contract between the patient and the doctor in this sort of case, because a sufficient foundation for liability has been found in the tort

<sup>86</sup> [1968] 1 W.L.R. 1498.

<sup>87</sup> (1839) 5 Bing. N.C. 733.

<sup>88</sup> [1920] 3 K.B. 163, 193; affirmed [1921] 1 A.C. 631.

of negligence. Conceivably, however, the question could still arise in a practical form. Suppose, for instance, that a patient is treated by a doctor who is not paid by him, and that the patient is (let us say) inoculated with some drug which turns out to be unfit for use. If the doctor is not negligent, it is nevertheless arguable that an action for breach of warranty could lie, provided that there is a contractual relationship in the first place.<sup>89</sup> Perhaps, too, this expansive approach to consideration might meet the difficulties which are commonly believed to arise when a person orders a meal in a restaurant and it is evident that he is the guest of another.<sup>90</sup> In such a situation it has usually been assumed that no warranty can be implied in favour of the plaintiff because he supplies no consideration though he seems to be plainly (if impliedly) a promisee. But perhaps it could be argued here that the mere act of eating the food is a sufficient consideration. How unreal can a rule become before it collapses totally in a welter of artificiality? In all these cases, it may be stressed, the real difficulty does not arise from the doctrine of privity but from the supposed rule that consideration must move from the promisee. In all of them it is fairly evident that the plaintiff is, at least impliedly, a promisee; and it is also evident that a genuine consideration is supplied by some third party.

I arrive accordingly at the conclusion that the supposed rule that consideration must move from the promisee is not in practice observed by the Courts. Indeed, I have been unable to find a single case in which a Court has refused to enforce a promise at the suit of the promisee on this ground except for *Dunlop v. Selfridge* itself. And in that case, of course, the plaintiff was not in fact the promisee though the House of Lords was prepared to assume that he was an undisclosed principal of the promisee. Orthodox lawyers may find it difficult to believe that a decision of the House of Lords has been so persistently ignored or defied over so long a period, but it is so. To those who may seek some face-saving consolation in this desperate situation I can only offer the following suggestion. The ratio of a case is not what the Court deciding the case thinks but what later Courts hold the ratio to be. It seems to me indubitable

<sup>89</sup> I cannot argue this out fully in a footnote, but the lawyer who wishes to challenge or by-pass *Roe v. Minister of Health* [1954] 2 Q.B. 66 will find ammunition in *Dodd v. Wilson* [1946] 2 All E.R. 691, and *Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 A.C. 454.

<sup>90</sup> *Lockett v. A. & M. Charles Ltd.* [1938] 4 All E.R. 170.

that all later cases treat the ratio of *Dunlop v. Selfridge* as concerned with the privity rule and not the consideration rule.

It will be seen that my conclusions here lend weight to my preliminary observations about the nature of the rules relating to consideration. If, as I suggest, these rules are merely guides which are used by the Courts to help them in deciding whether it is just and politic to enforce a promise, no surprise need be occasioned by this conclusion. If a promisor receives a real and substantial consideration from a third party, this is itself a perfectly good reason, in most cases, for enforcing the promise at the suit of the promisee. And so the Courts hold.

#### THE ENFORCEMENT OF GRATUITOUS PROMISES

It is, of course, an integral part of the orthodox doctrine that gratuitous promises are not enforced by the Courts except when they are under seal. So long as a 'gratuitous promise' is defined as meaning a promise without any consideration (as that word is in practice understood by the Courts) then this conclusion is not merely sound but self-evident. But if the term 'gratuitous promise' means what it means in ordinary speech, namely a promise to make a gift, then the proposition is not sound. No promise is enforced by the Courts unless there is some good reason (or consideration) for its enforcement; and the mere desire to make a gift is not a sufficient reason standing alone. Nor, according to the traditional view of the common law, is it a sufficient reason that a man is morally obliged to keep his word. But all this is just as true of commercial promises as it is of gratuitous promises. In both cases some good reason (or consideration) for enforcement must be shown, though it hardly need be stated that such reasons (or considerations) are more commonly found in the former than in the latter case.

I have already discussed one group of gratuitous promises which are regularly enforced by the Courts, namely, those cases in which the promisee has performed some act in reliance on the promise which makes it just to enforce the promise. I must now go on to consider the area of quasi or promissory estoppel. I propose to refer to this as promissory estoppel.

#### *The frontier between promissory estoppel and unilateral contracts*

Orthodox theory draws a firm line between a promise given for consideration, and a promise enforceable on the ground of promis-

sory estoppel. In the case of a promise for an act, the distinction comes down to a very fine point. If the act is stated or specified (or possibly if it is requested) by the promisor, then the promise is enforceable in the ordinary way; the performance of the act is a good consideration. If the act is done by the promisee in reliance on the promise, but it has not been requested or stated or specified by the promisor, then orthodoxy asserts that there is no consideration, though there is a sufficient reason for giving the promise the limited validity recognised by promissory estoppel. It may help to see this distinction in perspective if the following possible fact situations are differentiated.

