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THE EVOLUTION OF "CAUSA" IN THE CONTRACTUAL OBLIGATIONS OF THE CIVIL LAW

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THE EVOLUTION OF CAUSA IN THE CONTRACTUAL OBLIGATIONS OF THE CIVIL LAW

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In the modern Civil law a causa or cause is generally recognized as an essential element in every contractual obligation. It is the purpose of this essay to trace the development of this principle from its origin in the Roman law to the present time, indicating its nature and application throughout the varying and progressive course of jurisprudence.

In the early Roman law the term causa was not used in connection with contracts or obligations in any juristic sense. Generalizations are beyond the primitive intellect; its notions are simple and separate, and every right, every legal duty and relation, is adopted specifically. When the conception of a contractual obligation first appears there is no recognition of general characteristics common to all such obligations as known to us; even consent is quite disregarded, and, a fortiori, there remains unrecognized any merely rational ground for the enforcement of an obligation, such as gain or loss to either party, or a natural desire of the one to benefit the other. The attention is directed chiefly to the contract, which is more material than the obligation it contains; and in the formation of the contract there is required something more impressive than economic or social considerations; some striking formal act is demanded, and this alone is recognized, or, at least, is alone recognized as essential.

We therefore find in the Roman law that the earliest contract, the nexum, was most rigidly formal; the presence of the libripens and five witnesses, the acts done per aes et libram, and the technical dare damnas esto, uttered by the lender against the borrower—these were the essential elements in the formation of the contract and the creation of the obligation. And, as the system of obligations gradually broadened, each step consisted in admitting, as forming a contract, acts or relations of a particular kind. The mutuum thus arose from the nexum after the lex Vallia had deprived the latter of its binding force over the person of the debtor.

On the basis of the ancient mancipatio, which was a most formal transfer of property per aes et libram, there was developed the mancipatio fiduciae causa, a form of contract applicable, so far as regards its

nature, to all cases involving a delivery of goods which were later to be restored. As the industrial activities of the people increased, the peculiar, time-wasting formalities of the fiducia were discarded, and in its place appeared the commodatum, depositum and pignus.

Thus from the nexum and the mancipatio fiduciae causa arose the nominate real contracts, each with its restricted sphere and definite marks of identity, the only general characteristic recognized being the delivery of a res. Though in the mutuum and commodatum there was present a decided advantage to the recipient, the principal obligor, this was quite indifferent in their legal aspect, since they were classified as correlative with the pignus, where the benefits were mutual, and the depositum, where accruing only to the depositor.

The stipulatio, arising from the ancient religious sponsio, was also formal, the essential requirements consisting of a question and an answer corresponding thereto; it required no mention of any economic or other rational ground in its formation, and, in its early history, was unaffected by the absence, failure or insufficiency of any such considerations.

The same is true of the literal contract, consisting in the nomen transscripticium, or entry of a debt, with the assent of the debtor, in the creditor's codex accepti et expensi. Usually some sensible transaction lay behind these entries, but this was a matter of indifference to the law; let the formal requirements be fulfilled, and there was an enforceable obligation, whatever else might be lacking.

In the consensual contracts, which were of later recognition, the bare mutual agreement was sufficient, without artificial forms or performance by one of the parties. Here we seem to have the universal modern idea of a contract, but Roman jurisprudence limited this class to four of the most common kinds of business transactions: emptio venditio, locatio conductio, societas and mandatum; and never, during the existence of the empire, were any other agreements admitted. Thus it stopped far short of any general idea of contract as based on the consent of the parties. Moreover, though in three of these contracts mutuality was demanded by their very nature, the presence of the fourth proves that this was not recognized as a controlling element; such recognition would also have logically resulted in the inclusion of other mutual agreements, such as exchange, which contains virtually the same elements as sale. But the law continued in its long-accustomed method of expanding the system of contracts by adopting specific kinds by their particular names—not by recognizing certain elements as common to all.

The development of this contract system was completed before the close of the Republic. Thus far there was no mention of causa as a necessary ingredient in any contract, and still less so regarding contracts in general. Considering the mode of development, there was little need of such a principle; each contract had its own peculiar features, and these were far more perspicuous and more easily applied as a test than an idea such as causa, which has exercised, often without

satisfactory results, the analytic power of nineteenth century jurists. Moreover, causa is directly related only to the obligation a contract contains, not to the contract itself.

It is true that modern treatises on Roman law apply the term causa civilis to the res, verba, litterae and consensus upon which the classes of the above contract system are based;[1] but such a technical term was quite foreign to Roman jurists.[2] In the Corpus Juris we find but one instance of causa civilis being employed: in *Dig.* 15, 1, 49, 2, Pomponius says: "Ut debitor vel servus domino vel dominus servo intellegatur, ex causa civili cômputandum est;" here there is no technical use of the term,[3] for he continues, by way of illustration: "ideoque si dominus in rationes suas referat se debere servo suo, cum omnino neque mutuum acceperit neque ulla causa praecesserat debendi, nuda ratio non facit eum debitorem;" thus by causa civilis is merely meant such a ground as would bind a free man both by the Civil law and by natural reason.[4]

The word causa in Roman law as well as in the Latin language was one of common use and varied signification. Its primary meaning was that of cause, ground, reason, etc., but its derived meanings gradually passed from the nearer to the more remote. In many instances its signification is indefinite, not rigidly controlled by the context, and allowing more or less different interpretation; and the difficulty of precision is increased by the fact that, though some of its meanings are clearly distinct, others gradually coalesce.[5]

In the Corpus Juris we find as causae of obligations contractus and delicta, together with the peculiar facts quasi ex contractu and quasi ex delicto, which were grouped as variae causarum figurae.[6] Causa is here employed in its ordinary sense of cause, these juristic relations being viewed as faits générateurs d'obligations.[7] No analysis of an·

[1] Hugo, *Civilistische Magazin*, I, 191, note.

[2] Accarias, *Preécis de droit romain* (4. ed.), II, 16, note. He criticises severely the common usage of this term, saying: "Pour qui n'a pas de parti pris, ou elle ne signifie rien, ou elle désigne un élément de création legale. En ce sens, il y a certainement une causa civilis dans les contrats verbis et litteris, * * * mais dans les contrats réels ou consensuels on ne peut plus découvrir aucune causa civilis, puisque les conditions qu'ils supposent dérivent toutes de la nature des choses."

[3] Idem: "Si la théorie de la causa civilis est fausse comme théorie générale, l'expression elle-même, dans le sens que les interprètes ont voulu lui donner ici, n'est pas non plus romaine." Cf. Hugo's *Lehrbuch eines civilistischen Cursus*, III, 281; and Maynz, *Cours de droit romain*, II, 191, note.

[4] Glossa: "Ex qua causa liber homo obligatur civiliter et naturaliter, ex eadem causa servus obligatur naturaliter tantum."

[5] Brissonius, *De verborum significatione*, enumerates thirteen different meanings of causa, Dirksen's *Manuale* gives eleven, and Heumann's *Handlexikon* has eight, some of them with extended subdivisions.

[6] Dig. 44, 7, 1, pr.

[7] Ruben de Couder, *Resumé de droit romain*, 360.

individual obligation was involved, no attempt to discover the elements essential to its validity: it was merely a general observation regarding the manner in which obligations arose. In this sense it is the cause efficiente of French jurists, having no historical or logical relation to the cause of an obligation, as recognized in the Code Civil. It is not technical, and may therefore be applied freely to the contract as well as to the obligation, signifying then the res, verba, litterae and consensus by which contracts are created.[8] It is thus that causa civilis is used by modern writers.

