Cause and Consideration in California— A Re-Appraisal

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The purpose of this paper is to analyze, in terms of *cause* and *consideration*, the basis for legal enforceability of agreements in California, and to suggest some changes in the law with respect to certain types of agreements, such as releases, agreements based upon "moral obligation," waivers of the statute of limitations, and agreements to modify existing contracts.

This inquiry arises from the section in the California Civil Code which provides, in the alternative, that for the existence of a contract—an enforceable agreement—there must be "a sufficient *cause* or consideration."¹ Legal consideration, of course, is the traditional binding element required by the Anglo-American common law,² and although the exact contours of the doctrine are a matter of some uncertainty, the concept of consideration is itself familiar enough to any common-law lawyer. On the other hand, the alternative element in the Civil Code provision, sufficient cause, is not at all familiar to most California lawyers. Cause is generally regarded as the major basis for enforcing agreements in civil-law countries, yet notwithstanding its apparent codification in this state, few California lawyers are even aware of the existence of the doctrine.³

Therefore, before turning to problems of cause and consideration in California contract law, it is well to examine briefly the meaning of the two doctrines and their historical derivation.

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¹ CAL. CIV. CODE § 1550. (Emphasis added.)

² The code has a chapter containing eleven sections concerning the subject of consideration (§§ 1605-1615), but no provisions discussing the alternate requirement of "sufficient cause." CAL. CIV. CODE § 1605 defines good consideration as follows: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is good consideration for a promise." Although concocted in terms of the benefit-detriment theory of consideration, this definition includes all the elements laid down in the definition of consideration set forth in RESTATEMENT, CONTRACTS § 75 (1932).

³ The extent to which "cause" had become lost to the California lawyers and judges in the first sixty years under the Code is exemplified by the fact that the California Annotators to the Restatement were able to state that "the law of consideration in California closely follows that laid down in these sections," citing hundreds of cases purporting to demonstrate that consideration rather than cause is an essential element in all contracts. California annotations to RESTATEMENT, CONTRACTS § 75.

I. DERIVATION OF REQUIREMENTS FOR ENFORCEABILITY OF CONTRACTS

Under no system of law are all promises enforceable. It has been stated that:

In the law of contracts, the central and inevitable problem is that of enforceability of promises. There are plenty of subsidiary and collateral problems; the primary question is: When will a promise be enforced.⁴

Our own traditional answer to this question is embodied in the doctrine of consideration, firmly imbedded in the common law. Developed during the course of the three centuries preceding the American Revolution, the doctrine was consequently received by those states which received the common law during the eighteenth and nineteenth centuries.⁵ Yet, no matter how familiar the concept may appear, no single definition of consideration has ever been successfully devised.⁶ However, it may be said that the common-law and California Civil Code definitions in general require that a bargain be struck between the parties, by which the promisor is to be benefitted or the promisee prejudiced.⁷

On the other hand, under the modern Civil law in Europe and South

⁴ 1 CORBIN, CONTRACTS § 210 (1950).

⁵ Its essentials are familiar to every student of the law of contracts:

"(1) Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise.

"(2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person." RESTATEMENT, CONTRACTS § 75 (1932).

Consideration must be bargained for pursuant to an agreement. *Simmons v. Cal. Institute of Technology*, 34 Cal. 2d 264, 272, 209 P.2d 581, 586 (1949) (consideration was past services, and hence promise was unsupported, despite showing of other acts and promises which would have been sufficient consideration if bargained for). Consideration must have value. *Krobitzsch v. Middleton*, 72 Cal. App. 2d 804, 809, 165 P.2d 729, 732 (1946); *Grant v. The Aerodraulics Co.*, 91 Cal. App. 2d 68, 76, 204 P.2d 683, 688 (1949) ("something which is completely worthless cannot constitute a valid consideration"). Further, the true consideration for a written agreement may be shown by evidence outside its terms. *Lewis v. McWhirter Pet. Co.*, 89 Cal. App. 2d 453, 200 P.2d 856 (1948) (although a lease standing alone lacked consideration, since defendant assumed no obligation thereunder, a contemporaneous oral agreement furnished mutuality of obligation and consideration for the lease). On the other hand, a compromise of a disputed claim is sufficient consideration, *Silver v. Shenanski*, 89 Cal. App. 520, 531, 201 P.2d 418, 426 (1949), and one promise may act as consideration for several counter-promises, *Crosby etc. Foundation, Inc.*, 73 Cal. App. 2d 103, 118, 166 P.2d 392, 400 (1946); *First Nat'l. Bank v. Pomona Tile Mfg. Co.*, 82 Cal. App. 2d 592, 603, 186 P.2d 693, 700 (1947). In California, specific performance is denied a party to a contract who has not received an adequate consideration for the contract (CAL. CIV. CODE § 3391), although such a denial is to be distinguished from "lack of consideration" at law. Thus, a contract may be supported by legal consideration sufficient for a suit for damages but inadequate for specific performance in equity.

