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## CONSIDERATION AND FORM\*

§ 1. *Introduction.*—What is attempted in this article is an inquiry into the rationale of legal formalities, and an examination of the common-law doctrine of consideration in terms of its underlying policies. That such an investigation will reveal a significant relationship between consideration and form is a proposition not here suggested for the first time; indeed the question has been raised (and sometimes answered affirmatively) whether consideration cannot in the end be reduced entirely to terms of form.

That consideration may have both a “formal” and a “substantive” aspect is apparent when we reflect on the reasons which have been advanced why promises without consideration are not enforced. It has been said that consideration is “for the sake of evidence” and is intended to remove the hazards of mistaken or perjured testimony which would attend the enforcement of promises for which nothing is given in exchange.<sup>1</sup> Again, it is said that enforcement is denied gratuitous promises because such promises are often made impulsively and without proper deliberation.<sup>2</sup> In both these cases the objection relates, not to the content and effect of the promise, but to the manner in which it is made. Objections of this sort, which touch the form rather than the content of the agreement, will be removed if the making of the promise is attended by some formality or ceremony, as by being under seal. On the other hand, it has been said that the enforcement of gratuitous promises is not an object of sufficient importance to our social and economic order to justify the expenditure of the time and energy necessary to accomplish it.<sup>3</sup> Here the objection is one of “substance” since it

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1. Mansfield, C. J., in *Pillans v. Van Mierop*, 3 Burr. 1663, 1669, 97 Eng. Rep. 1035, 1038 (K. B. 1765); *Sharington v. Strotton*, 1 Plow. 297a, 302, 75 Eng. Rep. 454, 459-60 (K. B. 1565) (argument of counsel); Whittier, *The Restatement of Contracts and Consideration* (1930) 18 CALIF. L. REV. 611, 613.

2. Wilmot, J., in *Pillans v. Van Mierop*, 3 Burr. 1663, 1670, 97 Eng. Rep. 1035, 1038 (K. B. 1765); *Sharington v. Strotton*, 1 Plow. 297a, 308, 75 Eng. Rep. 454, 469 (K. B. 1565) (argument of counsel); *Davis v. Morgan*, 117 Ga. 504, 507, 43 S. E. 732, 733 (1903); Ames, *Two Theories of Consideration* (1899) 13 HARV. L. REV. 29, 42; Ballantine, *The Source of Obligation in Bilateral Contracts* (1916) 3 VA. L. REV. 432, 437; Whittier, *The Restatement of Contracts and Consideration* (1930) 18 CALIF. L. REV. 611, 613.

3. Ballantine, *Mutuality and Consideration* (1914) 28 HARV. L. REV. 121; Willis, *Rationale of the Law of Contracts* (1936) 11 IND. L. J. 227, 230; *Davis v. Morgan*, 117 Ga. 504, 507, 43 S. E. 732, 733 (1903).

touches the significance of the promise made and not merely the circumstances surrounding the making of it.

The task proposed in this article is that of disentangling the "formal" and "substantive" elements in the doctrine of consideration. Since the policies underlying the doctrine are generally left unexamined in the decisions and doctrinal discussions, it will be necessary to postpone taking up the common-law requirement itself until we have examined in general terms the formal and substantive bases of contract liability.

### I. THE FUNCTIONS PERFORMED BY LEGAL FORMALITIES<sup>4</sup>

§ 2. *The Evidentiary Function.*—The most obvious function of a legal formality is, to use Austin's words, that of providing "evidence of the existence and purport of the contract, in case of controversy." The need for evidentiary security may be satisfied in a variety of ways: by requiring a writing, or attestation, or the certification of a notary. It may even be satisfied, to some extent, by such a device as the Roman *stipulatio*, which compelled an oral spelling out of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders.

§ 3. *The Cautionary Function.*—A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer—symbol in the popular mind of legalism and weightiness—was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

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4. On the general problem of the rationale of legal formalities see Austin, *Fragments—On Contracts*, printed in 2 LECTURES ON JURISPRUDENCE (4th ed. 1879) 939-944; Llewellyn, *What Price Contract?* (1931) 40 YALE L. J. 704; Mechem, *The Requirement of Delivery in Gifts of Chattels* (1926-1927) 21 ILL. L. REV. 341, 457, 568; Bentham, *The Rationale of Judicial Evidence*, printed in 6 WORKS, (Bowring's ed. 1839) 64-86, 508-585; Chafee, *Acceleration Provisions in Time Paper* (1919) 32 HARV. L. REV. 747, 750; Sharp, *Promissory Liability. II.* (1940) 7 UNIV. OF CHI. L. REV. 250, 252 and *passim*; 3 SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1840) § 130; 2 SAVIGNY, OBLIGATIONENRECHT (1853) § 74; II<sup>2</sup> IHERING, GEIST DES RÖMISCHEN RECHTS (8th ed. 1923) §§ 45-47d; 3 GÉNY, SCIENCE ET TECHNIQUE (1921) §§ 202-206; DEMOGUE, LES NOTIONS FONDAMENTALES DU DROIT PRIVÉ (1911) 63-87; 1 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL (1923) §§ 191-212; 1 KOHLER, LEHRBUCH DES BÜRGERLICHEN RECHTS (1906) §§ 235-237; Huber, *Formen im schweizerischen Privatrecht* (1911), in Heft 58, GMÜR, ABHANDLUNGEN ZUM SCHWEIZERISCHEN RECHT (1914) 79-126.

§ 4. *The Channeling Function.*—Though most discussions of the purposes served by formalities go no further than the analysis just presented, this analysis stops short of recognizing one of the most important functions of form. That a legal formality may perform a function not yet described can be shown by the seal. The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability. This function of form Ihering described as “the facilitation of judicial diagnosis,” and he employed the analogy of coinage in explaining it.

Form is for a legal transaction what the stamp is for a coin. Just as the stamp of the coin relieves us from the necessity of testing the metallic content and weight—in short, the value of the coin (a test which we could not avoid if uncoined metal were offered to us in payment), in the same way legal formalities relieve the judge of an inquiry *whether* a legal transaction was intended, and—in case different forms are fixed for different legal transactions—*which* was intended.<sup>5</sup>

In this passage it is apparent that Ihering has placed an undue emphasis on the utility of form for the judge, to the neglect of its significance for those transacting business out of court. If we look at the matter purely from the standpoint of the convenience of the judge, there is nothing to distinguish the forms used in legal transactions from the “formal” element which to some degree permeates all legal thinking. Even in the field of criminal law “judicial diagnosis” is “facilitated” by formal definitions, presumptions, and artificial constructions of fact. The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. To the business man who wishes to make his own or another’s promise binding, the seal was at common law available as a device for the accomplishment of his objective. In this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention. It is with this aspect of form in mind that I have described the third function of legal formalities as “the channeling function.”