1. The promisor requests and desires the act, and the act confers a benefit on him, e.g. A promises commission to an estate agent if the agent introduces a purchaser who buys A's house. This promise is enforceable.

2. The promisor requests and desires the act, but it confers no direct benefit on him, though it involves a factual detriment to the promisee, e.g. A promises to give B the price of a house if B enters into a contract to purchase it from a third party. This promise is enforceable.<sup>91</sup>

3. The promisor requests and desires the act though it confers no direct benefit on him and involves no factual detriment to the promisee, e.g. A promises to give his son £100 if the son refrains from smoking until he is 21. This promise is enforceable.<sup>92</sup>

4. The promisor states the act to be performed by the promisee, but does not request or desire it; it confers no benefit on him though it might involve a factual detriment to the promisee, e.g. a father promises to give an allowance to his daughter if she should decide to leave her husband. This promise is, I submit, enforceable if the promisee *acts* on it.<sup>93</sup>

5. The promisor does not state any act which is to be performed by the promisee but it is reasonably implicit that such an act is requested or desired by him, e.g. A promises additional payment to his creditor without stating that he asks for more time to pay, but it

<sup>91</sup> *Crosbie v. M'Doual* and *Skidmore v. Bradford*.

<sup>92</sup> *Hamer v. Sidway*.

<sup>93</sup> This is Goodhart's view, 67 L.Q.R. 456, and 69 L.Q.R. 106. I submit below that the law goes well beyond this, or at least that it did so in the last century.



is reasonably implicit in the circumstances that this is what he wants. This promise is enforceable.<sup>94</sup>

6. The promisor does not state any act which is to be performed by the promisee but the promisee does act in reliance on the promise in a way which was the natural and foreseeable result of the promise. This promise is said to be not enforceable as a contract, but enforceable to the limited extent recognised by promissory estoppel.

7. The promisor states the act to be performed by the promisee, and the promisee performs some other act which is a necessary step towards the performance of the act stated by the promisor, but he does not perform the act stated. The promisee cannot enforce the principal promise but may in some circumstances be able to enforce an implied subsidiary promise.<sup>95</sup>

8. The promisor does not state any act which is to be performed by the promisee, but the promisee acts in reliance on the promise in a way which the promisor had no reason to anticipate.

9. The promisee does not act on the promise at all.

I do not suggest that the above list is an exhaustive statement of the possibilities; indeed, there are plainly other permutations and combinations, but this list will suffice for my purposes. The crucial cases are 6, 7, and 8. Few, I think, would contend that Case 9 is enforceable in the present state of law, either as a contract or even as a case of promissory estoppel.<sup>96</sup> Certainly *some* factor must be present in this case beyond the bare fact of the promise, if the promise is to be given any recognition, and none is stated in the facts assumed. Case 8 is not a case which has been much discussed. It is, at any rate, clear that orthodoxy would not allow Case 8 to be enforced as a binding contractual promise. The case I wish to concentrate on is Case 6. This is the case of promissory estoppel, but what I want to examine here is not why this case should be enforceable (to a limited extent) as a case of promissory estoppel, but why it should not be enforced as a case of consideration.

<sup>94</sup> *Alliance Bank v. Broom* (1864) 2 Dr. & Sm. 289. Most collateral contracts also fall into this category.

<sup>95</sup> *Luxor, Ltd. v. Cooper and Errington v. Errington*.

<sup>96</sup> I have not space here to consider in detail whether the promisee must not only act, but act to his detriment; I think the latter is correct so long as 'detriment' is not understood in any technical sense, but is treated as a ground for enforcing the promise. I doubt if a nineteenth-century lawyer would have understood 'acting on a promise' to mean anything other than 'acting on it in such a way as to make it just that the promise be enforceable'. But *Foakes v. Beer* (1884) 9 App. Cas. 605 shows that merely paying part of a debt was not thought to be 'acting' on a promise to forgo the balance.

### *The factual difficulty of defining the frontier*

If the law of consideration had been recognised for what I suggest it to be, namely a set of guides for deciding whether there is good reason for the enforcement of a promise, the answer would surely have been clear. There is no natural frontier between Case 5 and Case 6. Indeed, there are frequently great difficulties in drawing the factual distinction between Case 5 and Case 6. *Combe v. Combe* is one well-known case in which the act was not stated and the Court refused to imply a statement (or request, as it was there put). On the other hand, in the collateral contract cases, the act to be performed by the promisee would rarely be expressly stated, though it would normally be implicit. The man who deals with another by professing to be an agent is clearly impliedly requesting the other to deal with him. The car dealer who gives a collateral promise to a prospective hire purchaser usually makes it fairly clear what is the act to be done by the promisee. But it is to be observed that the *precise* act need not be stated or specified for a collateral promise to be enforceable. In *Wells v. Buckland Sand*,<sup>97</sup> a collateral promise was enforced where the act was the purchase of chrysanthemum sand from a third party who himself acquired the sand from the defendant. It was held that a collateral warranty is enforceable 'notwithstanding that no specific main contract is discussed at the time it is given' although it must be shown that it was contemplated that some such contract would be entered into. No particular contract of sale or hire purchase thus needs to be identified as the one into which the promisee must enter to make the promise enforceable. But it will be seen that the less precise is the nature of the act stated by the promisor, the closer does Case 5 get to Case 6.