For purposes of treatment it will be of advantage to here distinguish between a contract and an obligation, assuming a philosophical rather than a legal point of view. A contract then appears to be a purely legal concept, having no existence without the sanction of law. Obligations, however, may be termed either natural or legal, a natural obligation being one justified by naturalis ratio, a legal obligation, one enforceable by the machinery of the law. It is evident that an obligation may be either merely natural, or merely legal, or both simultaneously.[9] With an obligation that is merely natural we have nothing to do, it having no juristic existence. Those which are merely legal are treated only by way of distinction, since, having no naturalis ratio, they have no causa, relying upon the contractual form, the causa civilis, for their validity. Only with those which are both natural and legal are we directly concerned, causa being some fact, forming a naturalis ratio, to which fact the law has given juristic force as an essential element in contractual obligations.

Returning to the contracts above enumerated, one can point out in each the causae of their obligations; but it must be remembered that the Romans did so specifically only in exceptional cases, to be hereafter set forth; though the presence of these considerations influenced their reasoning, they were seldom differentiated and generalized, and denominated causae. These causae consist generally in a dare or facere, in something objective and easy of apprehension, and also capable of economic estimation—something having a natural existence developed directly by the industrial needs of the people quite independently of law. Thus, in the real contracts the causa of the obligation of the recipient was in the delivery of the thing, the res.[10]

In the verbal and literal contracts the causa was not necessarily visible.[11] But it was none the less usually present, and finally, with the

[8] "Une causa, c'est-à-dire un fait générateur, comme la tradition, les paroles solennelles, l'écriture, et quelquefois le simple consentement." de Fresquet, *Traité élémentaire*, 206.

[9] Cf. Savigny, *Obligationenrecht*, I, §5.

[10] The causa of one of the two obligations in the contract thus coincided with the latter's so-called causa civilis.

[11] "Ein abstracter Vertrag kann nach Römischem Recht die Stipulation sein; zwar ist sie geeignet, auch den Zweck (causa stipulationis) in sich aufzunehmen

increasing influence of the jus gentium, became of decisive importance. These contracts were originally of such strict formal validity that the bare form was sufficient to make them absolutely enforceable (provided, of course, the parties were of full capacity); but in course of time the praetor began to look behind the form (causa civilis) to the transaction, and, in case of action upon a stipulatio where there was no natural obligation, no dare or facere, no causa, to grant an exceptio doli mali. It is in this connection that we meet with one of the origins of the term causa as herein employed. In *Dig.* 44, 4, 2, 3, Ulpian says: "Si quis sine causa ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiatur exceptio utique doli mali ei nocebit. * * * Et si certa fuit causa stipulationis, quae tamen aut non est secuta, aut finita est, dicendum erit nocere exceptionem."

Considering the sense in which causa is here used, it appears that, although in the first instance it may be understood merely as reason or cause, the second requires a more material signification, adding that of res to that of reason or cause. Though scarcely technical because of the latitude with which causa is employed in this fragment, taken as a whole, still, from the manner of employment in the instances cited, there seems to be the beginning of a technical application; and this is strengthened in a related passage, also by Ulpian, *Dig.* 39, 5, 19, 5: "Sed et hae stipulationes quae ob causam fiunt, non habent donationem." These passages suggest that, in treating of the validity of stipulations after they became influenced by the jus gentium, there was needed a general term combining the sense of a reason with the signification of an act or thing which itself might be a reason, and that causa was adopted as best satisfying these requirements.

Here, then, we have one of the origins of causa in the sense in which it is found in the modern Civil law on obligations.[12] Being of such wide range as regards adaptability, with essentially the same meaning causa could easily have had several points of introduction in different parts of the contract system; and though no direct connection may be traced between its use in connection with the stipulatio and its later development, yet we may assume that its use there influenced its contemporaneous use in the innominate real contracts, which is clearly the antecedent of the modern doctrine of cause.

Continuing now the investigation into the causae of the obligations

(z. B. dotis nomine tot dari spondes? spondeo), allein häufig wird sie als abstracter Vertrag abgeschlossen (centum dare spondes? spondeo)." Baron, *Pandekten*, §214.

[12] *Code civil*, arts. 1108, 1131-1133. Artur, *Étude sur la cause*, 120. However, though its sense be quite the same, its position in the contract system of the Code Civil is radically different from its use in the above passages: in the former it is an essential element for the existence of a contract, in the latter the stipulatio exists validly without it, but its absence is a good defense in case of suit.

found in Roman contracts, we come to the class of contracts known as consensual. These are all fully bilateral (or synallagmatic), having two obligations, while the verbal and literal contracts have only one, and in the real, one is far more important than the other. As we have seen, the consensus is called the causa civilis of a consensual contract. As to the causae of the obligations, they are to be found in the reciprocal promises, viewed in connection with the things promised: thus in emptio venditio the seller binds himself to transfer the property in the object because the buyer promises to pay a certain sum therefor; and the buyer binds himself to pay the price because the seller promises to make him the owner of that object;[13] the legally sufficient reason for the promise of the one is the promise of the other, each promise being taken in connection with what is promised: the bare promise, without the existence of the object and the possibility of its subjection to the power of the promisor, is no juristic act; so also, the object itself, without any promise of its transfer, can not enter into the law of obligations. To be causae of obligations in the consensual contracts, there must be a practical and economic sense to the promises.

Considering the consensual contracts as a class it appears that three, emptio venditio, locatio conductio and societas, by their very nature required reciprocity in the obligations, that is, each obligation had its causa. But the theoretical insignificance of this fact is shown by the remaining contract, mandatum, which, also by a radical necessity, was gratuitous. Moreover, the term causa was never thus applied to the obligations of the consensual contracts in Roman law; nor was there need of it: in treating of sale, for example, it was sufficient to speak of the object sold and the purchase price.[14]

Of the contracts in Roman law there remain to be discussed only those called by modern writers innominate real. These were of later recognition than the nominate real contracts (mutuum, commodatum, depositum and pignus), and were stated under the general formulae of do ut des, do ut facias, facio ut des, facio ut facias. They quite coincide with exchange, in its widest untechnical sense, including services and acts as well as commodities. By nature they were consensual and bilateral, like emptio venditio and locatio conductio; but in them the bare consensus

[13] We expressly avoid the view of causa as the purpose the promisor has in mind in making the promise. Baron, illustrating causa obligationis as Zweck, says: "Der Käufer verspricht dem Verkäufer eine Geldsumme, damit der Verkäufer ihm verspreche, ihm einen gewissen Gegenstand in das Vermögen zu übertragen;" (*Pandekten*, §348, I.) and Laborde speaks of cause as "le but immédiat et apparent, que se propose la partie qui s'oblige." (*Théorie de la cause*, 7.) But it is not this purpose which forms the basis of his obligation, the naturalis ratio why he should be bound; the law does not enforce the promise of the buyer because in promising he purposed obtaining a certain object.

[14] In the Code civil there is no mention of cause in the title on Vente; art. 1583 reads: "Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix."

was never held sufficient to produce any legal effect. To create an obligation there had to be performance by one of the parties; this having occurred there was recognized during the Republic an obligation quasi ex contractu, entitling the party performing to a return of whatever gain had passed to the other. Later, during the Empire, such performance was given the effect of creating a contractus, so that the party performing could demand of the other the performance of what this one had promised.