In seeking to understand this channeling function of form, perhaps the most useful analogy is that of language, which illustrates both the

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5. II<sup>2</sup> GEIST DES RÖMISCHEN RECHTS (8th ed. 1923) 494. Cf., “In all legal systems the effort is to find definite marks which shall at once include the promises which ought to be enforceable, exclude those which ought not to be, and signalize those which will be.” Llewellyn, *What Price Contract?* (1931) 40 YALE L. J. 704, 738.

advantages and dangers of form in the aspect we are now considering. One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels; he must reduce the fleeting entities of wordless thought to the patterns of conventional speech. One planning to enter a legal transaction faces a similar problem. His mind first conceives an economic or sentimental objective, or, more usually, a set of overlapping objectives. He must then, with or without the aid of a lawyer, cast about for the legal transaction (written memorandum, sealed contract, lease, conveyance of the fee, etc.) which will most nearly accomplish these objectives. Just as the use of language contains dangers for the uninitiated, so legal forms are safe only in the hands of those who are familiar with their effects. Ihering explains that the extreme formalism of Roman law was supportable in practice only because of the constant availability of legal advice, *gratis*.

The ideal of language would be the word whose significance remained constant and unaffected by the context in which it was used. Actually there are few words, even in scientific language, which are not capable of taking on a nuance of meaning because of the context in which they occur. So in the law, the ideal type of formal transaction would be the transaction described on the Continent as "abstract," that is, the transaction which is abstracted from the causes which gave rise to it and which has the same legal effect no matter what the context of motives and lay practices in which it occurs. The seal in its original form represented an approach to this ideal, for it will be recalled that extra-formal factors, including even fraud and mistake, were originally without effect on the sealed promise. Most of the formal transactions familiar to modern law, however, fall short of the "abstract" transaction; the channels they cut are not sharply and simply defined. The Statute of Frauds, for example, has only a kind of negative canalizing effect in the sense that it indicates a way by which one may be sure of *not* being bound. On the positive side, the outlines of the channel are blurred because too many factors, including consideration, remain unassimilated into the form.

As a final and very obvious point of comparison between the forms of law and those of language, we may observe that in both fields the actual course of history is determined by a continuous process of compromise between those who wish to preserve the existing patterns and those who wish to rearrange them. Those who are responsible for what Ihering called "the legal alphabet"—our judges, legislators, and text-writers—exercise a certain control over the usages of business, but there

are times when they, like the lexicographer, must acquiesce in the innovations of the layman. The mere fact that the forms of law and language are set by a balance of opposing tensions does not, of course, insure the soundness of the developments which actually occur. If language sometimes loses valuable distinctions by being too tolerant, the law has lost valuable institutions, like the seal, by being too liberal in interpreting them. On the other hand, in law, as in language, forms have at times been allowed to crystallize to the point where needed innovation has been impeded.

§ 5. *Interrelations of the Three Functions.*—Though I have stated the three functions of legal form separately, it is obvious that there is an intimate connection between them. Generally speaking, whatever tends to accomplish one of these purposes will also tend to accomplish the other two. He who is compelled to do something which will furnish a satisfactory memorial of his intention will be induced to deliberate. Conversely, devices which induce deliberation will usually have an evidentiary value. Devices which insure evidence or prevent inconsiderateness will normally advance the desideratum of channeling, in two different ways. In the first place, he who is compelled to formulate his intention carefully will tend to fit it into legal and business categories. In this way the party is induced to canalize his own intention. In the second place, wherever the requirement of a formality is backed by the sanction of the invalidity of the informal transaction (and this is the means by which requirements of form are normally made effective), a degree of channeling results automatically. Whatever may be its legislative motive, the formality in such a case tends to effect a categorization of transactions into legal and non-legal.

Just as channeling may result unintentionally from formalities directed toward other ends, so these other ends tend to be satisfied by any device which accomplishes a channeling of expression. There is an evidentiary value in the clarity and definiteness of contour which such a device accomplishes. Anything which effects a neat division between the legal and the non-legal, or between different kinds of legal transactions, will tend also to make apparent to the party the consequences of his action and will suggest deliberation where deliberation is needed. Indeed, we may go further and say that some minimum satisfaction of the desideratum of channeling is necessary before measures designed to prevent inconsiderateness can be effective. This may be illustrated in the holographic will. The necessity of reducing the testator's intention to his own handwriting would seem superficially to offer, not only evidentiary safeguards, but excellent protection against inconsiderateness

as well. Where the holographic will fails, however, is as a device for separating the legal wheat from the legally irrelevant chaff. The courts are frequently faced with the difficulty of determining whether a particular document—it may be an informal family letter which happens to be entirely in the handwriting of the sender—reveals the requisite “testamentary intention.” This difficulty can only be eliminated by a formality which performs adequately the channeling function, by some external mark which will signalize the testament and distinguish it from non-testamentary expressions of intention. It is obvious that by a kind of reflex action the deficiency of the holographic will from the standpoint of channeling operates to impair its efficacy as a device for inducing deliberation.

Despite the close interrelationship of the three functions of form, it is necessary to keep the distinctions between them in mind since the disposition of borderline cases of compliance may turn on our assumptions as to the end primarily sought by a particular formality. Much of the discussion about the parol evidence rule, for example, hinges on the question whether its primary objective is channeling or evidentiary. Furthermore, one or more of the ends described may enter in a subsidiary way into the application of requirements primarily directed to another end. Thus there is reason to think that a good deal of the law concerning the suretyship section of the Statute of Frauds is explainable on the ground that courts have, with varying degrees of explicitness, supposed that this section served a cautionary and channeling purpose in addition to the evidentiary purpose assumed to be primarily involved in the Statute as a whole.<sup>6</sup>

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6. In the leading case of *Davis v. Patrick*, 141 U. S. 479, 487, 488 (1891), the Court, in defining the purposes of the suretyship section of the Statute, speaks of the danger that the creditor may “torture mere words of encouragement and confidence into an absolute promise.” It is clear that this danger exists not so much because of a lack of satisfactory proof of what was in fact said, but because of the lack of some device which will perform what I have called the channeling function of form. Though the receipt of a benefit by the surety, which was held in *Davis v. Patrick* to make his oral promise binding, may have some significance from an evidentiary standpoint, its primary significance would seem to be from the standpoint of the other two functions of form.

In Germany the promise of a surety is required by § 766 of the Civil Code to be in writing. The purpose of this requirement has been explained as follows: “The basis of this requirement of form is that oral suretyships are often entered incautiously and in haste, and that it is often difficult to decide in the case of oral ‘recommendations’ whether the alleged surety really intended to bind himself or only intended to recommend the principal debtor without obligation to himself.” I COSACK UND MITTEIS, *LEHRBUCH DES BÜRGERLICHEN RECHTS* (8th ed. 1927) § 221. The more usual explanation speaks only of a cautionary or deterrent purpose. See 2 STAUDINGER, *KOMMENTAR ZUM BGB* (9th ed. 1929) § 766 (1). An interesting parallel to the “main-purpose rule” in America is presented by the fact that § 350 of the German Commercial Code exempts the suretyship undertakings of “merchants” in commercial transactions from the requirement of a writing.

§ 6. *When are Formalities Needed? The Effect of an Informal Satisfaction of the Desiderata Underlying the Use of Formalities.*—The analysis of the functions of legal form which has just been presented is useful in answering a question which will assume importance in the later portion of this discussion when a detailed treatment of consideration is undertaken. That question is: In what situations does good legislative policy demand the use of a legal formality? One part of the answer to the question is clear at the outset. Forms must be reserved for relatively important transactions. We must preserve a proportion between means and end; it will scarcely do to require a sealed and witnessed document for the effective sale of a loaf of bread.