Next, it is to be noted that Case 6 is, or may be, very close to Case 7. In Case 7 the promisee may be given some enforceable contractual right although he has not actually performed the act stated by the promisor—though we have seen that this will only be so in somewhat rare cases.<sup>98</sup> On the other hand in Case 6 the promisee also performs some act other than the act stated, being an act which is the natural result of the promise. The fineness of this distinction in fact is illustrated by the situation in *Hohler v. Aston*.<sup>99</sup> In this case the defendant, Mrs A, promised to give a London house to

<sup>97</sup> [1965] 2 Q.B. 170.

<sup>98</sup> As shown by the discussion of *Luxor, Ltd. v. Cooper*.

<sup>99</sup> [1920] 2 Ch. 420.

Mr and Mrs R, her niece and husband. She contracted to acquire the property and Mr and Mrs R gave up the lease of their country property and moved into the London house. The defendant then died before the property had been transferred to her or to Mr and Mrs R. Sargant J. was able to decide the case in favour of the plaintiffs without having to consider whether the facts already stated were sufficient to enable Mr and Mrs R to enforce the aunt's promise. But he expressed the view that the promise would probably not have been enforceable, although he acknowledged the hardship which this would have entailed for Mr and Mrs R. If they had given up their country house at Mrs A's request, this would have rendered the promise enforceable, but because this was not actually stated as an act to be performed by them, the promise was (he thought) unenforceable. This distinction is exactly the orthodox doctrine, but the distinction seems so fine as to be virtually unintelligible. It seems most undesirable to decide a case of this kind on such a point because the whole issue would turn on oral evidence as to whether the aunt ever said to Mr and Mrs R that they must give up their country property and come and live in the London house. It is probable that recollection of oral discussions to this degree of accuracy would be impossible, and that the decision would actually turn on findings of fact which are bound to be unreliable. Perhaps if the decision had actually turned on this issue Sargant J. would have been prepared to imply a request. It could not be said that this was a *necessary* implication of the defendant's conduct; doubtless Mr and Mrs R could have retained the lease of their country house while going to live in the London house. But the possibility of implying a request where the Court feels it necessary to do justice is another confirmation of the unreality of the factual distinction between Case 5 and Case 6.

#### *Policy arguments for maintaining the frontier*

But even if these arguments are not felt to be convincing, it remains to inquire whether there can be any rational ground for distinguishing between Case 5 and Case 6. I have already indicated that this seems to me an impossible line to maintain. So long as it is believed that all contracts are bargains, there is some rational ground for requiring that the act to be performed by the promisee must be stated, if not actually requested, by the promisor; but once it is agreed that many promises are enforced though they are not bar-

gains, it is hard to see what rational purpose is intended to be served by the insistence that the act must be stated. The natural place to draw a line in the above listed cases is not between Case 5 and Case 6, but between Case 7 and Case 8. The difference between an act done by the promisee which is impliedly stated by the promisor, and an act done in natural and foreseeable reliance on the promise seems much less substantial than the distinction between the latter case and an act in reliance which could not have been anticipated by the promisor. That is not to say that even this last case may not, in certain circumstances, be thought to be a promise worthy of enforcement.

### *The authorities*

I turn, now, to inquire whether the orthodox distinction between Case 5 and Case 6 is in fact supported by the actual decisions of the Courts. And here we find a somewhat paradoxical situation. By the time of the *High Trees* decision in 1946, orthodox opinion had become so hardened in the view that gratuitous promises were never enforceable and that only bargains could constitute contracts, that orthodox lawyers could not believe that the dicta of Denning J. in that case could be sound law. When the issue came up again in *Combe v. Combe*, even Denning L.J. (as he had then become) resiled from the view that a *High Trees* type of promise could be fully enforceable as a contractual promise. *Combe v. Combe*, it will be recalled, involved the enforceability of a promise by a husband to pay his wife £100 per annum on their separation. The wife did not apply for maintenance to the Court, nor did she make any attempt to enforce the husband's promise for a period of some six years. She then sued the husband for £600. At first instance Byrne J. applied the dictum of Denning J. in the *High Trees* case and gave judgment for the wife. The judgment of Byrne J. gives no hint that the learned judge thought that he was doing anything very radical or unprecedented in enforcing the husband's promise. Perhaps he thought that the husband had impliedly requested that the wife should forbear from applying for maintenance. But even if he had thought that there was no such implied request, his decision would have been perfectly explicable in terms of the existing case law. As we have already seen, a forbearance (or an act) which naturally and foreseeably follows a promise had been previously held to be a good consideration for the enforcement of a promise in a