⁶ "It is very doubtful whether a man could, in a single lifetime, make such a careful study of the facts of the cases as to be able to say whether or not any single definition or statement of doctrine is in accord with the 'weight of authority.'" 1 CORBIN, CONTRACTS § 110 (1950).

⁷ Note 2 *supra*.

America, although the existence of cause is necessary for an agreement to be binding, in general it is fair to say that the agreement alone, if lawful, suffices for enforceability.⁸

The exact origins of both consideration and cause are shrouded in mystery, and some of the greatest legal minds differ on their evolution. It has even been argued that consideration was derived from cause, which in turn may have arisen out of a misinterpretation of the Justinian Code.⁹ Let us briefly examine the evidence.

Rome.

The highly formalistic Roman law had no doctrine of consideration.¹⁰ The *stipulatio* developed into the most common form by which any agreement was made actionable. The promisee asked, "Do you agree to pay me

⁸ See Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 4 (1951). This view that practically every serious agreement should be enforceable has even been called a postulate of pure reason. See ROUSSIER, *LE FONDEMENT DE L'OBLIGATION CONTRACTUELLE DANS LE DROIT CLASSIQUE DE L'EGLISE* (1933).

⁹ "The mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, 'the requirement of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol.' [Holmes, *Early English Equity*, 1 L.Q. REV. 171 (1885); HOLMES, *THE COMMON LAW* 285 (1909).] On the other hand, consideration is described as 'a modification of the Roman principle of causa, adopted by equity, and transferred thence into the common law.' [Salmond, *History of Contract*, 3 L.Q. REV. 166, 178 (1887).] A third learned writer derives the action of *assumpsit* from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the 'detriment to the promisee,' which constitutes the consideration of all parol contracts. [HARE, *CONTRACTS*, chs. VII and VIII (1887).] To the present writer it seems impossible to refer consideration to a single source." AMES, *LECTURES ON LEGAL HISTORY* 129 (1913).

The following comment on the origin of cause (*causa*) is found in BUCKLAND & McNAIR, *ROMAN LAW AND COMMON LAW* 229-30 (2d ed. 1952) (referring to Justinian's Digest, 2:14.7.4, set out in text at note 14 *infra*): "[This] famous passage on which the whole theory of *cause* was based, and which was taken to mean that every contract must have a *cause*, in reality says nothing of the kind. It distinguishes between agreements which have been recognized as nominate contracts, such as sale and hire, and agreements for which no special regime has been laid down. Then it goes on to say that in all these latter cases there will still be an action provided that there is also *cause*. The text, which may well be due to the compilers, clearly deals with what later came to be known as the innominate contracts, and *causa* here means what English lawyers call executed consideration. The contracts are of the type *do ut des*, *do ut facias*, *facio ut des*, or *facio ut facias*. Then the passage goes on to say that, if there is no *cause*, it is a case of *nudum pactum*, which will give rise to an exception [defense] but not to an action.

"*Causa* is here evidently made to play a part only in the theory of innominate contracts. It has nothing to do with the consensual contracts ['consensual' here means one of the four types of contracts recognized by the Roman law under this name: Purchase and Sale, Hire, Partnership and Mandatum], which have always been recognized to present a serious difficulty, but it has also, for the purposes of this passage, nothing whatever to do with the real or verbal contracts either. In other words, all it says is that executed consideration is required where no regimes have been set up for particular contracts."

¹⁰ BUCKLAND & McNAIR, *ROMAN LAW AND COMMON LAW*, 221 (2d ed. 1952).

10,000 sesterces?" The promisor answered, "I promise," and that was it. No witnesses or writing were required.¹¹

In ancient Rome, agreements that did not fall within one of the prescribed forms were known as agreements without a name, or innominate agreements. Before they could be enforced by means of an action, some reason—*causa*—had to be shown. A cause of action lay automatically for contracts which fell within the prescribed forms, but a cause had to be demonstrated for all other agreements in order to commence an action.