But assuming that the transaction in question is of sufficient importance to support the use of a form if a form is needed, how is the existence of this need to be determined? A general answer would run somewhat as follows: *The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises*—including in these “forces” the habits and conceptions of the transacting parties.

Whether there is any need, for example, to set up a formality designed to induce deliberation will depend upon the degree to which the factual situation, innocent of any legal remolding, tends to bring about the desired circumspective frame of mind. An example from the law of gifts will make this point clear. To accomplish an effective gift of a chattel without resort to the use of documents, delivery of the chattel is ordinarily required and mere donative words are ineffective. It is thought, among other things, that mere words do not sufficiently impress on the donor the significance and seriousness of his act. In an Oregon case,<sup>7</sup> however, the donor declared his intention to give a sum of money to the donee and at the same time disclosed to the donee the secret hiding place where he had placed the money. Though the whole donative act consisted merely of words, the court held the gift to be effective. The words which gave access to the money which the donor had so carefully concealed would presumably be accompanied by the same sense of present deprivation which the act of handing over the money would have produced. The situation contained its own guaranty against inconsiderateness.

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7. *Waite v. Grubbe*, 43 Ore. 406, 73 Pac. 206 (1903). The analysis of the case presented in the text is taken from Mechem, *The Requirement of Delivery in Gifts of Chattels* (1926-1927) 21 ILL. L. REV. 357, 486.

So far as the channeling function of a formality is concerned it has no place where men's activities are already divided into definite, clear-cut business categories. Where life has already organized itself effectively, there is no need for the law to intervene. It is for this reason that important transactions on the stock and produce markets can safely be carried on in the most "informal" manner. At the other extreme we may cite the negotiations between a house-to-house book salesman and the housewife. Here the situation may be such that the housewife is not certain whether she is being presented with a set of books as a gift, whether she is being asked to trade her letter of recommendation for the books, whether the books are being offered to her on approval, or whether—what is, alas, the fact—a simple sale of the books is being proposed. The ambiguity of the situation is, of course, carefully cultivated and exploited by the canvasser. Some "channeling" here would be highly desirable, though whether a legal form is the most practicable means of bringing it about is, of course, another question.

What has been said in this section demonstrates, I believe, that the problem of "form," when reduced to its underlying policies, extends not merely to "formal" transactions in the usual sense, but to the whole law of contracts and conveyances. Demogue has suggested that even the requirement, imposed in certain cases, that the intention of the parties be express, rather than implied or tacit, is in essence a requirement of form.<sup>8</sup> If our object is to avoid giving sanction to inconsiderate engagements, surely the case for legal redress is stronger against the man who has spelled out his promise than it is against the man who has merely drifted into a situation where he appears to hold out an assurance for the future.

## II. THE SUBSTANTIVE BASES OF CONTRACT LIABILITY

§ 7. *Private Autonomy*.—Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations. The man who conveys property to another is exercising this power; so is the man who enters a contract. When a court enforces a promise it is merely arming with legal sanction a rule or *lex* previously established by the party himself.<sup>9</sup> This power of

8. I TRAITÉ DES OBLIGATIONS EN GÉNÉRAL (1923) 280.

9. What I have called "the principle of private autonomy" is more commonly assumed than discussed in the Anglo-American literature. See, however, SALMOND, JURISPRUDENCE (9th ed. 1937) § 23, heading *Conventional law*; and VINOGRADOFF, COMMON-SENSE IN LAW (1914) 101-115. The problem generally discussed in this

the individual to effect changes in his legal relations with others is comparable to the power of a legislature. It is, in fact, only a kind of political prejudice which causes us to use the word "law" in one case and not in the other, a prejudice which did not deter the Romans from applying the word *lex* to the norms established by private agreement.

What has just been stated is not presented as an original insight; the conception described is at least as old as the Twelve Tables. But there is need to reaffirm it, because the issue involved has been obfuscated through the introduction into the discussion of what is called "the will theory of contract." The obfuscation has come partly from the proponents of that theory, but mostly from those who have undertaken to refute it and who, in the process of refutation, have succeeded in throwing the baby out with the bath.<sup>10</sup>

The principle of private autonomy may be translated into terms of the will theory by saying that this principle merely means that the will of the parties sets their legal relations. When the principle is stated in this way certain consequences may seem to follow from it: (1) that the law must concern itself solely with the actual inner intention of the promisor; (2) that the minds of the parties must "meet" at one instant of time before a contract can result; (3) that the law has no power to fill gaps in an agreement and is helpless to deal with contingencies unforeseen by the parties; and even (4) that the promisor must be free to change his mind at any time, since it is his will which sets the rule. Since these consequences of the will theory are regarded as unacceptable, the theory is assumed to be refuted by the fact that it entails them.

If we recognize that the will theory is only a figurative way of expressing the principle of private autonomy, we see to what an extent this "refutation" of the will theory really obscures the issues involved. In our country a law-making power is vested in the legislature. This fact is frequently expressed by saying that the will of the legislature is the

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country under the heading "freedom of contract" is the problem of the limits on private autonomy. Cf., HECK, GRUNDRISS DES SCHULDRECHTS (1929) § 41.

Cohen's discussion of *Contract and Sovereignty*, and Gardner's discussion of the *Specialty Principle* and *Bargain Principle* appear in effect to deal with the principle of private autonomy without using that term. See Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553, 585-592; Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 23, 25.

The principle of private autonomy has nothing to do with the ancient controversy whether the binding effect of a contract derives from "the law" or "the contract." Acceptance of it as a basis of contract liability in no way involves adherence to Marshall's view that "obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties." *Ogden v. Saunders*, 12 Wheat. 213, 345 (dissenting opinion) (U. S. 1827). As even Windscheid recognized, the problem is not *where* the obligation comes from, but *why* it is imposed.

10. Duguit and Pound in particular seem to me to have rejected too much in their repudiation of the will theory.

law. Yet from this hackneyed metaphor we do not feel compelled to draw a set of conclusions paralleling those listed above as deriving from the will theory of contract. Specifically, we do not seek the "actual, inner" intention of individual legislators; we do not insist, except in a very formal way, on proof that a majority of the legislators were actually of one mind at one instant of time; we do not hesitate to fill gaps in defective statutes; and, finally, we do not permit a majority of those who voted for a particular law to nullify it by a later informal declaration that they have changed their minds.

The principle of private autonomy, properly understood, is in no way inconsistent with an "objective" interpretation of contracts. Indeed, we may go farther and say that the so-called objective theory of interpretation in its more extreme applications becomes understandable only in terms of the principle of private autonomy. It has been suggested that in some cases the courts might properly give an interpretation to a written contract inconsistent with the actual understanding of either party.<sup>11</sup> What justification can there be for such a view? We answer, it rests upon the need for promoting the security of transactions. Yet security of transactions presupposes "transactions," in other words, acts of private parties which have a law-making and right-altering function. When we get outside the field of acts having this kind of function as their *raison d'être*, for example, in the field of tort law, any such uncompromisingly "objective" method of interpreting an act would be incomprehensible.