number of situations. When *Combe v. Combe* came before the Court of Appeal, however, that decision was reversed. The Court first held that there was no implied request by the husband that the wife should forbear; and even if they were wrong in thinking that a request (as opposed to a statement of the act or forbearance) was necessary, the absence of an implied request must have also led to the view that there was no implied statement in that case. Perhaps the Court should have implied a request as Professor Goodhart cogently argued.<sup>1</sup> Certainly they *could* have done so without doing the least violence to the facts. Why then did they not do so? I submit that they did not do so because they did not feel that the justice of the case required it. Denning L.J. himself made no secret of his views as to the merits of the case:

The doctrine of consideration is sometimes said to work injustice, but I see none in this case . . . I do not think it would be right for this wife, who is better off than her husband, to take no action for six or seven years and then come down on him for the whole £600.<sup>2</sup>

With this statement I find myself in complete sympathy. I have already suggested that the changing moral values of our society may well mean that a man would not necessarily be regarded as under any obligation to maintain a separated wife where she has an income as large as his own. It is true that the addition of an express promise may suffice to create such an obligation but in this situation the length of time which had elapsed since the promise was made had completely altered the nature of the promise which the wife was trying to enforce. What the husband promised was an income of £100 per annum, a matter of £2 per week. What the wife was trying to enforce was payment of a lump sum of £600. While I would freely admit that two views may be possible as to the merits of the case, I find it hard to believe that the Court of Appeal did not regard the merits as with the husband. Had they wished to find in favour of the wife it would have been so easy to imply a requested forbearance that it is hard to believe they did in fact wish to do so.

If we pause here for a moment, what did *Combe v. Combe* actually decide? The common (and now orthodox) interpretation of the case is that it decides this: that action by a promisee in reliance on a promise (where the action is not requested or stated) is not

<sup>1</sup> 67 L.Q.R. 456, 69 L.Q.R. 106.

<sup>2</sup> At p. 222.

directly enforceable by the promisee, but may be set up by him as a defence to proceedings by the promisor. Once again I feel obliged to depart from orthodox doctrine. I would suggest that, on the contrary, the case decided nothing more than this: that an act (or forbearance) which naturally and foreseeably follows from and in reliance on a promise is not a consideration for the enforcement of the promise *where the justice of the case does not require that it should be*. So viewed the decision is perfectly in line with older cases. Among these cases are the ones to which I have already made reference, namely *Dillwyn v. Llewellyn*, and the line of authorities following it, and culminating in *Inwards v. Baker*. There is no doubt that the principle stated in these cases is flatly inconsistent with orthodox doctrine; for these cases stand for the principle that if a man promises to give another some land, and permits the other to build a property on his land, then even though he has not requested or stated that such building is the act on which his promise becomes enforceable, the promise will be enforceable. As I have already pointed out, the judges who decided these cases did not find anything inconsistent between the notion of requiring a consideration for the enforcement of a promise, and yet enforcing the promises in these cases. I have also pointed out that attempts have been made by orthodox lawyers to 'explain' away these decisions, but the need for such 'explanations' only arises because of the conviction that they are inconsistent with some 'doctrine' for which there was (in this respect) no contrary authority.

By the time that the last of these cases, *Inwards v. Baker*, was decided, the *High Trees* case had itself become the new orthodoxy; or at least it had become the new orthodoxy as orthodoxy interpreted *Combe v. Combe*. So the plaintiff in *Inwards v. Baker* did not (presumably for this reason) try to enforce his father's promise to give him the land on which he had built his bungalow; he merely invited the Court to say that he could remain in the bungalow as long as he wished. To this the Court acceded. Here is a paradox indeed. The *High Trees* principle, as cut down by the generally accepted interpretation placed on *Combe v. Combe*, was not the radical and forward-looking innovation that it was thought by orthodoxy to be. It was, on the contrary, a reactionary step. It did not create new defences to actions which would previously have found the defendant helpless. On the contrary, it refused to recognise

as a consideration what earlier Courts were willing to recognise as consideration.

I do not rely solely on *Dillwyn v. Llewellyn* and the cases following it for my view that an act done in reliance on a promise may be a good consideration even though it is not stated or requested by the promisor as an act to be performed by the promisee. These particular cases may be explained away as anomalous or exceptional. I therefore turn to an examination of the House of Lords' decision in *Jorden v. Money*<sup>3</sup> which lies at the heart of this whole question. The treatment of this case by lawyers during the past thirty-five years is one of the most extraordinary chapters in the whole law of consideration,<sup>4</sup> and must make one wonder whether lawyers actually read the cases which form the pillars of orthodoxy.