The contract itself was thus unilateral rather than bilateral; though there were two natural obligations in the agreement, one of these had to be fulfilled in order to bring the contract into existence, leaving only one natural obligation to become the legal obligation of the contract; though each of the natural obligations had a causa, the one being the causa of the other, this was wholly disregarded. But viewing the legal obligation which is created, it is evident that, quite apart from the original agreement, it forms also a natural obligation, the causa of which consists in the performance of the obligee.[15]

This performance, then, had two aspects: viewed as the causa civilis of the contract it was called res, and hence, as regards classification, these contracts were assimilated to the real; on the other hand, viewed as the basis of the obligation, as a reason for its existence, the performance was called causa. Thus, in *Dig.* 2, 14, 7, 2, Ulpian says: "Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem; ut puta dedi tibi rem ut mihi aliam dares, dedi ut aliquid facias: hoc synallagma [contractus] esse, et hinc nasci civilem obligationem." But this distinction was by no means rigid or technical, and res and causa were often used interchangeably.

The point of chief importance is that causa was employed to represent the dare or facere in these transactions, this dare or facere being viewed as having some juristic effect. The circumstance that this effect might be a contract was quite accidental; causa was not considered as peculiar to contractual obligations. This is clearly revealed in the remedies developed for these transactions: in demanding counter-performance, suing, of course, upon the contractus, the complainant used the actio praescriptis verbis, wherein no mention was made of causa; while in seeking to recover his res, consequently rejecting the idea of a contract and relying upon the obligation quasi ex contractu, his remedy was by the condictio causa data causa non secuta.[16] Causa was merely employed as a convenient general term signifying some fact upon which depended

[15] Pufendorf says of these contracts: "Elles sont fondées sur quelque cause, c'est-à-dire, sur ce que l'un des contractans a donné ou fait actuellement quelque chose, afin que l'autre exécutât à son tour ce à quoi il s'est engagé en sa faveur." *Le Droit de la nature et des gens*, Bk. V, ch. II, §2.

[16] Dig. 12, 4. Glück, *Pandekten*, XIII, 10. The glossa remarks: "Causa nihil aliud est hic quam res, cujus intuitu datur aliquid, puta, aut invicem des vel facias aliquid." This condictio is sometimes called ob rem dati.

an obligatory relation, without regard to whether the obligation was contractual or not.[17]

It was only in a later age, long after the vicissitudes of time had swept away the formal contract system of the Roman law, that jurists, inspired with the genius of Roman jurisprudence in the law of obligations, should select this undeveloped principle of causa, and make it a universal element in every contractual obligation. This was impossible for the Romans; their formal system was rooted deep in their national history and development; though modified by the jus gentium, and though the jus gentium reached full application in the consensual and nominate real contracts, yet an aspect of formalism was given even these by denying contractual force to agreements in general by rigidly classifying those admitted and pointing out the distinctive marks of each. In such a system there was not only no need of a recognition of causa as known to modern jurists, but it was inadmissible as such. It could be used in a certain class as a general term for the dare or facere upon which an obligation was based, but its recognition as a technical term, indicating an elément essential to every contractual obligation, would have demoralized the entire contract system. Law is one of the products constantly issuing from the social organism, and especially is the law of obligations rooted in the character and customs of the people. A radical social as well as political revolution was therefore necessary to eliminate the formal and peculiar elements, leaving conditions favorable to the recognition of the essential and universal.

These conditions, as regards Western Europe,[18] were brought about by the submergence and transmutation of Roman institutions in consequence of the invasions by the barbarians. These being on a lower stage of civilization, their conquests brought about simpler social conditions, a simpler system of commercial and industrial relations, demanding correspondingly simpler rules of law. They found the Roman law upon their arrival, but were unable to maintain it at the point it had reached, still less to advance it to a higher point. And this was due not alone to the shortcomings of the conquerors, but largely also to the state of the Roman law at that time. Scattered throughout an indefinite number of volumes, of varying authority, and itself interwoven with technicalities and intricacies of procedure belonging to a period several centuries

[17] This observation is emphasized if we examine the other condictiones sine causa, all being given for obligations which were quasi ex contractu, and some excluding even the presence of an agreement. See Baron, *Pandekten*, §§281-285.

[18] As to the Eastern Empire it need only be said that it suffered from internal decay, resulting in a cessation of legal progress after the reign of Justinian; in time there began a retrogression, which continued through many centuries, gradually simplifying the highly developed system of Justinian, until a very low standard had been reached. This retrogression is indicated by the successive abridgments of the Corpus Juris, forming a descending series until the Hexabiblos of Harmenopulos was reached in 1345, "ein kläglicher Auszug aus den Auszügen der Auszüge." Holtzendorff, *Encyclopädie der Rechtswissenschaft* (5. ed.,) I, 174.

earlier, there was required, for its proper understanding, a high degree of knowledge and special training even among the Romans. Moreover, the emperors had long been the agency of all legal progress, and western Europe was now withdrawn from their authority. Besides, the imperial development of the law of obligations had ever been slight, and the doctrine of causa had made no perceptible advance since the great jurists of the third century.

From the fall of Rome until after the eleventh century the social organization throughout western Europe remained simple, especially as regards business relations, and consequently there was no demand for a complex law of obligations. During these centuries there was going on a coalescence of rules derived from the Roman law with the legal institutions of the Germans, forming a new law as well of obligations as of property, persons, etc. But the Roman elements were chiefly of the more positive, practical kind, and the doctrine of causa, which had only begun to form dim outlines during the culminating period of Roman jurisprudence, remained wholly unaffected. It was compelled to wait until a time should come when the loftiest achievements of Rome's greatest jurists, as preserved in Justinian's Digest, could be understood and appreciated.

The importance to our subject of these intermediate centuries is of a different nature from that of the centuries preceding and following; it consists in two leading considerations: first, that during them the social connections with the Roman state were swept away, or radically transformed, so that the formal contract system of Rome could never be re-established; secondly, that they brought about simpler social conditions, so that later, when business relations rapidly began to grow more complex, the current system of contract law was simple, thus facilitating the introduction of theories and principles derived from the Corpus Juris.

The codification of Justinian, being executed long after the Western Empire had fallen, reached only the parts of Italy temporarily reconquered by Justinian himself. Though it remained in use and was studied, at least in Rome, throughout the succeeding centuries, this appears to have been true chiefly of the Institutes and Novels, the Digest in particular being neglected. Hence the knowledge of Roman law as a system of jurisprudence did not exist. It was not until the second half of the eleventh century, and then only at Bologna, that the Digest began to be thoroughly studied and appreciated. In northern Italy had grown up schools teaching the law as found in the edicts and capitularies of the Lombard and Frankish kings, and a method of treatment by writing glossae on the text had been developed in dealing with this material. But at this period the great commercial cities of northern Italy began to outgrow the legal system derived from the centuries preceding: the increasing complexity of their business relations and industrial conditions demanded a more highly-developed system; and thus it

was that the schools of law took up the study of Justinian's Corpus Juris, including the Digest; this supplied a fund of legal rules and principles, which, properly treated, satisfied every demand.[19]

This demand was directed especially towards the law of obligations, whose principles are, moreover, capable of more general application than those of other departments of law. The rules concerning property and persons are far more dependent upon peculiarities in the form of government than those concerning obligations.[20] Thus it happened that in the Corpus Juris the matters pertaining to obligations were best understood and most generally applied. But in the Roman law of obligations it is necessary to distinguish between that which is founded in the very nature of human relations, and that which is due to formal peculiarities or to accidental phenomena in the development of legal institutions: the former is essential and permanent, the latter, incidental, and disappears from the applied law with the conditions upon which it is dependent. Consequently, though the study of the Corpus Juris embraced both these elements, the application to actual cases had to be restricted to the former.