A legitimate criticism of the principle of private autonomy may be that it is phrased too narrowly, and excludes by implication private heteronomy. If we look at the matter realistically, we see that men not only make private laws for themselves, but also for their fellows. I do not refer here simply to the frequent existence of a gross inequality of bargaining power between contracting parties, nor to the phenomenon of the standardized contract established by one party for a series of routine transactions. Even without excursion into the social reality behind juristic conceptions, a principle of private heteronomy is visible in legal theory itself, as, for example, where it is laid down as a rule of law that the servant is bound to obey the reasonable commands of his master. Here the employer, within the framework of the agreement and subject to judicial veto, is making a part of "the law" of the relation between himself and his employee.

§ 8. *What Matters Shall be Left to Private Autonomy?*—From the fact that a principle of private autonomy is recognized it does not fol-

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11. 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 95.

low that this principle should be given an unlimited application. Law-making by individuals must be kept within its proper sphere, just as, under our constitutional system, law-making by legislatures is kept within its field of competence by the courts. What is the proper sphere of the rule of private autonomy?

In modern society the most familiar field of regulation by private autonomy is that having to do with the exchange of goods and services. Paradoxically, it is when contract is performing this most important and pervasive of its functions that we are least apt to conceive of it as a kind of private legislation. If *A* and *B* sign articles of partnership we have little difficulty in seeing the analogy between their act and that of a legislature. But if *A* contracts to buy a ton of coal from *B* for eight dollars, it seems absurd to conceive of this act as species of private law-making. This is only because we have come to view the distribution of goods through private contract as a part of the order of nature, and we forget that it is only one of several possible ways of accomplishing the same general objective. Coal does not have to be bought and sold; it can be distributed by the decrees of a dictator, or of an elected rationing board. When we allow it to be bought and sold by private agreement, we are, within certain limits, allowing individuals to set their own legal relations with regard to coal.<sup>12</sup>

The principle of private autonomy is not, however, confined to contracts of exchange, and historically it perhaps found its first applications outside the relationship of barter or trade.<sup>13</sup> As modern instances of the exercise of private autonomy outside the field of exchange we may cite gratuitous promises under seal, articles of partnership, and collective labor agreements. In all these cases there may be an element of exchange in the background, just as the whole of society is permeated by a principle of reciprocity. But the fact remains that these transactions do not have as their immediate objective the accomplishment of an exchange of values.

When the principle of private autonomy is extended beyond exchange, where does it stop? The answer to this question is by no means simple, even if it be attempted in terms of some particular system of positive law. I shall not attempt to give such an answer here. One question must, however, be faced. When the principle of private autonomy is extended beyond exchange, can it legitimately be referred to

12. "Bargain is then the social and legal machinery appropriate to arranging affairs in any specialized economy which relies on exchange rather than tradition (the manor) or authority (the army, the U. S. S. R.) for apportionment of productive energy and of product." Llewellyn, *What Price Contract?* (1931) 40 *YALE L. J.* 704, 717.

13. WEBER, *WIRTSCHAFT UND GESELLSCHAFT* (1925) 417.

as a "substantive basis of contract liability"? When we say that the contracting parties set the law of their relationship are we not giving a juristic construction of their act rather than a substantive reason for judicial intervention to enforce their agreement? It must be admitted that in one aspect the principle of private autonomy is a theory of enforcement rather than a reason for enforcement. But in another aspect the principle always implies at least one broad substantive reason for enforcement, which is identical with that underlying government generally. Though occasional philosophers may seem to dispute the proposition, most of us are willing to concede that some kind of regulation of men's relations among themselves is necessary. It is this general desideratum which underlies the principle of private autonomy. Whenever we can reinforce this general need for regulation by a showing that in the particular case private agreement is the best or the only available method of regulation, then in such a case "the principle of private autonomy" may properly be referred to as a "substantive" basis of contract liability.

§ 9. *Reliance*.<sup>14</sup>—A second substantive basis of contract liability lies in a recognition that the breach of a promise may work an injury to one who has changed his position in reliance on the expectation that the promise would be fulfilled. Reliance as a basis of contract liability must not be identified with reliance as a measure of the promisee's recovery. Where the object of the court is to reimburse detrimental reliance, it may measure the loss occasioned through reliance either *directly* (by looking to see what the promisee actually expended in reliance on the promise), or *contractually* (by looking to the value of the promised performance out of which the promisee presumably expected to recoup his losses through reliance). If the court's sole object is to reimburse the losses resulting from reliance, it may be expected to prefer the direct measure where that measure may be applied conveniently. But there are various reasons, too complicated for discussion here, why a court may find that measure unworkable and hence prefer the contractual measure, even though its sole object remains that of reimbursing reliance.<sup>15</sup>

14. On the general topic of this section see Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 22-23; Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553, 578-580; POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 269-284; HARRIMAN, THE LAW OF CONTRACTS (2d ed. 1901) §§ 646-652; Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936-1937) 46 YALE L. J. 52, 373; Mason, *A Theory of Contract Sanctions* (1938) 38 COLUMBIA LAW REV. 775. "It may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise." 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 139.

15. See Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936-1937) 46 YALE L. J. 52, 66-67 and *passim*.

What is the relation between reliance and the principle of private autonomy? Occasionally reliance may appear as a distinct basis of liability, excluding the necessity for any resort to the notion of private autonomy. An illustration may be found in some of the cases coming under Section 90 of the Restatement of Contracts. In these cases we are not "upholding transactions" but healing losses caused through broken faith. In another class of cases the principle of reimbursing reliance comes into conflict with the principle of private autonomy. These are the cases where a promisee has seriously and, according to ordinary standards of conduct, justifiably relied on a promise which the promisor expressly stipulated should impose no legal liability on him.<sup>16</sup> In still other cases, reliance appears not as an independent or competing basis of liability but as a ground supplementing and reinforcing the principle of private autonomy. For example, while it remains executory, a particular agreement may be regarded as too vague to be enforced; until it has been acted on, such an agreement may be treated as a defective exercise of the power of private autonomy. After reliance, however, the court may be willing to incur the hazards involved in enforcing an indefinite agreement where this is necessary to prevent serious loss to the relying party.<sup>17</sup> The same effect of reliance as reinforcing the principle of private autonomy may be seen in much of the law of waiver. Finally, in some branches of contract law reliance and the principle of private autonomy appear not as reinforcing one another so as to justify judicial intervention where neither alone would be sufficient, but as alternative and independently sufficient bases for imposing liability in the same case. This is perhaps the situation in those cases where the likelihood that reliance will occur influences the court to impose liability on the promisor.<sup>18</sup> On the one hand, we may

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16. In a number of recent cases of this sort, involving promises of bonuses to employees, recovery has been permitted. In these cases the principle of reimbursing reliance is regarded as overriding the principle of private autonomy. See *Tilbert v. Eagle Lock Co.*, 116 Conn. 357, 165 Atl. 205 (1933); *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 264 N. W. 385 (1936), 36 Columbia Law Rev. 996; *Wellington v. Curran Printing Co.*, 216 Mo. App. 358, 268 S. W. 396 (1925); *Mabley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N. E. 697 (1935), 49 HARV. L. REV. 148, 149. As tending in this direction, see also *George A. Fuller Co. v. Brown*, 15 F.(2d) 672 (C. C. A. 4th, 1926).