The facts in *Jorden v. Money* were as follows. The plaintiff M had executed a bond for £1,200 in favour of one C, and on C's death the bond had passed to C's widow, the defendant, Mrs J. The defendant had frequently stated to M and others that the debt was gone, and that she would never enforce it; she repeated these statements at a time when M was contemplating marriage. In reliance thereon M did marry; subsequently Mrs J married and demanded payment on the bond. The plaintiff therefore brought an action in equity asking for an order that the bond be given up and cancelled. It was held that the action should be dismissed. Now, what did this case decide? The commonly accepted view is that the case decided that a representation of intention cannot be the foundation for an estoppel; estoppel can only arise from a statement of fact. Therefore, although the plaintiff relied on Mrs J's representations of intention by marrying, he could not plead estoppel. Naturally this causes great difficulty to the new orthodoxy which now (I think) recognises the defence of promissory estoppel based on a representation of intention. How can this be reconciled with *Jorden v. Money*? One suggestion is that that case was a decision at common law, while promissory estoppel is an equitable development.<sup>5</sup> But this will not do; *Jorden v. Money* was a decision in equity on appeal from the Chancery Court of Appeal. Another explanation is that *Jorden v.*

<sup>3</sup> (1854) 5 H.L. Cas. 185.

<sup>4</sup> See, for a typical example, Jackson, 81 L.Q.R. pp. 87-95. This treatment of *Jorden v. Money* is also to be found in the Sixth Interim Report of the Law Revision Committee in 1937, para. 40, but I have not attempted to trace it back further.

<sup>5</sup> This seems to be the explanation hinted at in Cheshire & Fifoot, *op. cit.*, p. 83.

*Money* does not lay down an absolute rule; exceptions to it may be justified.<sup>6</sup> Another suggestion is that Mrs J did not intend to be legally bound by her promises,<sup>7</sup> and there are remarks by Lord Cranworth which would support this,<sup>8</sup> though the suggestion is difficult to reconcile with some of the evidence, and it would anyhow involve rejection of most of the speeches as erroneous dicta.<sup>9</sup> Another suggestion is that promissory estoppel is not really estoppel at all.<sup>10</sup> Another is that the new promissory estoppel has a more limited effect than a 'real' estoppel,<sup>11</sup> and another is that the decision was wrong.<sup>12</sup>

The truth is that there is a very much simpler explanation of *Jorden v. Money* which seems to stare in the face anyone who actually reads the report. Discussions of the case all start with the assumption that the plaintiff could not enforce the defendant's promise in contract because he could show no consideration; and it is for this reason that (it is assumed) the plaintiff relied on estoppel. The truth is precisely the opposite. The plaintiff could have proved a good contract; in fact he *did* show a good contract, and that is precisely why he failed. To understand this paradoxical statement it must be recalled that the Statute of Frauds required at this time that a promise in consideration of marriage must be proved in writing. The only act in reliance on the promise which the plaintiff could show was his marriage; *but he had no written note or memorandum signed by the defendant*. His counsel, therefore, deliberately refrained from arguing his case in contract but relied on estoppel. The whole point of the case (at all events as it developed in the House of Lords) was whether the plaintiff was entitled to do this. Could he evade the Statute of Frauds by calling his cause of action estoppel instead of contract? Had this stratagem succeeded, a blow would have been dealt to the Statute of Frauds greater than anything that had gone before; for it would have meant that any plaintiff who

<sup>6</sup> Anson on *Contracts*, 23rd ed., pp. 106-7.

<sup>7</sup> Lord Denning in the *High Trees* case [1947] K.B. 130, 134.

<sup>8</sup> Although the defendant repeatedly said that she would not enforce the bond she refused to give it up physically; the difficulty was to draw the correct inference from this fact. Lord Cranworth thought that it showed she did not mean to be bound in law but in honour only (5 H.L. Cas. 221-2); but another explanation which the defendant herself gave was that she hoped one day to enforce the bond against the plaintiff's co-obligor, who was, however, bankrupt at the time.

<sup>9</sup> Not to mention the many cases in which *Jorden v. Money* has been followed, see, e.g., *Maddison v. Alderson* (1883) 8 App. Cas. 467; *Nippon Menkwa v. Dawson's Bank* (1935) 51 Ll.L.R. 146.

<sup>10</sup> Treitel, *op. cit.*, p. 98.

<sup>11</sup> Wilson, 67 L.Q.R. 330.

<sup>12</sup> Jackson, 81 L.Q.R. 84.



could show that he had altered his position in reliance on the defendant's promise could ignore the Statute and rely on estoppel.<sup>13</sup> And since at this time the distinction between estoppel as a cause of action and as a ground of defence was not established, the threatened evasion of the Statute would have seemed even wider than it might today. It is, therefore, quite understandable that the House of Lords should not have sanctioned the plaintiff's claim.