The school at Bologna first, and later those elsewhere, taking up the Corpus Juris, applied to it the method already developed—that of making glossae on the text. This was a prerequisite to its practical understanding and use, and also to the extraction and further development of the various legal principles and theories it contained. The glossators purpose only to explain, and their method being such that it dealt with material in a fragmentary manner, it is evident that much advance in the development of general doctrines was impossible; hence, as regards causa, no noteworthy progress was made in the doctrine itself. However, the glossators helped prepare the way for this doctrinal development, making the text more distinct, and also adding somewhat in ideas, for, as was quite inevitable, in explaining they also construed more or less.

It was in the thirteenth century, when the glossators were completing their work, that the Corpus Juris began to exert its irresistible influence upon the current, customary systems of law. There began to appear treatises professing to set forth this law. These were largely based upon the Corpus Juris, especially as regards obligations, and some were little more than paraphrases of selected titles from the Institutes and Digest. By reason of this artificial introduction, the writers varying in degree of reliability, and all without official authority, there ensued a long period of confusion and uncertainty,[21] increased by the peculiar political con-

[19] Savigny, *Geschichte des römischen Rechts* (2. ed.), III, 84.

[20] The English Common Law is far more nearly like the Continental in the matter of obligations than in any other department. The fact that it has been influenced by the Roman law chiefly in this department of itself reveals the innate universality of this branch of law, especially as compared with those of persons and property.

[21] Glasson, *Droit et institutions de la France,* VII, 595.

ditions and the local nature of all private laws. One principle, however, was positively accepted by all: conventio legem vincit, otherwise emphasized as pacta sunt servanda. Thenceforth it was established that the formal contract system of Rome, with its so-called causa civilis, had passed away, never to be re-adopted.

In stating, however, that as a general rule all agreements were actionable, it was necessary to understand thereby only such as were intended to have, or would be recognized as having, some juristic effect.[22] In carrying out this understanding some of the foremost writers virtually began the modern development of the doctrine of causa, though without making definite, technical use of the term itself. They had not yet reached the point of comprehensive generalization, which remained for a much later century. They discussed limited classes of facts, or even individual cases, and therefore did not need so general a term as causa.

Beaumanoir (about 1275) appears to have more nearly approached its adoption than any other writer for several centuries. He treats quite comprehensively of convenences which are contre droit and contre bones meurs and in one instance even speaks of them collectively as les convenences qui sont fetes par malveses causes,—conventions which would now be clearly recognized as having a cause illicite.[23] As to the agreements which would now be considered sans cause there is far less precision, conditions precedent to the formation of a contract being confused with its elements of validity or enforceability.[24] Other writers of Coutumiers also generalized more or less regarding the essentials of a contractual obligation, but none approached the comprehensive modern view; indeed, this was scarcely possible in view of the diversified formalism, coming out from the centuries preceding (being of Germanic, late Roman, and Canonical origin), and persisting in various parts of the law of contracts: *e. g.* the provisions for an oath, [25] or the requirement of a writing.

[22] "Handlung, deren Absicht auf eine rechtliche Wirkung gerichtet ist." Puchta, *Institutionen,* II, 342.

[23] Beaumanoir, *Coutumes du Beauvoisis,* ch. 34, §§2, 23, 24, and cf. 25. Also, in ch. 35, §22, treating of the validity of "lettres" containing an obligation, he says: "Le letre qui dist que je doi deniers et ne fet pas mention de quoi je les doi, est souspechonneuse coze de malice; et quant tele letre vient en cort, si doit savoir li juge le coze dont tele dete vint, avant qu'il le face paier."

[24] Glasson (*Droit et institutions de la France,* VII, 602) is evidently in error when he says of Beaumanoir: "Ce jurisconsulte fait très clairement remarquer que dans les contrats synallagmatiques, l'obligation de l'un est la cause de l'obligation de l'autre." The instance selected in support of this assertion and stated thus: "En cas d'échange, celui qui a reçu la chose d'autrui et qui a livré la sienne propre peut réclamer ou la chose promise ou la restitution de ce qu'il a donné"—merely shows Beaumanoir to have repeated the Roman law on innominate real contracts.

[25] "Le droit canonique avait fait du serment promissoire un véritable contrat formaliste qui se répandit très rapidement à raison de l'esprit religieux du temps. En l'organisant ainsi, il s'était inspiré à la fois du droit romain et de la fides facta germanique." Glasson, *Droit et institutions de la France,* VII, 684.

Returning to the pure Roman law we find, succeeding the glossators in the work upon the Corpus Juris, the commentators. These departed from the exegetic method of the former; instead of concise elucidations they wrote long treatises on the text, examining it exhaustively, and tracing the application of rules into minute details. No direct progress appears to have been made in the development of general doctrines, such as causa: for, employing the deductive method, and being under the scholastic influence of the period, they analyzed without corresponding synthesis, made subtle distinctions without comprehensive generalization. It was not until the sixteenth century that the synthetic process began; then, turning away from scholasticism, jurists sought to understand Roman law as a whole, as a system of jurisprudence, with interrelated principles of general application. Here is the beginning of the modern scientific development of Roman law.

Simultaneously with this study of the Corpus Juris went the continued development of the current law. This development continued to be chiefly based upon principles derived from the Roman law, but during the seventeenth century a new factor was introduced: the philosophy of natural law was employed to modify and work these principles into harmony with the highest juristic ideals of the age. This was especially true of France; in Germany there was a more literal adherence to the Corpus Juris, efforts being directed towards adjusting it to existing conditions, while in France the striving was towards a perfect, philosophical system of law, founded on natural reason. These respective tendencies were encouraged by local circumstances, such as differences in the state of the current law; and the divergence increased throughout the eighteenth and nineteenth centuries. Consequently the further development of the theory of causa divided into two well-defined branches, which we may call the French and the German, each requiring separate treatment.

First taking up France as having wrought the theory of causa more naturally and perfectly into her native jurisprudence, we find, already in the latter part of the seventeenth century, the decisive statement of ideas which ultimately led to the insertion in the Code Civil of cause as one of the "quatre conditions . . essentielles pour la validité d'une convention." [26] Domat, in his *Lois Civiles dans leur Ordre Naturel,* though merely claiming "to undertake the digesting of the Roman laws into their true and natural order, hoping thereby to render the study of them more easy, more useful, and more agreeable," [27] in fact developed a modern system, based on natural reason, the Corpus Juris being used chiefly by way of suggestion. Though his terminology was largely that of Roman law, and though the Corpus Juris was cited on nearly every article, yet this was only the formal exterior, beneath which lay the most radical departure from Roman principles of classification

[26] *Code civil,* art. 1108.

[27] Author's Preface, in Translation by William Strahan.

and treatment.[28] Moreover, at that time there was no national jurisprudence: each district had its own customs and laws, differing variously from those of other districts, and the treatises on these current systems were chiefly local Coutumiers. It was Domat's work, penetrating beneath these in analysis and rising beyond them in generalization, that led the way to the uniform national jurisprudence of the nineteenth century.