17. *Morris v. Ballard*, 16 F.(2d) 175 (App. D. C. 1926) (specific performance granted); *Kearns v. Andree*, 107 Conn. 181, 139 Atl. 695 (1928) (damages measured by the reliance interest granted).

18. Though there are few decisions where the likelihood of reliance is explicitly made a ground for decision, there is reason to suppose that this factor is a potent influence in shaping the law of contracts. See Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936-1937) 46 YALE L. J. 52, 60-61. Cf. *Rutgers v. Lucet*, 2 Johns. 92, 95 (N. Y. 1800): "The confidence placed in him [the promisor], and his undertaking to execute the trust, raise a sufficient consideration." The factor of likely reliance may explain why the rejection of an offer, without

say that the likelihood of reliance demonstrates that the parties themselves viewed their transaction as an exercise of private autonomy, that they considered that it set their rights and were prepared to act accordingly. On this view, the law simply acquiesces in the parties' conception that their transaction determined their legal relations. On the other hand, we may say that the likelihood that reliance will occur is a sufficient reason for dispensing with proof that it occurred in fact, since where reliance takes negative and intangible forms it may be difficult to prove. On this theory enforcement of the promise is viewed either as protecting an actual reliance which has probably occurred, or as a kind of prophylactic measure against losses through reliance which will be difficult to prove if they occur.

§ 10. *Unjust Enrichment*.<sup>19</sup>—In return for *B*'s promise to give him a bicycle, *A* pays *B* five dollars; *B* breaks his promise. We may regard this as a case where the injustice resulting from breach of a promise relied on by the promisee is aggravated. The injustice is aggravated because not only has *A* lost five dollars but *B* has gained five dollars unjustly. If, following Aristotle, we conceive of justice as being concerned with maintaining a proper proportion of goods among members of society, we may reduce the relations involved to mathematical terms. Suppose *A* and *B* have each initially ten units of goods. The relation between them is then one of equivalence, 10:10. *A* loses five of his units in reliance on a promise by *B* which *B* breaks. The resulting relation is 5:10. If, however, *A* paid these five units over to *B*, the resulting relation would be 5:15.<sup>20</sup> This comparison shows why unjust enrichment resulting from breach of contract presents a more urgent case for judicial intervention than does mere loss through reliance not resulting in unjust enrichment.

Since unjust enrichment is simply an aggravated case of loss through reliance,<sup>21</sup> all of what was said in the last section is applicable

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proof of actual reliance thereon by the offeror, terminates the power of acceptance, and perhaps affords a clue to the rules laid down in connection with the problem of election between inconsistent remedies.

19. Concerning the role of unjust enrichment in contract law see Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations* (1932) 41 YALE L. J. 386, 390; Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 34-35; and Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936-1937) 46 YALE L. J. 52, 373, esp. at pp. 53-57, 66-75, 396-397, 405, 409.

20. Cf., ARISTOTLE, NICOMACHEAN ETHICS, 1132a-1132b.

21. It is possible to conceive of cases where a defendant would be enriched through the breach of his promise though this enrichment did not result from reliance on the promise by the party impoverished. Such a case would be presented, for example, where after the plaintiff had voluntarily described a secret formula to the defendant, the defendant, for a consideration then paid him, promised not to use the formula in his business, and then later broke his promise. Normally, how-

here. When the problem is the quantum of recovery, unjust enrichment may be measured either *directly*, (by the value of what the promisor received), or *contractually*, (by the value of the promised equivalent). So too, the prevention of unjust enrichment may sometimes appear openly as a distinct ground of liability (as in suits for restitution for breach of an oral promise "unenforceable" under the Statute of Frauds), and at other times may appear as a basis of liability supplementing and reinforcing the principle of private autonomy (as where the notion of waiver is applied "to prevent forfeiture," and in cases where the inference of a tacit promise of compensation is explained by the court's desire to prevent unjust enrichment).

§ 11. *Substantive Deterrents to Legal Intervention to Enforce Promises.*—I have spoken of "the substantive bases of contract liability." It should be noted that the enforcement of promises entails certain costs which constitute substantive objections to the imposition of contract liability. The first of these costs is the obvious one involved in the social effort expended in the legal procedure necessary to enforcement. Enforcement involves, however, another less tangible and more important cost. There is a real need for a field of human intercourse freed from legal restraints, for a field where men may without liability withdraw assurances they have once given.<sup>22</sup> Every time a new type of promise is made enforceable, we reduce the area of this field. The need for a domain of "free-remaining" relations is not merely spiritual. Business deals can often emerge only from a converging series of negotiations, in which each step contains enough assurance to make worthwhile a further exchange of views and yet remains flexible enough to permit a radical readjustment to new situations. To surround with rigid legal sanctions even the first exploratory expressions of intention would not only introduce an unpleasant atmosphere into business negotiations, but would actually hamper commerce. The needs of commerce in this respect are suggested by the fact that in Germany, where the code makes offers binding without consideration, it has become routine to stipulate for a power of revocation.

§ 12. *The Relation of Form to the Substantive Bases of Contract Liability.*—Form has an obvious relationship to the principle of private autonomy. Where men make laws for themselves it is desirable that they should do so under conditions guaranteeing the desiderata de-

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ever, where a man secures a benefit for himself through the breaking of a promise it is because the promise has induced someone else to give up something.

22. Cf., Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553, 573; Willis, *Rationale of the Law of Contracts* (1936) 11 IND. L. J. 227, 230; *Richard's Ex'r v. Richards*, 46 Pa. 78, 82 (1863).

scribed in our analysis of the functions of form. Furthermore, the greater the assurance that these desiderata are satisfied, the larger the scope we may be willing to ascribe to private autonomy. A constitution might permit a legislature to pass laws relating to certain specified subjects in an informal manner, but prescribe a more formal procedure for "extraordinary" enactments, by requiring, for example, successive readings of the bill before it was put to a vote. So, in the law of contracts, we may trust men in the situation of exchange to set their rights with relative informality. Where they go outside the field of exchange, we may require a seal, or appearance before a notary, for the validity of their promises.

When we inquire into the relevance of form to liability founded on reliance or unjust enrichment, it becomes necessary to discriminate between the three functions of form. As to the desiderata implied in the evidentiary and cautionary functions it is clear that they do not lose their significance simply because the basis of liability has shifted. Even in the law of torts we are concerned with the adequacy of the proof of what occurred in fact, and (sometimes, at least) with the degree of deliberation with which the defendant acted. It is true that in the law of torts these considerations are not usually effectuated in the same way that they are in contract law. This is due to the fact that the channeling function of form becomes, in this field, largely irrelevant, for this function is intimately connected with the principle of private autonomy and loses its significance in fields where that principle has no application. To the extent, then, that the basis of promissory liability shifts from the principle of private autonomy to the reimbursement of reliance or the prevention of unjust enrichment, to that extent does the relevance of the channeling function of form decrease. This function loses its relevance altogether at that indefinite point at which it ceases to be appropriate to refer to the acts upon which liability is predicated as a "transaction."