That this is the true explanation of the case seems to me borne out by the whole of the report, but as this explanation appears to run counter to everything said about the case since, I must justify my assertion by detailed reference to the report itself.

I look first at the arguments and there I find that the plaintiff's counsel, Mr Roundell Palmer (afterwards Lord Chancellor Selborne), argues that the Statute of Frauds does not apply:<sup>14</sup>

MR PALMER: 'The first question on this point is, whether this is a case in which the Statute of Frauds applies at all. The respondent relies on two grounds of equity;<sup>15</sup> first, that there having been an assurance of the creditor that the bond should not be enforced, a marriage took place on the faith of that assurance. The Statute of Frauds cannot apply to such a case.'

THE LORD CHANCELLOR: 'It does not apply if the party was led into the marriage by a misrepresentation of fact; but the question is, whether, when the creditor says, "I have abandoned" (supposing her to have said so), she means more than "I will not enforce"; and then the further question is, whether that is not a contract to which the Statute is applicable.'

MR PALMER: 'It is not: the statute says, "nor upon any agreement made upon consideration of marriage". This was not so made: it is a promise with reference to a marriage, a promise of a creditor not to enforce a claim; but it is not a promise the consideration of which, in the legal sense of the words, is a marriage.'

The real issue in the case could hardly be more clearly put. Palmer is arguing that a representation of intention followed by marriage in

<sup>13</sup> Viewed in this light it will also be seen that the plaintiff's case was in a sense based on his 'part-performance' (i.e. the detrimental act which formed the basis of the alleged estoppel) and the decision was therefore a forerunner of *Maddison v. Alderson*.

<sup>14</sup> 5 H.L. Cas. at pp. 206-7.

<sup>15</sup> The second point was an attempt to set up a wholly independent consideration (which did not move from the promisee) but which failed on the evidence.

reliance thereon differs from a promise supported by the consideration of the marriage. Lord Cranworth disagrees.

In his judgment Lord Cranworth maintains this opinion:

I think that that doctrine [estoppel] does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not; what is here contended for, is this, that Mrs. Jorden, then Miss Marnell, over and over again represented that she abandoned the debt. Clothe that in any words you please, it means no more than this, that she would never enforce the debt; she does not mean, in saying that she had abandoned it, to say that she had executed a release of the debt so as to preclude her legal right to sue. All that she could mean, was that she positively promised that she never would enforce it. My opinion is, that if all the evidence had come up to the mark, which, for reasons I shall presently state, I do not think it did, that if upon the very eve of the marriage she had said, 'William Money, I never will enforce the bond against you,' that would not bring it within these cases. *It might be, if all statutable requisites, so far as there are statutable requisites, had been complied with, that it would have been a very good contract whereby she might have bound herself not to enforce the payment. That, however, is not the way in which it is put here; in short, it could not have been, because it must have been a contract reduced into writing and signed; but that is not the way in which this case is put; it is put entirely upon the ground of representation.* Now my Lords, I think that the not adhering to this statement, call it contract or call it representation, is no more fraud<sup>16</sup> than it would be not adhering to her engagement if she had said, 'Mr William Money, you may marry; do not be in fear, you will not be in want; I promise to settle £10,000 Consols upon you.' *If she does not perform that promise, she is guilty of a breach of contract, in respect of which she may be sued, if it is put into a valid form, but not otherwise;* so if she had said, as she did to William Money, 'I mean to give you everything I am worth in the world; I promise to do so' her not doing so, is no fraud in the sense in which these cases speak of fraud; it is no misrepresentation of a fact which the party is afterwards held bound to make good as true; it seems to me that the distinction is founded upon perfectly good sense, and that in truth in the case of what is something future, there is no reason for the application of the rule, because the parties have only to say, 'Enter into a contract,' and then all difficulty is removed.<sup>17</sup>

I do not see how the point could be more clearly put. Estoppel is a necessary part of the law where the misrepresentation is one of

<sup>16</sup> Had there been fraud of course the Statute of Frauds could have been by-passed because it was already well established that the Statute was not to be used as an instrument of fraud.

<sup>17</sup> 5 H.L. Cas. at pp. 214-17. The italics are mine.

fact because that cannot be enforced as a promise.<sup>18</sup> It is unnecessary where the misrepresentation is one of intention because there is no difference between such a misrepresentation followed by reliance and a promise given for consideration.<sup>19</sup> Lord Brougham, the concurring judge, does not expressly deal with the Statute of Frauds but he also makes it plain that in his opinion the defendant *promised* that she would not enforce the bond.<sup>20</sup> I have no doubt that Lord Brougham, like Lord Cranworth, would have regarded that promise as made for consideration and enforceable if it had not been for the Statute of Frauds, subject perhaps to the argument that Mrs Jorden intended to be bound in honour only. The dissenting judge, Lord St Leonards, thought that the principle of estoppel could be applied to a representation of intention. But he too makes it clear that he is not treating promissory estoppel as a doctrine which can only be used when there is no contract, but as a doctrine which may legitimately be used by the Courts even where there is a contract which is unenforceable under the Statute of Frauds.

