CAUSE AND CONSIDERATION IN THE QUEBEC CIVIL CODE

In Quebec, as is well known, our common law is French, just as the common law of South Africa is Roman-Dutch, and to much the same extent. But whereas in South Africa the law is uncodified and must be collected from numerous works of authority in Dutch and Latin extending from the 16th to the beginning of the 19th century, in Quebec on the other hand we have a Civil Code, which came into force on the 1st of August, 1866. In form it is framed upon the same general plan as the Code Napoléon. In substance it reproduces with some modifications and additions pre-existing law, which rested ultimately upon French customary law, but which had also been influenced at several points by the law of England.

This brief explanation may serve as introduction to the subject of this paper.

Amongst the fundamental questions which every legal system must answer is that of the distinction between agreements and contracts. A contract is an agreement enforceable at law. Yes. But what is the test of enforceability? Assume the intention to contract, a lawful object, an agreement unaffected by fraud, etc., parties capable of contracting—is that enough, or is something more wanted to raise the agreement to the rank of contract? To this question both English law and French law answer that something more is wanted. English law requires 'consideration.' French law requires 'cause.' Quebec law, to avoid a quarrel upon so abstract an issue, demands one or other or both. The accommodating language of the Code seems intended by confusing the issue to conceal the antagonism between the two ideas.

The Civil Code exists in a French and in an English version. Since neither is more authentic than the other, I shall quote from the English version.

The third Title of the third Book treats of Obligations. Under the caption *General Provisions* two preliminary articles declare:—Art. 982. "It is essential to an obligation that it should have a cause from which it arises"; and art. 983. "Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of the law solely." The language of these articles, which is taken almost *verbatim* from Pothier, certainly

savours of the lecture room. But it is unambiguous. It simply means that obligations arise in various ways and from various sources. This, however, is not the sense of the word 'cause' which concerns us. There is a more technical use of the word, which we find in later paragraphs.

Following the scheme outlined in art. 983 the codifiers proceed to: Chapter First—Of Contracts. Section I. *Of the Requisites to the Validity of Contracts;* which art. 984 declares to be four—"Parties legally capable of contracting; their consent legally given; something which forms the object of the contract; a lawful cause or consideration." The last requirement is developed a little lower down in a sub-section headed *Of the Cause or Consideration of Contracts,* which contains two articles, viz., art. 989. "A contract without a consideration, or with an unlawful consideration has no effect; but it is not the less valid though the consideration be not expressed or be incorrectly expressed in the writing which is evidence of the contract." . . . Art. 990. "The consideration is unlawful when it is prohibited by law or is contrary to good morals or public order." . . . It will be noticed that while art. 984 speaks of 'cause or consideration,' arts. 989-990 speak of 'consideration' alone; but they are substantially the same as arts. 1108, 1131, 1133 of the Code Napoléon, in which the corresponding word is 'cause.'

It was part of the instructions of the Commissioners who framed our Code that they should first of all codify the existing law, and that proposed amendments should be embodied in separate articles. The Commissioners were further directed in stating the old law to cite the authorities for each article of their draft. Numerous authorities are annexed to the three articles just cited. The references are to the Roman law, or to Pothier and other French writers. There is no reference to the law of England.

Now, the French law (perhaps I should say the French lawyers) had a doctrine of cause, not very coherent, perhaps, but *sui generis.* The English law had its doctrine of consideration, which, whatever its origin, by the middle of the last century had run its own course for fully three hundred years. It was not then—it never had been—the same as the French doctrine of cause. But the codifiers speak of 'cause *or* consideration' as if the two conceptions were identical. How to explain the identification? Is it a stroke of political legerdemain? or did they really not know the difference? or are the two things not so different

as they seem? or have we in Quebec invented a hybrid thing which is neither 'cause' nor 'consideration' but partakes of the nature of both? Certainly the codifiers may be acquitted of any conscious intention to change the law. Had such been their purpose it would have been indicated in the manner prescribed to them. The fact is that the identification of cause and consideration had been made before the date of the Code—how long before I cannot say. A probable explanation is that English-trained lawyers happening upon the French doctrine of cause assumed its identity with consideration, while French lawyers in like manner assumed that consideration was the same as cause. There resulted an *entente* of expression and, perhaps, a real fusion of ideas, which we find perpetuated in the ambiguous language of the Code.