In his treatment of obligations Domat, avoiding the terms contrat or pacte because of their restricted signification in the Roman law, adopts that of convention,[29] and with its assistance develops a contractual system on the broadest desirable basis. Then, beginning his classification, he says: "Les communications et les commerces pour l'usage des personnes et celui des choses sont de quatre sortes, qui font quatre espèces de conventions. Car ceux qui traitent ensemble ou se donnent réciproquement une chose pour une autre, comme dans un vente ou dans un échange; ou font quelque chose l'un pour l'autre, comme s'ils se chargent de l'affaire l'un de l'autre; ou bien l'un fait et l'autre donne, comme lorsqu'un mercenaire donne son travail pour un certain prix; ou bien enfin, un seul fait ou donne, l'autre ne faisant ou ne donnant rien, comme lorsqu'une personne se charge gratuitement de l'affaire d'une autre, ou que l'on fait une donation par pure libéralité." [30]

The first three classes are evidently suggested by the innominate real contracts of the Roman law, the first being do ut des, the second, facio ut des or do ut facias, the third, facio ut facias; but the basis of classification is radically different. In the first place, by ranging sale with exchange as a do ut des, he clearly rejects the Roman formal system, constructing a new one based on natural characteristics. But still more fruitful is the observation that to him there is no distinction between facio ut des and do ut facias: taking the agreement as the basis of the contract, the two elements of doing and giving appear simultaneously as promises, and these two formulae become equivalents the one of the other; while in Roman law, where performance was the basis of the contract, the one had to precede. This difference is further revealed in the succeeding article: "Dans ces trois premières sortes de conventions, il se fait un commerce où rien n'est gratuit, et l'engagement de l'un est le fondement de celui de l'autre." Thus he makes the engage-

[28] "La tendance la plus marquée des jurisconsultes du XVIIe et du XVIIIe siècles * * * est la généralisation et, par suite, la formation d'un droit commun. Domat, par la nature de son esprit, devait suivre ce courant qui conduira à la codification du XIXe siècle; mais il cherche moins à dégager ce droit commun des pratiques coutumières les plus répandues dans notre pays que d'un droit idéal qu'il puise dans les préceptes évangéliques et surtout dans les lois romaines." Tardif, *Histoire des sources du droit français*, 494.

[29] *Dig.* 2, 14, 1, 3: "Conventionis verbum generale est ad omnia pertinens, de quibus negotii contrahendi transigendique causa consentiunt qui inter se agunt."

[30] Domat, *Lois civiles*, Liv. I, Tit. I, §1, art. 4.

ment (not the performance) of the one the basis of the obligation of the other.

Having discarded the Roman contractual system and its tests of validity, it became necessary to adopt some other test; this had to be founded in natural reason, hence going to the obligation rather than the contract, and had to be of universal application. The germ of such a principle was found in the Roman causa as employed in the innominate real contracts. We have the principle already suggested above; continuing the quotation we reach the term itself: "Dans les conventions mêmes, où un seul paraît obligé, comme dans le prêt d'argent, l'obligation de celui qui emprunte a été précédée de la part de l'autre de ce qu'il devait donner pour former la convention. Ainsi, l'obligation qui se forme dans ces sortes de conventions, au profit [à la charge] de l'un des contractants, a toujours sa cause de la part de l'autre: et l'obligation serait nulle, si dans la vérité elle était sans cause."

As regards meaning it appears that cause here embraces all the sense of the corresponding causa in the Roman law, and further, that it is more differentiated, having more of technical force. The latter observation is emphasized in the author's treatment of the fourth class above, "où un seul fait ou donne et où l'autre ne fait et ne donne rien," concerning which he says: "L'engagement de celui qui donne a son fondement sur quelque motif raisonable et juste, comme un service rendu, ou quelqu'autre mérite du donataire, ou le seul plaisir de faire du bien. Et ce motif tient lieu de cause de la part de celui qui reçoit et ne donne rien." [31]

The doctrine of cause is further developed by Domat in discussing invalid or unenforceable conventions. He here sets forth the principles which were finally adopted into the Code Civil regarding obligations "sans cause, ou sur une fausse cause, ou sur une cause illicite." As to the first of these he says: "Dans les conventions où quelque'un se trouve obligé sans aucune cause, l'obligation est nulle. Et il en est de même, si la cause vient à cesser. Mais c'est par les circonstances qu'il faut juger si l'obligation a sa cause ou non." [32] Though making no use of the expression cause illicite, he states definitely the reasons for the nullity of conventions which are prohibited by law or are contrary to good morals.[33] The passage just quoted emphasizes Domat's acceptance of the term cause with the same material sense with which it is employed in the Corpus Juris, that is, as a prestation, as something real and objective, and generally capable of economic estimation. It also emphasizes the position allotted to cause in the law of obligations, that it is an element upon which depends the existence of an obligation, not merely its enforceability, and that the obligation, not the contract, has a cause.

[31] Domat, *Lois civiles*, Liv. I, Tit. I, §1, art. 6.

[32] *Idem*, §5, art. 13.

[33] *Idem*, art. 6.

The French jurists of the eighteenth century, following the method of Domat, wrote treatises on law as founded in natural reason, but ceased his artificial dependence upon the Corpus Juris; they recognized that there was growing up in France a native jurisprudence, which though tracing its historical sources chiefly to the Roman law, nevertheless had an independent existence and sanction. Among the writers of this century we need only consider Pothier,[34] "le plus grande jurisconsulte du XVIIIe siècle," who made the chief and final advance in the law of obligations, as left by Domat, before the formation of the Code Civil.

Domat had achieved the virtual separation from the Corpus Juris; Pothier completed the process by making the separation nominal or verbal as well.[35] Though the doctrine of cause appears quite complete in Domat, there is evident in Pothier an increase in its positiveness, and in the technical force with which the term is employed. In his *Traité des Obligations* (1761), on "Defaut de cause dans le contrat," he says: "Tout engagement doit avoir une cause honnête. Dans les contrats intéressés, la cause de l'engagement que contracte l'une des parties, est ce que l'autre partie lui donne, ou s'engage de lui donner, ou le risque dont elle se charge. Dans les contrats de bienfaisance, la libéralité que l'une des parties veut exercer envers l'autre, est une cause suffisante de l'engagement qu'elle contracte envers elle. Mais lorsqu'un engagement n'a aucune cause, ou, ce qui est la même chose, lorsque la cause pour laquelle il a été contracté est une cause fausse, l'engagement est nul, et le contrat qui le renferme est nul." [36] The use of cause appears here as definite and unhesitating as if the principle had long been settled that every obligation (engagement) required this element for its existence. And inasmuch as this Traité was immediately acknowledged the leading authority, and has since remained a classic work, upon obligations, it followed that thenceforth the doctrine of cause was firmly established in the jurisprudence of France.

If we examine cause as employed in the above passage it appears to have a different meaning according as the contracts are á titre onéreux (intéressés) or á titre gratuit (de bienfaisance). In the former it is still a dare or facere, that is, some objective reality, allowing of economic estimation, and viewed in connection with some transaction for whose legal existence it forms a sufficient reason. And this is indirectly

[34] "Schon vor Pothier hat Prevôt de la Jannès in seinen Élémens de jurisprudence von diesem auf den Grund mehrerer Parlamentsentscheidungen nothwendigen Erfordernisse einer cause de l'obligation gesprochen." Warnkoenig, *Französische Staats- und Rechtsgeschichte,* II, 533.