Your lordships are asked to consider that a representation of an intention is not a binding act, and that you cannot misrepresent what you intend to do. But if you declare your intention with reference, for example, to a marriage, not to enforce a given right, and the marriage takes place on that declaration, I submit that, in point of law, that is a binding undertaking.<sup>21</sup>

I cannot quote here the whole of Lord St Leonards's judgment but anyone who cares to read it for himself will see that the question to which he adverts throughout is whether the misrepresentation of intention can be sued on despite the Statute of Frauds.<sup>22</sup>

<sup>18</sup> Lord Cranworth was not to know that such misrepresentations were very soon to become enforceable as implied promises in a wide variety of cases.

<sup>19</sup> This is also confirmed by Lord Cranworth's speech only a few months before *Jorden v. Money* in *Maunsell v. Hedges* (1854) 4 H.L.C. 1039, at pp. 1055-6, in which he explicitly states that there is no difference between a promise intended to be and in fact acted upon, and a contract; 'they are identical'.

<sup>20</sup> 5 H.L. Cas. at p. 227.

<sup>21</sup> *Ibid.*, pp. 251-2.

<sup>22</sup> Lord St Leonards also argued that estoppel based on a statement of fact was itself invented partly in order to evade the Statute of Frauds and that there was therefore no reason why the Courts should be afraid to use statements of intention in the same way. Support for this is to be found in *Pickard v. Sears* (1837) 6 Ad. & E. 469, 474. If this is right, it seems that the doctrine of estoppel by representation may have had its origins in the attempts to evade the Statute of Frauds, and that without the Statute, cases of estoppel might from the beginning have been treated as contractual misrepresentations.

*The true view; an unnecessary frontier*

It will be seen, therefore, that virtually all modern academic (and much judicial) discussion of promissory estoppel has been entirely beside the point. This discussion invariably takes as its starting point the assumption that the performance of an act in reliance on a promise, not requested or stated by the promisor, cannot be a good consideration. If this assumption is unfounded then there is not, and never has been, any need for promissory estoppel.<sup>23</sup> *Jorden v. Money*, far from being (as the new orthodoxy would have it) a difficult obstacle in the way of recognition of promissory estoppel, is a clear indication that promissory estoppel was never necessary at all. The facts of *Jorden v. Money* are the clearest possible example of my Case 6 that I have been able to find. The plaintiff undoubtedly married in reliance on the defendant's promise but the defendant never requested the marriage nor did she promise to release the debt if and when the plaintiff married. Her promise was, indeed, originally made before any question of marriage was in contemplation; it was repeated time and again and the plaintiff acted upon it by his marriage. I have myself no doubt that, as the law was then understood, this was a good consideration for the enforcement of the promise which would (apart from the Statute of Frauds) have been enforced by the House of Lords in 1854.

I do not, of course, mean to say that nineteenth-century Courts would have held that a promise always becomes enforceable whenever the promisee acts in reliance on it (even though the act is not requested or stated by the promisor). But what I suggest is that the Courts were at that time prepared to enforce such a promise where they felt that the justice of the case required it.<sup>24</sup> If this was so, then there was good reason (or consideration) for enforcement in the promisee's actions in reliance on the promise. Alas, the new orthodoxy has now itself grown so strong and vigorous that it may be too late for the Courts to recognise what they have actually done; and I am not vain enough to suppose that this lecture can repair the damage. I console myself with the belief that the process of

<sup>23</sup> It might, of course, be argued that estoppel is a useful device in *limiting* the enforceability of promises, but needless to say it has never been put forward as such.

<sup>24</sup> This is, of course, the position taken by the American Restatement of Contracts, §90. It is well known that Corbin wanted to see 'action in reliance' treated as 'consideration' but in the result the Restatement treats such promises as enforceable contracts without consideration.

implying a request or statement of the act to be performed by the promisee is so easy that no Court which wishes directly to enforce a promise in this sort of case need find any difficulty in doing so. And I may illustrate that this can and still does happen by referring again to *V/O Rasnoimport v. Guthrie & Co. Ltd.* The consideration for the enforcement of the promisor's implied warranty of authority in this case was held to be the act of the plaintiffs in taking up the bill of lading in due course of business. It seems to strain the meaning of words to say that the defendants requested anyone to take up the bill of lading; it even strains the meaning of words to say that the defendants promised that they had authority to sign the bill of lading and impliedly stated to the world that the promise was to take effect on the taking up of the bill of lading. It is much more in accordance with reality to say that the defendants impliedly warranted their authority and that in the ordinary course of business the plaintiffs relied on this statement by taking up the bill of lading.