### III. THE POLICIES, "FORMAL" AND "SUBSTANTIVE," UNDERLYING THE COMMON-LAW REQUIREMENT OF CONSIDERATION

§ 13. *Reasons for Refusing to Enforce the Gratuitous and Unrelied-on Promise.*—*A* promises to give *B* \$100; *B* has in no way changed his position in reliance on this promise, and he has neither given nor promised anything in return for it. In such a situation enforcement of the promise is denied both in the common law and in the civil law. We give as our reason, "lack of consideration"; the civilians point to a failure to comply with statutory formalities. In neither case, of course, does the reason assigned explain the policies which justify excluding this

promise from enforcement. An explanation in terms of underlying policies can, however, be worked out on the basis of the analysis just completed.

Looking at the case from the standpoint of the substantive bases of contractual liability we observe, first of all, that there is here neither reliance nor unjust enrichment. Furthermore, gratuities such as this one do not present an especially pressing case for the application of the principle of private autonomy, particularly if we bear in mind the substantive deterrents to judicial intervention. While an exchange of goods is a transaction which conduces to the production of wealth and the division of labor, a gift is, in Bufnoir's words, a "sterile transmission."<sup>23</sup> If on "substantive" grounds the balance already inclines away from judicial intervention, the case against enforcement becomes stronger when we draw into account the desiderata underlying the use of formalities. That there is in the instant case a lack of evidentiary and cautionary safeguards is obvious. As to the channeling function of form, we may observe that the promise is made in a field where intention is not naturally canalized. There is nothing here to effect a neat division between tentative and exploratory expressions of intention, on the one hand, and legally effective transactions, on the other. In contrast to the situation of the immediate gift of a chattel (where title will pass by the manual tradition), there is here no "natural formality" on which the courts might seize as a test of enforceability.

§ 14. *The Contractual Archetype—The Half-Completed Exchange.*  
—*A* delivers a horse to *B* in return for *B*'s promise to pay him ten dollars; *B* defaults on his promise, and *A* sues for the agreed price. In this case are united all of the factors we have previously analyzed as tending in the direction of enforcement of a promise. On the substantive side, there is reliance by *A* and unjust enrichment of *B*. The transaction involves an exchange of economic values, and falls therefore in a field appropriately left to private autonomy in an economy where no other provision is made for the circulation of goods and the division of labor, or where (as perhaps in primitive society) an expanding economy makes the existing provision for those ends seem inadequate. On the side of form, the delivery and acceptance of the horse involve a kind of natural formality, which satisfies the evidentiary, cautionary, and channeling purposes of legal formalities.

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23. PROPRIÉTÉ ET CONTRAT (2d ed. 1924) 487. This remark of Bufnoir's cannot be taken too literally; the element of exchange is a variable one, and there are few human relationships which do not involve a degree of reciprocity. It should be recalled that the practice of exchanging goods has commonly emerged in primitive societies out of a system of donations with, as Llewellyn says, "a felt obligation to reciprocate."

Describing this situation as "the contractual archetype,"<sup>24</sup> we may take it as our point of departure, dealing with other cases in terms of the degree of their deviation from it. Naturally, all kinds of nuances are here possible, and some minor departures from the pattern were the occasion for dispute in the early history of the action of debt. We are concerned here, however, chiefly with two major deviations from the archetype: the situation of the executory exchange, and the situation of reliance without exchange.

§ 15. *The Wholly Executory Exchange.*—*B* promises to build a house for *A*, and *A*, in return, promises to pay *B* \$5,000 on the completion of the house. *B* defaults on his promise, and *A*, without having had occasion to pay anything on the contract, sues *B* for damages. Judicial intervention in this kind of case apparently began in England toward the end of the sixteenth century. This development we describe by saying that after *Strangborough v. Warner*<sup>25</sup> and related cases the bilateral contract as such became for the first time enforceable. It is now generally assumed that so far as consideration is concerned the executory bilateral contract is on a complete parity with the situation where the plaintiff has already paid the price of the defendant's promised performance. Yet if we examine the executory bilateral contract in terms of the policies underlying consideration, it will become apparent that this assumption is unjustified, and that Lord Holt in reality overshot the mark in his assertion that "where the doing a thing will be a good consideration, a promise to do that thing will be so too."<sup>26</sup>

Where a bilateral contract remains wholly executory the arguments for judicial intervention have been considerably diminished in comparison with the situation of the half-completed exchange. There is here no unjust enrichment. Reliance may or may not exist, but in any event will not be so tangible and direct as where it consists in the rendition of the price of the defendant's performance. On the side of form, we have lost the natural formality involved in the turning over of property or the rendition and acceptance of services. There remains simply the fact that the transaction is an exchange and not a gift. This fact alone does offer some guaranty so far as the cautionary<sup>27</sup> and channeling

24. Cf. Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936) 46 *YALE L. J.* 52, 67 and references there cited.

25. 4 *Leo.* 3, 74 *ENG. REP.* 686 (K. B. 1589).

26. *Thorp v. Thorp*, 12 *Mod.* 455, 459, 88 *ENG. REP.* 1448, 1450 (K. B. 1702).

27. "In *Bilateral Contracts* [inconsiderateness] . . . is supposed to be prevented by the mutuality: each party contracting for his own pecuniary advantage; contemplating a *quid pro quo*; and therefore, being in that circumspective frame of mind which a man who is only thinking of such advantage naturally assumes." Austin, *Fragments—On Contracts*, printed in 2 *LECTURES ON JURISPRUDENCE* (4th ed. 1873) 939, 940.

functions of form are concerned, though, except as the Statute of Frauds interposes to supply the deficiency, evidentiary safeguards are largely lacking. This lessening of the factors arguing for enforcement not only helps to explain why liability in this situation was late in developing, but also explains why even today the executory bilateral contract cannot be put on complete parity with the situation of the half-completed exchange.

In the situation of the half-completed exchange, the element of exchange is only one factor tending toward enforcement. Since that element is there reinforced by reliance, unjust enrichment, and the natural formality involved in the surrender and acceptance of a tangible benefit, it is unnecessary to analyze the concept of exchange closely, and it may properly be left vague. In the executory bilateral contract, on the other hand, the element of exchange stands largely alone<sup>28</sup> as a basis of liability and its definition becomes crucial. Various definitions are possible. We may define exchange vaguely as a transaction from which each participant derives a benefit, or, more restrictively, as a transaction in which the motives of the parties are primarily economic rather than sentimental. Following Adam Smith, we may say that it is a transaction which, directly or indirectly, conduces to the division of labor. Or we may take Demogue's notion that the most important characteristic of exchange is that it is a situation in which the interests of the transacting parties are opposed, so that the social utility of the contract is guaranteed in some degree by the fact that it emerges as a compromise of those conflicting interests.<sup>29</sup> The problem of choosing among these varying conceptions may seem remote and unimportant, yet it underlies some of the most familiar problems of contract law. For example, suppose a nephew promises his uncle that he will not smoke until he is twenty-one, and the uncle promises him \$5,000 as a reward if he will keep his promise. Where the nephew sues after having earned the reward by following the prescribed line of conduct recovery has been permitted.<sup>30</sup> But would such an agreement be enforced as an executory bilateral contract? Could the uncle, for example, sue the nephew for smoking a cigarette? In answering this question it is at once apparent that we are faced with the necessity of defining the particular kind of exchange which is essential to the enforcement of a bilateral contract.

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28. I say "largely alone" because there is always the possibility that the court will be influenced by actual reliance on the bargain or by the probability that reliance has taken place or will occur.