[35] He says: "Dans notre droit on ne doit point définir le contrat, comme le définissent les interprètes du droit romain, Conventio nomen habens a jure civili, vel causam, mais on le doit définir, une convention par laquelle les deux parties réciproquement, ou seulement l'une des deux, promettent et s'engagent envers l'autre à lui donner quelque chose, ou à faire ou ne pas faire quelque chose." *Traité des obligations,* Part. I, ch. I, §I.

[36] Part. I, ch. I, §6.

acknowledged to be still its more proper signification, for in the other class of contracts, the gratuitous, cause is qualified by suffisante; in these it is no longer necessarily a prestation, but falls back upon the will of the obligor.

Pothier, continuing his discussion of cause, follows Domat in the latter's treatment of void conventions (but using contrat where Domat uses convention). Though in this connection the term cause was hardly employed by Domat, Pothier uses it in the most prominent and technical manner; he begins, "Lorsque la cause pour laquelle l'engagement a été contracté, est une cause qui blesse la justice, la bonne foi, ou les bonnes moeurs, cet engagement est nul, ainsi que le contrat qui le renferme;" and further on the expression cause licite and cause illicite are freely used.[37]

Pothier as well as Domat always employs cause in a clear manner, suggesting no doubt or confusion regarding its meaning or use. This is especially noticeable in that he generally avoids speaking of the cause of a contract or convention: as in Domat it is the cause of an obligation, so in Pothier, expressing the same idea, it is the cause of an engagement or promesse.

Thus stood the doctrine of cause at the time of the formation of the Code Civil. This work was done hastily, the original draft being completed within four months. It was done, moreover, during a period in the midst of wars with other nations, and of radical political changes within. It was not a time for the thorough study and analysis of legal principles, nor had there arisen since his death such a jurist as Pothier. Consequently it was quite inevitable that the editors of the Code should be controlled by the powerful reason and logic of the writings of this jurist, who had emancipated himself from the Roman law and had purposed to write, and in fact had written, the law both as it was and as it ought to be.[38] And so we find that nearly three-fourths of the Code Civil was derived from Pothier, and this chiefly in the matter of obligations, where his classification and terminology as well as principles were largely adopted.[39]

Article 1108 of the Code Civil reads as follows: "Quatre conditions sont essentielles pour la validité d'une convention: le consentement de la partie qui s'oblige; la capacité de contracter; un objet certain qui forme la matière de l'engagement; une cause licite dans l'obligation." It is noteworthy that here cause is placed in direct connection with the obligation, as in Domat and Pothier, and this is emphasized in art. 1131, which states the effect of the absence of a cause licite, viz.: "L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet;" and to this is added, by way of explanation,

[37] Part. I, ch. I, §6.

[38] "La qualité propre à cet éminent jurisconsulte, c'est une union parfaite de la théorie et de la pratique." *Grand dictionnaire universel*, on Pothier.

[39] "Le Traité des obligations est passé presque textuellement dans notre Code Civil." *Grand dictionnaire universel*, on Pothier.

art. 1132, that "La convention n'est pas moins valable, quoique la cause n'en soit pas exprimée;" and art. 1133, "La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes moeurs ou à l'ordre public." These are the only instances in which the term cause is thus employed in the Code.

Considering now the meaning of cause in these articles, it will be necessary first to distinguish between the contracts à titre onéreux and those à titre gratuit. In the former the cause is always some quid pro quo furnished at the request of the obligor, usually by the obligee: in the bilateral contracts it consists in a promise to give or do something; in the unilateral, in something given or done. In the contracts à titre gratuit the cause is no longer a quid pro quo, but must be found in the will or desire of the obligor to benefit the obligee, such will or desire being taken in connection with the facts or circumstances upon which it is based and by which it is explained. This is the view of cause presented by Domat and Pothier, and we may assume it to be the one adopted by the editors of the Code, especially since Bigot-Préameneu, in the *Exposé des Motifs,* said on art. 1131: "Il n'y a point d'obligation sans cause: elle est dans l'intérêt réciproque des parties ou dans la bienfaisance de l'une d'elles." [40]

This would seem to be the juristic termination of the question, and in practice there is no need of transcending these simple rules. But academic discussion, penetrating into legal treatises, sought to determine the real ultimate nature of cause; and by reason of its ordinary meaning, as that which produces an effect, the development of theories easily passed into the realm of psychology. Instead of simply inquiring cur debet? they also, or even only, asked cur promisit? Instead of merely taking cause in a legal sense, as indicating the reason considered sufficient by the courts for enforcing an obligation, they went beyond the legal sphere into the psychological, inquiring why the obligor entered into the obligation; then, in place of a juristic fact, they had a psychological phenomenon, a motif: the attention was distracted from the material facts, such as the promise or prestation, to their influence upon the mind of the obligor. Thereupon it became necessary to distinguish among different kinds of motifs so as to exclude all but the one which would correspond with the juristic cause; and then, finally, to give the doctrine a more practical and objective aspect, cause was declared to be the "but que celui qui s'oblige se propose d'atteindre en contractant."

This tendency in treatment was quite advanced before the final adoption of the Code, as appears particularly from the discussions in the Conseil d'État on art. 1132. Here Bigot-Préameneu is reported as saying: "Un citoyen reconnaît devoir une somme sans enoncer la cause de sa dette; son obligation est valable parce que la declaration qu'il doit

[40] *Proces-Verbaux du Conseil d'État, contenant la discussion du Proyet du Code Civil,* IV, 168.

fait presumer qu'il a une cause; la volonté de s'engager a dû en effet être appuyée sur un motif." Tronchet and Portalis, also editors, expressed themselves to the same effect, though less definitely, while Treilhard, of the Conseil d'État, said: "Si je dis: je dois à Pierre, on suppose qu'une cause a déterminé mon aveu." [41]

This view of cause was adopted by many writers and was gradually elaborated until the simple statements of Domat and Pothier seem quite forgotten. Being an attempt to philosophize concerning the real nature of cause, it was destined to lead to a clearer apprehension of the doctrine in its philosophical aspect; but for a time the writers seem to have overlooked its strictly legal character, its relation to actual practice, and the importance of Domat's and Pothier's utterances and to have become confused in their own reasoning. They failed to regard the different kinds of contracts, and what the cause was, objectively and materially, in each. They set out with the statement that "un engagement sans cause est un acte de folie," thus beginning in the realm of psychology instead of jurisprudence, dealing with mental phenomena instead of juristic facts.

Toullier considered cause to be "le motif qui détermine à faire la promesse;" but this being evidently too indefinite he proceeds to distinguish between the cause déterminante and principale, and the cause impulsive and accessoire, the former alone being recognized in law. Demante, following Toullier, says: "La cause est ce qui dans un contrat détermine une partie à s'obligor. Cette cause déterminante de l'obligation ne doit pas être confondue avec la cause impulsive du contrat, autrement le motif qui porte à contracter." The distinction here made between the cause of the obligation and that of the contract, understood as the writer doubtless meant it, is perhaps correct; [42] but its abstruseness has been such that his critics have perceived only his division of cause in to déterminante and impulsive, treating both as applying to obligations. It is moreover doubtful whether any positive distinction can be drawn between the motive leading one to enter into the contract, and that causing one to bind himself.[43] It seems at most an artificial one, perhaps convenient in discussion to gain lucidity, but useless as a legal test.

[41] *Discussions du Code Civil dans le Conseil d'État*, II, 258. In the second edition (1808) of these Discussions, it is remarked, after examining a case, "On voit qu'ici le mot cause signifie le motif, le but de l'obligation." III, 404.