There is one final point to be made on the doctrine of promissory estoppel. It will be remembered that in the *High Trees* case itself the promisee had not acted on the promise by changing his position in any way. The only sense in which he had acted on the promise was that he had paid rent at the reduced rate allowed by the promisor. Lord Denning, then and later, has insisted that there is no need for a promisee to show that he has changed his position by acting on the promise; it is enough that he has in fact acted on it. If this were indeed so, then I would agree that this case did mark a development of the law. Moreover, the distinction between enforcing such a promise as a shield and enforcing it as a sword would then make more sense; for it would mean that a promise to waive a debt or part of a debt could be relied on by the promisee with no consideration beyond the moral obligation of the promisor. But this is not the way in which the doctrine of promissory estoppel has in fact developed. With the exception of Lord Denning himself it is still generally insisted that the promisee must change his position by *acting* on the promise before he can rely on it; and it is this requirement of an act which makes nonsense of the whole doctrine of promissory estoppel. For if the promisee acts on the promise in this sense I submit that this can be a sufficient consideration for the enforcement of the promise.<sup>25</sup>

<sup>25</sup> This is supported by a number of Australian decisions which appear to treat the principle of *Hughes v. Metropolitan Railway* (1877) 2 App. Cas.

This is already a very long lecture and I have not space here to develop fully my ideas about the reform of the law of consideration. But there are, I suggest, important conclusions to be drawn from what I have tried to demonstrate. The first is that to talk of abolition of the doctrine of consideration is nonsensical. Consideration *means* a reason for the enforcement of a promise. Nobody can seriously propose that all promises should become enforceable; to abolish the doctrine of consideration, therefore, is simply to require the Courts to begin all over again the task of deciding what promises are to be enforceable. They will, of course, have to use new technical justifications for this task, and the obvious one that lies to hand is the 'intent to create legal relations'. No doubt there is something to be said for beginning this task all over again, and for using a new technique for the purpose. Changes in social and commercial conditions, and changes in the moral values of the community, mean that the Courts will not always find the same reasons for the enforcement of promises to be good today as their forbears did; equally, it is likely that they will often find good reasons for the enforcement of promises where their predecessors did not. Moreover, I think there is less likelihood of the 'intent to create legal relations' formula ossifying into a 'doctrine'; though there is the converse danger that its application may create uncertainty as to what promises will be enforceable. But I question whether the 'intent to create legal relations' formula will in the long run work any better than the rules of consideration.

In particular, I believe that the problems arising from the enforcement of gratuitous promises are too complex to be adequately dealt with by either the rules of consideration or the 'intent to create legal relations' formula. I believe that it will be found more fruitful to concentrate on variations in the degree of enforceability of promises. By this I mean that it may be found desirable to enforce gratuitous promises in a much wider range of circumstances than exists at the moment, but not to the same extent as ordinary commercial promises. For instance, it may be found wise to render many

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439 as an instance of waiver *supported by consideration*; the action (or inaction) of the promisee which is induced by the promise is a sufficient consideration for its enforcement. See, e.g., *Barns v. Queensland National Bank Ltd.* (1906) 3 C.L.R. 925; *McNaghten v. Paterson* (1908) 6 C.L.R. 257; *Mulcahy v. Hoyne* (1925) 36 C.L.R. 41.

gratuitous promises enforceable in principle against the promisor, but not necessarily against his executors. Whether *this* would be just may well depend on his family obligations, and the solvency of his estate. It may be wise to provide for a much wider defence of frustration in the case of gratuitous promises. A man promises his son an allowance while the latter is at the university; it may be just and equitable to enforce this promise, but would it remain just and equitable if the promisor became incapacitated and lost his job? Perhaps, too, a wider latitude should be allowed to some form of defence based on mistake. Perhaps we need to consider the possibility of the conduct of the promisee depriving him of the right to enforce a gratuitous promise. Different remedies may also be advisable for breach of gratuitous promises. For instance, we may need to consider the application of a different measure of damages for gratuitous promises. Perhaps we need to consider a shorter limitation period. And perhaps after all some gratuitous promises may be better treated as merely giving rise to a defence than a cause of action.<sup>26</sup> Certainly we shall need to consider whether the same rules will be appropriate for all kinds of gratuitous promises. A promise to render gratuitous services is not necessarily in like case with a promise to make a cash gift; and a promise of money to a charity is not necessarily the same as a promise made to a member of the family. In short we must look to the reasons (or considerations) which make it just or desirable to enforce promises, and also to the extent to which it is just to enforce them.

<sup>26</sup> So perhaps after all the modern orthodoxy may have something to be said for it. But the distinction between enforcing a promise as a sword and not just as a shield must be based on some more rational basis than the wholly artificial distinction recognised by the new orthodoxy. The *nature* of the promise is far more important than the question whether the promisor has requested or stated the act to be performed.

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