29. 1 *TRAITÉ DES OBLIGATIONS* (1923) 31; 2 *id.* 130-131.

30. *Hammer v. Sidway*, 124 N. Y. 538, 27 N. E. 256 (1891); *Lindell v. Rokes*, 60 Mo. 249 (1875); *Talbott v. Stemmons*, 89 Ky. 222 (1889).

A similar problem underlies many of the cases involving "illusory promises."

Like consideration, exchange is a complex concept. To the problem of the executory exchange we may, within a narrower compass, apply the same general approach that we have applied to the problem of consideration as a whole. Here our "archetype" is the business trade of economic values in the form of goods, services, or money. To the degree that a particular case deviates from this archetype, the incentives to judicial intervention decrease, until a point is reached where relief will be denied altogether unless the attenuated element of exchange is reinforced, either on the formal side by some formal or informal satisfaction of the desiderata underlying the use of legal formalities, or on the substantive side by a showing of reliance or unjust enrichment, or of some special need for a regulation of the relations involved by private autonomy.

§ 16. *Transactions Ancillary to Exchanges.*—There are various transactions which, though they are not themselves immediately directed toward accomplishing an exchange, are necessary preliminary steps toward exchanges, or are ancillary to exchanges in process of realization. Among these we may mention offers, promises of unpaid sureties, and what Llewellyn has described as "going-transaction adjustments" such as are involved in unilateral concessions or promises of extra compensation granted during performance of a bilateral contract.

Because of their connection with exchanges, these transactions, in varying degrees, participate in the underlying grounds, both "formal" and "substantive," which justify the enforcement of exchanges. Thus, for example, if it were thought that exchanges could in practice only be arranged through the device of preliminary offers and that offers could be effective only if made irrevocable, then the substantive grounds for enforcing bilateral contracts of exchange would extend to offers. Again, a promise of extra compensation to a man already under contract to build a house at a fixed price participates to some extent in the "formal" guaranties which justify the enforcement of exchanges. From the standpoint of the "channeling" function, for example, such a promise receives a certain canalization from being related to an existing business deal. There is not here to the same degree as in purely gratuitous promises a shadowy no-man's land in which it is impossible to distinguish between the binding promise and tentative or exploratory expressions of intention.

How far legal sanction ought to be extended to these transactions bordering on and surrounding exchanges is a legislative question which

cannot be discussed here, though it may be observed that it is precisely in this field that the greatest difference between the common law and the civil law exists. Probably our own law is in need of some reform. The written promise of a surety who guarantees the performance of one party to an exchange, for example, probably ought to be made enforceable without consideration. As to offers, the problem is more difficult, and probably some distinction between kinds of offers is in order.

§ 17. *Unbargained-for Reliance*.—An uncle promises to give his nephew one thousand dollars; in reliance on this promise the nephew incurs an indebtedness he would not otherwise have incurred. In this case we have a change of position which is not bargained for as the price of the uncle's promise. Where the element of exchange is removed from a case, the appeal to judicial intervention decreases both in terms of form and of substance. The appeal is diminished substantively because we are no longer in the field which is in modern society the most obviously appropriate field for the rule of private autonomy. From the formal standpoint, when we lose exchange, we lose the formal guaranties which go with the situation of exchange. (See §§ 14 and 15, *supra*.)

Section 90 of the Contracts Restatement provides in effect that a promise which has given rise to unbargained-for reliance may or may not be enforced, depending on the circumstances of the case. The section makes explicit only two criteria bearing on the question whether relief should be granted, namely, the seriousness of the promisee's reliance and its foreseeability by the promisor. On the basis of the analysis presented in this article, the following additional inquiries would be relevant: (1) Was the promise prompted wholly by generosity, or did it emerge out of a context of tacit exchange? (See §§ 15 and 16, *supra*.) (2) Were the desiderata underlying the use of formalities satisfied in any degree by the circumstances under which the promise was made? (See § 6, *supra*.) As bearing on the second question, we may ask whether the promise was express or implied, and whether after the promise was made the promisee declared to the promisor his intention of acting on it.<sup>31</sup>

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31. In this sense, the "acceptance" of the promise of a gratuity may be significant, even though the Restatement of Contracts in § 85 exempts promises made enforceable under § 90 from the requirement of mutual assent. On the Continent the requirement of some expression of acceptance, which is often applied even to purely unilateral promises, operates to some extent as a kind of surrogate for consideration, and many of the criticisms which in this country are directed against the requirement of consideration are there directed against the rule that the unaccepted promise cannot be binding. See HECK, *GRUNDRISS DES SCHULDRECHTS* (1929) § 41; 1 DEMOGUE, *TRAITÉ DES OBLIGATIONS* (1923) 51-63. In France the

§ 18. *Nominal Consideration.*—It has been held that a promise to make a gift may be made binding through the payment of a "nominal" consideration, such as a dollar or a cent. The proper ground for upholding these decisions would seem to be that the desiderata underlying the use of formalities are here satisfied by the fact that the parties have taken the trouble to cast their transaction in the form of an exchange. The promise supported by nominal consideration then becomes enforceable for reasons similar to those which justify the enforcement of the promise under seal. (See § 12, *supra*.) From the standpoint of such an analysis any such distinction as is taken in *Schnell v. Nell*<sup>32</sup> and Section 76 (c) of the Contracts Restatement is wholly out of place.

§ 19. *Release of Claims.*—There is in our law a noticeable, though not consistently expressed tendency to treat the surrender of rights differently from the creation of rights.<sup>33</sup> The same tendency may be observed in foreign systems.<sup>34</sup> In general it may be said that it is easier to give up a right than to create one. Words like "renunciation," "surrender," "extinction," and "waiver" are associated in the lawyer's mind with laxness, with a letting down of the bars. What is the explanation for this tendency? This is a question which has not, so far as I am aware, been answered at all. I believe that the analysis presented in § 6, *supra*, may give at least a part of the answer.

If when a creditor releases his debtor the desiderata underlying the use of formalities are satisfied by the circumstances surrounding the informal transaction, then we have an explanation for the observed relaxing of "formal" requirements in this situation. An analogy from the law of gifts will again be helpful. Ordinarily the effective gift of a chattel requires either some document of transfer or a delivery of the chattel itself. It has been held, however, that where the chattel is already in the possession of the donee, mere words of donation are sufficient. This is partly because in such a situation donative words are accompanied by a sense of present deprivation which is absent where

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principal doubt concerning the binding effect of an offer arises not from the lack of consideration but from the lack of acceptance by the offeree of the proposition to keep the offer open for a certain period. See 2 DEMOGUE, TRAITÉ 17. That there may be a certain overlapping in the function of consideration and mutual assent is apparent in the following passage from Austin, "*Why a promise is binding*. . . . It binds, on account of the expectation excited in the promisee. For which reason a mere sollicitation (that is, a promise made but not accepted) is not binding; for a promise not accepted could excite no expectation." *Fragments—On Contracts*, printed in 2 JURISPRUDENCE (4th ed. 1873) 939.

32. 17 Ind. 29 (1861).