Doubtless cause and consideration have something in common. They may be off-shoots from the same stock. The word *cause* is met with in Roman law in many separate contexts. The difficulty is to ascertain how far in each case the word is a term of art. In relation to contract the best established use of the word seems to be in connection with the innominate real contracts (do ut des, etc.) in which the prestation on one side is represented as the cause of the obligation on the other. By parity of reasoning the delivery of the *res* in the four nominate real contracts—*mutuum, depositum, commodatum, pignus*—may be regarded, though this is not to be found in the texts, as the 'cause' in each case of the obligation of the deliveree. So far, the use of the word seems free from objection. But modern civilians depart from the analogy of the Roman law by inventing a 'cause' for the consensual contracts as well. This they find not in a necessary antecedent, but in an invariable concomitant. Thus the cause of the obligation of the buyer to pay the price is found in the obligation of the seller to deliver the thing sold, or, as they also put it, the cause of the one obligation is the object or content of the other. In thus extending the scope of the word 'cause' the jurists have distorted it from its proper meaning. It becomes not the *cause* of the obligation, but the object, the advantage, which the obligor proposes to himself as the equivalent of his undertaking—le but immédiat en vue duquel le débiteur a consenti à s'obliger—in other words, the *quid pro quo,* the consideration.

We seem, then, to see the two doctrines converging to a point. Where there is executed performance, or promise for promise,

what figures as cause in the one system figures equally as consideration in the other. But here the resemblance ends. The French law of France recognises under the name of *contrats de bienfaisance* a third class of contracts in which the giving is all on one side, the receiving all on the other. Hereupon the commentators, while protesting that cause is not the same as motive, find a cause in the anticipated happiness of the object of the bounty or in the mental satisfaction, which is supposed to reward the doer of a generous act. But if this is not motive, language has no meaning. So we get a third application of the word 'cause' differing from the first two. Of course, we may use the word cause to mean anything we please. It need not have any more to do with causation than consideration has to do with considering. But if there is to be a "theory of cause," the word must have a stable value and must express a single idea. This however, as expounded by the commentators upon the French law, it does not. I find it impossible to resist Professor Planiol's conclusion that the different classes of 'cause' cannot by any ingenuity be referred to a single principle, "Les auteurs modernes ont beaucoup travaillé pour trouver une définition générale de la cause. . . . Leurs efforts ont été vains; la raison est la multiplicité des notions comprises sur le nom de cause; à ce qui est hetérogéne, il est impossible de donner une définition unique."[1]

To turn next to the theory of consideration, we are forced to admit that if to-day it has attained in most common-law jurisdictions a tolerable degree of precision, there have been periods in its history when its outlines were ill-defined. The idea that a moral consideration would uphold an assumpsit obtained a certain acceptance in decisions of the end of the eighteenth century and the beginning of the nineteenth. Moral consideration, if it means anything, means at all events a moral duty to perform, antecedent to, and independent of, the promise of performance. Thus limited, it seems to imply the duty to remunerate a past service whether moved or not moved by a previous request. The French writers recognise such a duty as constituting a cause. If we admit that it constitutes 'consideration' the identification is carried still further. But the identification stops short of the pure

[1] Marcel Planiol, *Traité élémentaire de droit civil*, t. 2, § 1035. Planiol attributes the invention of the theory of cause to Domat, whose "Loix civiles" was published in 1689, *sed quaere*.

gratuity—the *contrat be bienfaisance.* In English law such a contract has never been actionable unless under seal. It may be, however, that the vague idea of moral consideration, which for English law received its quietus in *Eastwood* v. *Kenyon,*[2] having found its way into the law of the Province of Quebec has been perpetuated in our system and has made it easier for us to speak of "cause *or* consideration" as if the two words were different names for the same thing. Perhaps we shall find that the harmonious association in our Code of two distinct ideas of contract reflects and continues a phase of thought which in England and most other common law jurisdictions has become merely matter of history.

I turn now to the doctrine and jurisprudence of the Province of Quebec. By doctrine is meant the views of the writers of text-books. By jurisprudence is meant decided cases. It is necessary to premise that in Civil law jurisdictions these two sources are equally valuable or valueless. Neither makes law. The one and only interpreter of law is reason. So far as the doctrine or jurisprudence is reasonable we may suppose that in a concrete case it will commend itself to the reason of the court. Decided cases, however, have this superiority to doctrine, that if they are uniform and continuous they make custom, and through custom law. This is the 'rerum perpetuo similiter judicatarum auctoritas' of the civilians.[3] I have stated the theory. In practice, the decisions of a court of superior jurisdiction necessarily carry more weight than the speculations of a commentator.