[42] Colmet de Santerre has adopted the reasoning of Demante, making it more perspicuous, however, warning against confusing the cause or motif of the contract with the cause of the obligation, and giving illustrations, viz.: "Pierre achète un cheval. Pourquoi l'achète-t-il? parce qu'il veut faire un voyage. Ce projet de voyage * * * est la cause ou le motif du contrat. Quand on cherche la cause de son obligation on trouve une autre cause. Pourquoi doit-il 2,000 francs au vendeur? parce que celui-ci lui a promis le cheval." *Manuel élémentaire de droit civil*, II, 198.

[43] "Ces termes sont synonymes, car les deux choses se confondent. En effet, le motif qui me détermine à contracter me détermine aussi à m'obliger; car en contractant je m'oblige." Laborde, *Théorie de la cause*, 6.

Demolombe, while following Demante, strove to make the principle more definite and practical, and thus introduced a view of cause, which, though still psychological, directed attention more specifically to the objective facts or circumstances—to the fait or promesse in the contracts à titre onéreux, and to the libéralité in those à titre gratuit. He defined cause as "le but direct et immédiat que la partie se propose d'atteindre en s'obligeant; c'est la cause finale de l'obligation elle-même." [44] The distinction was then drawn between the cause finale and the cause occasionelle, the latter being the motif or cause of the contract according to Demante. This view was widely adopted. Having more objectivity and definiteness than its predecessor, it was better adapted to form a legal test; in fact, the illustrations which were generally adduced coincided perfectly with the statements of Domat and Pothier, only the standpoint from which they were viewed revealing the psychological element.[45]

Some writers, however, felt that in legal applications of the theory of cause the stress must be placed directly on the fait, the promesse, and the libéralité—not indirectly as being the purposes of the obligor; that in practice the immediate question was not, what did the obligor purpose to attain in binding himself, but what was the sufficient legal reason for holding him bound. The answer to the latter question, by the very form of the question itself, was precisely limited to what the law required, it was specific and certain, while the answer to the former necessitated distinctions between different kinds of causes.

Laurent was foremost in attacking the doctrine of cause finale. He went back to Domat and to the utterance of Bigot-Préameneu in the Exposé des Motifs, and rejected every notion of motif in the cause of an obligation so far as regards its juristic sense. In the contracts à titre onéreux he says the cause "consiste dans le fait qui produit le contrat unilatéral, ou dans la promesse réciproque qui constitue le contrat synallagmatique;" while in contracts à titre gratuit it is "la volonté de conférer un bienfait." [46]

Laurent, however, did more than bring the theory of cause back to its legal basis; he went on to determine what the cause was with regard to the other conditions essentielles of art. 1108; instead of contenting himself with treating cause by itself, tacitly accepting its necessary presence as a distinct contractual element, he sought to discover its rela-

[44] Demolombe, *Traité des contrats*, I, 330.

[45] The statement in Stabel, *Institutionen des französischen Civilrechts*, may be taken as representative: "Die causa einer Verbindlichkeit ist der unmittelbare, nächste Grund, aus welchem sie einem Anderen versprochen wird. Dieser Grund liegt entweder darin, dass der Zusagende eine Gegenzusage oder eine Gegenleistung erhalten hat, oder darin, dass er dem Promissar einen unvergoltenen Vortheil zuwenden wollte. Jeder vernünftige Mensch muss bei Uebernahme einer Verbindlichkeit entweder den einen oder den anderen Zweck gehabt haben." I. 327.

[46] Laurent, *Droit civil*, XVI, 148, 151.

tions to the other elements. In so doing he indicated the proper line of further study—one more fruitful to legal development than the preceding; and though his reasoning must be modified, and his chief conclusion rejected, the importance of his purpose should be acknowledged.

As a result of his analysis, Laurent asserted the requirement of a cause in a contract to be superfluous, that "dans les contrats à titre onéreux la cause se confond avec l'objet," and "dans la donation la cause se confond * * * avec le consentement du donateur," so that "le contrat existe et est valable dès que les trois premières conditions exigées par l'article 1108 existent: le consentement, la capacité et l'objet." [47] But in arriving at this conclusion he seems to have overlooked the close relation of the objet to the obligation. Art. 1108 says, "un objet certain qui forme la matière de l'engagement," that is, of the obligation. Each obligation, in the nature of things as well as according to the Code, must have a cause and an objet: the latter is the prestation to which the obligor is bound, the former is the reason why he is bound. In bilateral contracts, then, it results that the objet of one obligation is the cause of the other, as Laurent well states: "La chose promise par l'acheteur est la cause de l'obligation du vendeur, et la chose promise par le vendeur est la cause de l'obligation de l'acheteur." [48] But a unilateral contract, having only one obligation, contains only one cause and one objet; since, evidently, the objet of an obligation can not be the cause of the same obligation, we must seek elsewhere the cause of the obligation in a unilateral contract. As Laurent himself says, "Dans les contrats unilatéraux, la cause de l'obligation du débiteur est la chose ou le fait qui est presté par l'autre partie et qui donne naissance au contrat;"[49] but this chose or fait can not be the objet in the contract, at least according to the Code, art. 1126 of which reads: "Tout contrat a pour objet une chose qu'une partie s'oblige à donner, ou qu'une partie s'oblige à faire ou à ne pas faire."

In a promissory note we may assume the consentement, the capacité and an objet certain to be present, but, as between the original parties at least, something more is required, namely, a valid reason for the obligation it contains, that is, a cause. And this is true whether the contract be à titre onéreux or à titre gratuit. Though in the latter, as Laurent says, "la cause se confond * * * avec le consentement," yet inquiry is proper into the reason for the obligor's "volonté de conférer un bienfait," which reason, as Domat remarked, may consist in "un service rendu, ou quelqu'autre mérite du donataire, ou le seul plaisir de faire du bien." Whatever it may be, it is distinguishable from the consentement, being that which explains this consentement, that which renders the obligation intelligible.[50]

[47] Laurent, *Droit civil*, XVI, 149, 151.

[48] *Idem*, XVI, 149.

[49] Laurent, *Droit civil*, XVI, 150.

[50] In an earlier volume of his Droit Civil, Laurent argued that "la théorie de

The conclusion necessary from this analysis is that the cause in a contract has a distinct character of its own, and can not, as such, be transmuted into any other contractual element. Though the thing itself, which is clothed with the character of cause, may in fact coincide with some other element, as with the objet of the reciprocal obligation in all bilateral contracts, and with the consentement in those unilateral contracts à titre gratuit which rest upon a pure libéralité (as distinguished from those which are rémunératoire), this coincidence is quite accidental; it occurs only by reason of the special circumstances in these particular contracts, and is foreign to the essential nature of cause. This view remains in harmony with Domat and Pothier: the nature of cause and its position in the law of obligations remain unaltered; there has merely been added an investigation showing its relations to the other contractual elements.