33. See 6 WILLISTON, CONTRACTS (rev. ed. 1938) §§ 1820-1833.

34. See, e.g., the Swiss Code of Obligations § 115; the German Civil Code § 397; Raynaud, *La renonciation à un droit* (France 1936) 35 REV. TRIM. DE DR. CIV. 763.

the chattel remains in the donor's hands.<sup>35</sup> The cautionary function of form is thus satisfied in this situation without the imposition of form. So, I believe, if we look at the problem now under discussion from the standpoint of the cautionary function of form it will be apparent that there is a difference between releasing a claim and creating a claim by a promise. The release of a claim, even if made orally, carries with it normally a sense of deprivation which is lacking in the case of a promise. Where words have this effect, where they tend to produce a psychological wrench on the speaker, they satisfy the desideratum of inducing deliberation as well as a writing or a seal. On the side of "substance," it may be observed that releases are normally transactions ancillary to a relationship of exchange. (See § 16, *supra*.)

What has just been said is not presented as an adequate analysis of the whole problem of waiver and renunciation. Such an analysis could be made, I believe, in terms of the factors outlined in this article, but it would have to take into account the nuances and complexities to which these factors are subject in this field. Among the counter-currents which pull in a direction opposite from the tendency just discussed are the rule of *Foakes v. Beer*,<sup>36</sup> and the peculiar background surrounding the surrender of personal-injury claims.

§ 20. *Moral Obligation as Consideration.*—Courts have frequently enforced promises on the simple ground that the promisor was only promising to do what he ought to have done anyway. These cases have either been condemned as wanton departures from legal principle, or reluctantly accepted as involving the kind of compromise logic must inevitably make at times with sentiment. I believe that these decisions are capable of rational defense. When we say the defendant was morally obligated to do the thing he promised, we in effect assert the existence of a substantive ground for enforcing the promise. In a broad sense, a similar line of reasoning justifies the special status accorded by the law to contracts of exchange. Men *ought* to exchange goods and services; therefore when they enter contracts to that end, we enforce those contracts. On the side of form, concern for formal guaranties justifiably diminishes where the promise is backed by a moral obligation to do the thing promised. What does it matter that the promisor may have acted without great deliberation, since he is only promising to do what he should have done without a promise? For the same reason, can we not justifiably overlook some degree of evidentiary insecurity?

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35. See Mechem, *The Requirement of Delivery in Gifts of Chattels* (1926) 21 ILL. LAW REV. 341, 365.

36. L. R. 9 App. Cas. 605 (1884).

In refutation of the notion of "moral consideration" it is sometimes said that a moral obligation plus a mere promise to perform that obligation can no more create legal liability than zero plus zero can have any other sum than zero. But a mathematical analogy at least equally appropriate is the proposition that one-half plus one-half equals one. The court's conviction that the promisor ought to do the thing, plus the promisor's own admission of his obligation, may tilt the scales in favor of enforcement where neither standing alone would be sufficient. If it be argued that moral consideration threatens certainty, the solution would seem to lie, not in rejecting the doctrine, but in taming it by continuing the process of judicial exclusion and inclusion already begun in the cases involving infants' contracts, barred debts, and discharged bankrupts.

§ 21. *Performance of Legal Duty as Consideration.*—The analysis presented in this article is not sufficient for a comprehension of the factors underlying all the situations where courts have talked about "consideration." For example, cases where courts have said that illegal agreements are void for lack of consideration (since the law must close its eyes to an illegal consideration)<sup>37</sup> obviously involve policies going beyond those analysed in this paper. It is for a similar reason that I have not drawn into the discussion cases laying down the rule that the performance of a legal duty cannot be consideration. These cases involve factors extrinsic to the problems under discussion here. Among those factors are the effects of improper coercion, and the need for preserving the morale of professions, like that of policeman, jockey, and sailor, which involve activities impinging directly on the interests of others.<sup>38</sup> These cases touch the present discussion only in the sense that there is some relation between coercion and the desiderata underlying the use of formalities; whatever tends to guarantee deliberateness in the making of a promise tends in some degree to protect against the milder forms of coercion.

§ 22. *The Future of Form.*—Despite an alleged modern tendency toward "informality," there is little reason to believe that the problem of form will disappear in the future. The desiderata underlying the use of formalities will retain their relevance as long as men make promises to

37. See, e.g., *Branch v. Haas*, 16 Fed. 53, 55 (1883).

38. See the analysis of this problem in Whittier, *The Restatement of Contracts and Consideration* (1930) 18 CALIF. L. REV. 611, 616-624; and Sharp, *Pacta Sunt Servanda*, *supra* page 787. The problem of the enforceability of a promise to pay the promisee for doing his legal duty has been much discussed in French law. See, e.g., 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS* (1923) 603. Where such promises are denied enforcement, the doctrinal dispute has hinged about the question whether the proper ground is lack of cause or illicit cause.

one another. Doubt may legitimately be raised, however, whether there will be any place in the future for what may be called the "blanket formality," the formality which, like the seal, suffices to make any kind of promise, not immoral or illegal, enforceable. It is not that there is no need for such a device. The question is whether with our present-day routinized and institutionalized ways of doing business a "blanket formality" can achieve the desiderata which form is intended to achieve. The net effect of a reform like the Uniform Written Obligations Act, for example, will probably be to add a line or two to unread printed forms and increased embarrassment to the task of judges seeking a way to let a man off from an oppressive bargain without seeming to repudiate the prevailing philosophy of free contract. Under modern conditions perhaps the only devices which would be really effective in achieving the formal desiderata would be that of a nominal consideration actually handed over, or a requirement that the promise be entirely in the handwriting of the promisor. As the holographic will shows, even the second of these devices would be inadequate from the standpoint of the "channeling" function.

§ 23. *The Future of Consideration.*—The future of consideration is tied up to a considerable extent with the future of the principle of private autonomy. If the development of our society continues along the lines it is now following, we may expect, I believe, that private contract as an instrument of exchange will decrease in importance. On the other hand, with an increasing interdependence among the members of society we may expect to see reliance (unbargained-for, or half-bargained-for) become increasingly important as a basis of liability. We may also see an expansion of the principle of private (or semi-private) autonomy to fields outside that of exchange. We get some hint of this second development in the expanding importance of the collective labor agreement. It appears also in the increasing use by business of revocable dealer and distributor agencies, and standing offers, devices which have their *raison d'être* in furnishing a kind of frame-work or private constitution for future dealings. These changes in business practice will inevitably bring with them in time modifications of the doctrine of consideration. For example, the relationship involved in dealer and jobber agencies is one which calls increasingly for some kind of judicial regulation to prevent hardship and oppression. If the assumption that this relationship is "contractual" coupled with existing definitions of consideration operates to exclude judicial intervention, then legal doctrine should be modified so as to permit bringing this relationship within the control of the law.

It has sometimes been proposed that the doctrine of consideration be "abolished." Such a step would, I believe, be unwise, and in a broad sense even impossible. The *problems* which the doctrine of consideration attempts to solve cannot be abolished. There can be little question that some of these problems do not receive a proper solution in the complex of legal doctrine now grouped under the rubric "consideration." It is equally clear that an original attack on these problems would arrive at some conclusions substantially equivalent to those which result from the doctrine of consideration as now formulated. What needs abolition is not the doctrine of consideration but a conception of legal method which assumes that the doctrine can be understood and applied without reference to the ends it serves. When we have come again to define consideration in terms of its underlying policies the problem of adapting it to new conditions will largely solve itself.

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