Amongst commentaries upon the Civil Code of the Province, the works of Mr. P. B. Mignault and of Mr. Justice Langelier hold first rank. On the question which occupies us these authors are in exact agreement. "Il me reste," says Prof. Mignault, "une observation à faire. Nos articles parlent de la considération, ce qui me paraît être un anglicisme et remplace mal à propos le mot *cause* qu'emploie le code Napoléon et que nous trouvons dans nos articles 982 et 984. Cette dernière expression est non seulement la seule qui soit *française,* mais aussi la seule, qui soit *juridique.* Je m'en servirai exclusivement."[4] Prof. Mignault then proceeds to expound the French doctrine of *cause,* adopting without change the language of Mourlon's *Repetitions écrites sur le code civil,* upon which his own treatise is based. Mr. Justice

[2] (1840) 11 A. & E. 438.

[3] Dig. 1. 3. 38.

[4] Mignault, Droit civil Canadien, vol. 5, p. 200, note (a).

Langelier follows the same method of interpretation.[5] The theory of cause is explained and illustrated. The theory of consideration is not even mentioned.

With very great respect for these learned and lucid writers, I cannot accept their solution as satisfactory. They resolve the difficulty of interpretation by ignoring its existence. The Civil Code speaks not of cause merely, but in art. 984 of 'cause or consideration,' and in arts. 989-90 of consideration alone. The first is a term of art in the law of France. The second is a term of art in the law of England. *Prima facie* there seems to be no reason why we should recur to the one of these systems rather than to the other. The fact above adverted to, that the codifiers do not cite any English authorities for these articles, is not conclusive, for the Roman and French authorities cited do not explain the use of the word consideration along with or in substitution for cause. If we are to depend upon the Code alone or upon its commentators the issue of *cause v. consideration* seems likely to remain undetermined.

Perhaps a better way will be to resort to the decisions of the courts before and after codification. For the pre-codification period little assistance is given by the reports. The two cases to which I shall refer do not carry us farther back than the years immediately preceding codification. They may, however, for that very reason have a certain value as illustrating the then state of the law.

In *Easton v. Easton*[6] the plaintiffs by their declaration prayed that the defendants might be condemned to execute a deed of ratification of a certain deed of donation. The property donated was at the time of donation subject to an outstanding life-interest or usufruct; and the donors by the said deed of donation bound and obliged themselves to ratify, confirm and renew the donation within eight days of the death of the usufructuary. This, though duly required, they failed and neglected to do. Defendant demurred . . . . "because no cause or consideration was alleged as having been given by plaintiffs to this defendant entitling them to the ratification claimed by the action; such promise was therefore a *nudum pactum* and could not be enforced by law." The court was of opinion that as the original deed of donation was valid the promise to ratify the same was binding.

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[5] Langelier, Cours de droit civil, vol. 3, pp. 362-3.

[6] (1863) 7 L. C. J. 138.

The case of *Colvile v. Flanagan*[7] decided nothing pertinent to our enquiry, and is only referred to in connection with the argument put forward by one of the parties that "both in our own and in the English law a moral obligation is a good consideration for a promise to pay." Reference is made to *Lee v. Muggeridge,*[8] and to *Woodbridge v. Spooner,*[9] but not to the later case of *Eastwood v. Kenyon.*[10] The respondent's case then states:— "The appellants in this case plead no consideration given for the check, and it is not pretended on the respondent's part that actual pecuniary value was given, although he had been in the habit of performing friendly services which in another would probably have been remunerated in money. The consideration is sufficiently shown in the words with which the check was handed to Mr. H. for the respondent, 'Mr. Flanagan has been very useful to me and most discreet in everything he has undertaken. I wish to make him an acknowledgement of my obligation to him.' "

These two cases, both decided immediately before the publication of the Code, if they do not help us much, point at all events to the conclusion that counsel at that time approached the question of 'cause or consideration' rather from the point of view of 'consideration' than from the point of view of 'cause.'

Coming to more recent times we have in 1894 the case of *Scanlan vs. Smith,*[11] which came before the Superior Court in Review. This was an action against executors for arrears of an annuity alleged to be due under a contract made by their testator. Plaintiff was testator's sister-in-law. Being left badly off on her husband's death she proposed to keep a boarding-house as a means of livelihood, and leased a house for the purpose. Testator, who was a wealthy man, expressed his disapproval, and persuaded plaintiff to abandon her project, promising her an annual pension of $200. His motive was found to be "his large fortune, the humiliation of seeing his sister-in-law reduced to gaining a livelihood by such means, while he was well able to provide for her, and finally a promise made to his dying brother to care for the widow." In this state of facts the court held that there was an obligation having a legal cause (obligation ayant une cause légale) and pronounced for the plaintiff. In what the

[7] (1864) 8 L. C. J. 225.
[8] (1813) 5 Taunt. 36.
[9] (1819) 3 B. & Ald. 233.
[10] (1840) 11 A. & E. 438.
[11] R. J. Q. 6 C. S. 58.

cause consisted is not stated, but there is no indication that the court found it in the evident detriment to the promisee.