The discussion has thus far been confined to the jurisprudence of France. The codes adopted during the century in other countries, and modeled upon the French Code Civil, have generally copied more or less literally articles 1108, 1131, 1132 and 1133.[51] Portugal is a notable exception, having avoided all mention of cause. In some of these codes, particularly in those of Spain and the Spanish-American countries, a definition of cause is essayed. These definitions, however, merely reveal the various aspects in which cause was viewed in France. Thus the Código Civil of Chile (art. 1467) adopts the extreme psychological view: "Se entiende por causa el motivo que induce al acto ó contrato;" while that of Spain (art. 1274) follows the more legal one: "En los contratos onerosos se entiende por causa, para cada parte contratante, la prestacion ó promesa de una cosa ó servicio, hecha por la otra parte; en los remuneratorios, el servicio ó beneficio que se remunera; y en los lucrativos ó de mera beneficencia, la liberalidad del bienhechor." The Code of Argentina exhibits more independent analysis, but, though the phraseology is different, the idea remains the same; Lib. II., Sec. I, Part I, Tit. I, art. 5, reads: "No hay obligacion sin causa, es decir, sin que sea derivada de uno de los hechos, ó de uno de los actos lícitos ó ilícitos, de las relationes de familia, ó de las relaciones civiles."

As adopted into the jurisprudence of France, and derived thence into

la cause reçoit son application aux donations" as follows: "Admettons que la cause, dans les libéralités, ne soit autre chose que la volonté de donner. Cette volonté est de conférer un bienfait, par conséquent un sentiment de bienfaisance, d'affection ou de gratitude. Le fait seul de consentir ne suffit donc pas, il faut que le consentement ait un motif juridique: ce motif juridique est la cause de la libéralité, la loi se contente du sentiment qui nous porte à faire le bien, parce que c'est un bon sentiment: voilà la cause." XI, 658.

[51] Some, however, apparently failing to perceive the relation of the cause to the obligation, have omitted the words "dans l'obligation" after "une cause licite" in art. 1108. See the Civil Code of Louisiana, art. 1779; of Netherlands, art. 1356; of Chile, art. 1445.

the laws of other states, cause reveals the final stage of generalization as regards contractual obligations, being required as a constituent in every contract known to the law of obligations. It is a true juristic element, neither reducible to nor interchangeable with other elements. Though not absolutely necessary, its disuse would be retrogression, involving a separate and more particular enumeration of requirements for each class of contracts, according as the thing forming objectively the cause differs in different kinds. Moreover, cause now exists independently of its historic origin in the Roman law, requiring no reference beyond the time of Domat to explain its meaning and use.

Turning now to Germany we find the development of the law there to have been such that causa has failed of adoption as a recognized essential element in every contract. The writings of Domat were viewed in their true light as belonging to the jurisprudence of France, and therefore never gained acceptance in Germany. Instead the Germans continued their adherence to the Corpus Juris, deriving thence their legal principles, and applying them quite as literally as was compatible with modern conditions. Especially was this true in the law of obligations, concerning which it has been said, "es herrscht hier fast durchweg das römische Recht." [52]

Inasmuch as the Roman contractual system, with its causa civilis distinguishing between contractus and pactum, had passed away, there arose during the Middle Ages the principle, already mentioned, of pacta sunt servanda. This has remained the leading principle in the German contract system to the present time, and consequently attention has been directed chiefly to the consensus; since this acts immediately in forming the contract, and is only mediately related to the obligation, while the exact reverse is true of causa, it has resulted that analysis has been rather of the contract than of the obligation; thus causa has appeared, when at all, in a subordinate role.[53] Causa, as used in the innominate real contracts of Roman law, has never been raised into a universal contractual element, as in the jurisprudence of France, but has been restricted to its Roman application in connection with the condictiones given in the cases of grundlose Bereicherung.

This is the condition of the theory of causa in the Bürgerliches Gesetzbuch, which went into effect January 1, 1900. The only positive recognition of the causa of Roman jurisprudence is in the title on Ungerechtfertigte Bereicherung, the first section (812) of which reads: "Wer durch die Leistung eines Anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur

[52] Holtzendorff, *Encyclopädie der Rechtswissenschaft*, 397.

[53] Gerber (*Privatrecht*, 432) says: "Heutzutage wird der Grundsatz, dass das einfache Versprechen nur in Verbindung mit seinem materiellen Rechtsgrunde Geltung hat, meistentheils festgehalten;" but this principle has never reached general acknowledgment as a specific rule to which the term causa, or any equivalent, has been applied.

Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt." Here there appears no advance beyond the Roman doctrine embraced in the condictio sine causa, and causa is certainly not viewed as a universal essential for the formation or existence of a contractual obligation.

There has been, however, in the Pandektenrecht of Germany a certain development of the theory of causa in connection with the law of obligations, but in the realm of philosophy rather than in that of law. It has had its origin, partly in the circumstance that a stipulatio or a cautio (Schuldschein) might either contain or omit mention of the purpose for which given, and partly in the perceived psychological relation between the binding act of the obligor and the promise or performance of the obligee. This causa has been variously distinguished and denominated according to the various aspects of the discussion. Dernburg, a current author, seems to take the simple legal view when he says: "Verpflichtungen ruft man in das Leben aus bestimmten wirthschaftlichen Gründen;" [54] but elsewhere he states that "die Neueren verwenden causa vorzugsweise zur Bezeichnung des bestimmenden Zweckes der Vermögenszuwendungen: hierin folgen wir ihnen." [55]

This view, it will be perceived, embraces causa both as the purpose to be attained in binding one's self, and as the motive leading to such binding act (the cause finale and the cause déterminante of French writers). Of these, the former is the more popular. It is usually based on the philosophical observation that no one binds himself merely for the sake of doing so, but by reason of some causa.[56] This causa has been variously called causa obligationis, materielle causa, Zweck,[57] Grund, Verpflichtungsgrund,[58] and some have even adopted the extreme view of making it an Absicht or Bestimmungsgrund.[59]

A peculiarity of this doctrinal development is that the references to the Corpus Juris are chiefly to the employment of causa as a preposition, e.g. donandi causa, solvendi causa, credendi causa, uses in which it may be replaced by gratia.[60]

It appears that this treatment of causa has been in the sphere of contractual obligations, and thus far it coincides with the treatment by Domat and Pothier; moreover, so far as regards the object forming the

[54] Dernburg, *Pandekten* (5. ed.), II, §22.

[55] *Idem*, I, §95.

[56] "Man verspricht z. B. nicht 1000 M., lediglich, um sie zu versprechen, sondern zu einem gewissen Zweck." Wächter, *Pandekten*, 352.

[57] Baron, *Pandekten*, §214.

[58] Windscheid, *Pandekten*, II, §318.

[59] Arndts, *Pandekten*, §463.

[60] Lotmar, *Ueber Causa im römischen Recht*, 33.

physical basis of the causa, this, too, coincides with the statements of these French jurists. But there is nevertheless a most radical difference from a legal point of view; it is the same we have traced in the writings on the French Code Civil, viz.: the distinction between viewing causa as the reason why a person binds himself, and taking it as the reason why the law holds him bound. Philosophically there may be no objection to the reasoning of these authors of Pandekten regarding Zweck, but law is practical, objective and empirical, and theories, to become firmly introduced into a living system of jurisprudence, must conform to legal standards. The new German code has rejected the causa of the Pandektenrecht because not sufficiently juridical, and has supplied the place of a universal principle of causa in contracual obligations by its more particular constituents.

As we glance back, in closing, over the evolution of causa in the contractual obligations of the Civil law, we are impressed with the tremendous reach of its development: two thousand years ago it was unrecognized and unknown; to-day it represents an element of the highest legal refinement, absolutely essential to the existence of a contract among nearly all peoples speaking languages of Latin origin. It also illustrates most perfectly the manner in which juristic theories and social conditions react upon each other in the development of legal principles and institutions, how gradual and tentative this development is, and how adjustable to the needs of civilization.

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