In *Brulé v. Brulé*[12] action was brought upon a promissory note made by defendant in favor of his sister. The evidence established that the note was made in fulfilment of a promise given by defendant to his dying father. Payment was resisted on the ground that the transaction was in effect a gift *mortis causa* made by the father, and invalidly constituted. The court rejected this view and found "qu'au contraire ce billet n'est que la reconnaissance d'une obligation librement contractée par le défendeur en faveur de sa soeur, fille mineure, pour lui venir en aide, à la mort de son père; obligation justifiée par les avantages que le défendeur avait reçus antérieurement de son père par préference sur la dite soeur, qui se trouvait reduite à l'indigence." It will be noticed that though there may have been an antecedent moral duty to provide for the sister, there was no antecedent *obligation to her.* The promise was made to the father. The consideration (if any) moved from the father. We have not to do here, it must be remembered, with the vague generalities of the Civil Code, but with the more precise language of a Dominion Statute. By the Bills of Exchange Act, sec. 53, valuable consideration for a bill [or note] may be constituted by—(a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. It has been argued that this section has introduced the English law of consideration into Quebec *quoad* negotiable instruments. Certainly it is difficult to see how a statute of general application can take its color, chameleon-like, from its environment, so that the same word 'consideration' should carry one meaning in Quebec, another in the common law provinces. On the other hand the corresponding section of the British Bills of Exchange Act is said to leave untouched the rule of the Scottish law that valuable consideration is not necessary to support an obligation. Perhaps we may take it, then, that the words 'any consideration sufficient to support a simple contract' mean, when applied to Quebec, 'any consideration judged sufficient by the law of Quebec.'

But even if this be so, the statute compels the Quebec lawyer, who is apt to live in a rather nebulous atmosphere of moral consideration, to distinguish in relation to bills and notes between

[12] (1904) R. J. Q. 26 C. S. 77.

present consideration, and antecedent debt or liability. He must elect between the two. Now in the case before us it does not appear that the brother owed any antecedent debt or liability (understand legal debt or liability) to his sister. There was no existing relation between them which could have given rise to legal process. The note therefore can only be upheld, if at all, on the ground of a consideration sufficient to support a simple contract. But this too seems to be wanting. It may possibly consist in the moral duty (if such there was) to provide for the sister, rendered more stringent, it may be said, by the promise to the father, and by the fact that the son had enjoyed advantages in preference to his sister. If this is our law, we seem to go the full length of, and perhaps even beyond, the doctrine of moral consideration, as stated by Mansfield, C. J. and Gibbs, J. in *Lee v. Muggeridge.* The doubt must occur, however, whether it is the proper business of a court of law to assume the office of a court of conscience.

Another case which raises the same doubt is *Corbett v. Murray.*[13] A son had embezzled funds. The father gave promissory notes to cover the amount of his defalcations. The court found that there was no agreement to compromise the crime, and further, that there was consideration for the note in the father's moral duty to indemnify the employer.

In the later case of *Legris v. Chéné,*[14] a father on his death-bed gave two checks to his son. The father died on October 30th. The checks were presented for payment on October 31st. Payment was refused for want of funds. The court held that there was no valid gift of the checks, but allowed the plaintiff to recover the amount of the checks from the representatives of the deceased. How an action could be maintained upon the checks is not very apparent, for they must have been invalidated by the death of the drawer. The case for the plaintiff was that at the instance of his father he had bought land, and contracted with a builder for the construction of a house upon it, the father undertaking to be answerable for the cost. A clearer case of detriment to the promisee could scarcely be found. The court did not, however, decide for the plaintiff on this ground, but on the ground of moral duty. "Ces cheques n'ont pas été donnés sans considération. C'était un devoir de conscience pour Chéné père

[13] (1901) 7 R. J. 203.
[14] (1914) R. J. Q. 23 K. B. 571.

de s'acquitter de l'engagement qu'il avait contracté. Ces cheques étaient donc validement causés."

Perhaps nothing brings the necessity of consideration into clearer relief than a promise to keep an offer open. E. g., A in writing offers to sell his house to B and adds "the offer to be left open until Friday, 9 A. M."[15] Here there are two offers; 1, an offer to sell; 2, an offer not to withdraw the offer to sell. In English law, if the second offer is accepted, and there is a sufficient consideration moving from the promisee, there results a contract to which the courts will give effect, with the consequence that A is answerable in damages if he withdraws his offer to sell. In French Canadian law the result will be the same if the second offer is accepted, and there is a 'lawful cause or consideration.' In a business community such cause or consideration is most likely to consist in some value given or promised by the offeree to the offeror to compensate him for foregoing for a time his chance of sale in the open market. In the recent case of *Cox v. Clendenning*[16] Cox wrote to Clendenning, "I, the undersigned, give W. Clendenning or any other person assigned by him, the option on subdivision Nos. 84 and 85, fronting on Bagg Avenue, as per official lot No. 642 of the plan of the parish of S. Laurent, for the amount of $500 payable on the passation of the deed of sale. This option to expire May 30, 1912." Next day, Cox withdrew his offer. Clendenning refused to admit the withdrawal, and purported to accept within the time limited. Clendenning sued for specific performance. The court (Archibald, A. C. J., and Greenshields and Mercier, JJ., dissenting) had little difficulty in dismissing the action on the ground that there had never been an agreement to sell, and therefore, no contract which could be specifically enforced. The learned Chief Justice said that "the contract broken is not a contract to sell, but a contract to wait so that the purchaser might have the chance to buy." Such a contract was not susceptible of specific enforcement and a breach of it resulted only in damages. But further, it was questionable whether there ever was a binding contract between the parties. His Lordship continued: "I have discussed this case on the assumption that the option in question did form a contract between the parties; but I might add that so far as this particular case is concerned, there was no undertaking of any description

[15] As in *Dickinson v. Dodds,* (1876) L. R. 2 Ch. D. 463.
[16] (1915) R. J. Q. 49 C. S. 71.

on the part of the plaintiff even to attempt to sell the property. . . . It looks to me exceedingly like a case where one of the essential elements of a contract fails, viz., the consideration." There is nothing in this with which a common-lawyer could disagree. Nor, seemingly, would the result be different in a system of law which demanded merely cause. At its lowest valuation that much-abused term supposes at least an intention to benefit the promisee, but to suppose any such intention in a real-estate transaction, except as the equivalent of some advantage to the promisor, is plainly absurd.

From the above decisions and a few others, one may construct such a theory of consideration as one will. As explained above, the decisions are not authoritative, but they are, at all events, as authoritative as text-books. From neither source does one obtain a critical examination of the law in force in the Province of Quebec. It is not very easy to establish anything definite. The French teaching of cause is completely nebulous; the English theory of consideration, when allowed to include moral consideration, is scarcely less so. As between the two we see the decisions of our courts inclining now to one, now to the other in accordance with the predilections of the court for one or other doctrine. If the Supreme Court of Canada were called upon to decide between them, one may suppose that it would favor a solution which in such an important matter would minimize the difference between the law of Quebec and that of the other provinces. If the question went in appeal to the Judicial Committee of His Majesty's Privy Council—that splendid and imperial tribunal, which views all systems of law with the same impartial aloofness—one might with even more assurance expect the same result. If under all reserves I may express my own opinion, gathered from the jurisprudence of the courts, it is as follows: I do not think our law enforces a merely gratuitous promise. The so-called *contrat de bienfaisance* finds no place in our Code, and is not at home in our system. On the other hand, the 'cause or consideration' of the Civil Code is not identical with consideration as now interpreted by the English courts. In common with some of the states of the Union we still admit that moral consideration will, in certain cases, support a promise. What 'moral consideration' imports is hard to say. It extends to services rendered by the promisee, whether moved or not by a previous request. In some cases it has been taken to include any antecedent moral duty to the promisee, e. g., the duty to support an indigent sister or to

make amends for a son's defalcations. But the content of a notion so essentially vague, eludes definition. Another point which emerges is that in its more normal applications consideration presents itself to our minds rather as advantage to the promisor than as detriment to the promisee. If in a concrete case the latter element seems more conspicuous than the former the promise is likely to be upheld, not so much on this ground, as on the ground of moral duty. Finally, it is pertinent to observe that the extremely elastic conceptions of civil liability favored by our system admit of applications which are foreign to the common law, at all events as it exists at present. Thus, if I make to you a statement or express an intention upon which you are intended to act, and upon which you do act to your detriment, it is said that an action lies upon the "delictual fault," i. e., in tort and not in contract. If this is so, the necessity for consideration of any kind seems to disappear. But to enter upon this subject lies outside the scope of this article.

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