Thus, a basis of actionability was apparently at least one meaning of the term *causa*.¹² Without such a cause, the agreement was known as a nude pact, that is, it could be the basis of a defense but not of a cause of action.¹³ This was the rule *ex nudo pacto*.

Byzantium.

In Justinian's sixth century "distillation" of the Roman law, it was stated that "if there is no additional ground (*causa*), in that case it is certain that no obligation can be created, (I mean) in the mere agreement; so that a bare agreement (*nudum pactum*) does not produce an obligation; it only produces an exception (*exceptio*)."¹⁴ It has been stated that the whole modern theory of cause was based upon this passage which was taken to mean that *all* contracts must have a cause, not just the formless or unnamed contracts as was the case in Roman law, and that *causa* here means what English lawyers call executed consideration and has "nothing to do with consensual contracts."¹⁵

Barbarian period.

As in Rome, agreements between barbarians were not binding merely because each party gave his consent, without a formality. The old Germanic law required gestures as well as words—*Hand und Mund*. Yet, apparently,

¹¹ JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 293 (2d ed. 1952). The stipulation established a unilateral obligation in which the answering party was obligated. In order to put the matter on the basis of a reciprocal obligation the answering party asked and received from the earlier questioner a promise. 4 VON LINGENTHAL, HISTORY OF GRECO-ROMAN LAW 285. To put an agreement into the form of a question and answer was hardly a very heavy legal burden. It was certainly a more simple form than the specialty in English law which could not be attacked on grounds of lack of consideration but had to be written and in addition under seal—in both respects a heavier burden than the simple Roman *stipulatio*.

¹² BUCKLAND, A TEXTBOOK OF ROMAN LAW 429 (2d ed. 1932).

¹³ BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 12 (2d ed. 1952). Professor Radin translated the *causa* as "reason" and a suit to recover something paid *sine causa* was for restitution of payments made "without adequate legal reason," similar to modern-day suits for unjust enrichment. Radin, *Fundamental Concepts of the Roman Law*, 13 CALIF. L. REV. 134 (1925).

¹⁴ D.2:14.7.4; see second para., note 9 *supra*.

¹⁵ BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 229-30 (2d ed. 1952).

that law knew only obligations in cash or exchange and rarely recognized promises giving rise to future obligations.¹⁶

Feudal period.

In the feudal period, in addition to the formalities of the oath or the blow with the palm of the hand, other means were used to make agreements binding.¹⁷ One of these methods was the use of earnest money, in use also in Roman times. Agreements were valid without any consideration and were enforced in the courts of the Church, which had jurisdiction as a consequence of the oath.¹⁸ Eventually, formalism waned and as a result the essence of contracts was found to lie in consent and not form. This was clear in the Canon law by the end of the twelfth century.¹⁹ Thus, the earliest tendency against Roman and barbarian formalism is to be found in the Canon law.²⁰

Twelfth century canonists.

When in the twelfth century the Roman law began to be studied assiduously, its latter day students found that they could not defend the Roman rule that innominate agreements—pacts which did not fall within the *stipulatio* or some other form—*must have a causa*.²¹ As a result, neither the doctors of law at Bologna nor the early canonists attached importance to the rule *ex nudo pacto*.²²

However, beginning in the last quarter of the twelfth century, what was apparently a new formal requirement entered the Canon law. At Montpellier and in Bologna, writers who followed Justinian closely argued that all agreements should be enforceable, provided there existed something they called a *causa*.²³ But, according to Roussier, their *causa* was found to be simply the promises themselves, making unnecessary any proof of donative intent or of consideration in the sense of a bargained-for equivalent—as he

¹⁶ BRISSAUD, HISTORY OF FRENCH PRIVATE LAW 472 (1912). A writing became required for valid deeds through a misinterpretation of the Roman law according to which the *cautio* or writing expressing the stipulation—merely a matter of proof at Roman law—tended to be absorbed with a requirement of a writing in order to make an efficacious contract. *Id.* at 488.

¹⁷ The oath had to be taken with the right hand raised or resting on the relics of the Gospels and effected a principal obligation toward God and a secondary one toward the creditor.

¹⁸ BRISSAUD, HISTORY OF FRENCH PRIVATE LAW 498-500 (1912).

¹⁹ ROUSSIER, LE FONDEMENT DE L'OBLIGATION CONTRACTUELLE DANS LE DROIT CLASSIQUE DE L'EGLISE 18 (1933).

²⁰ *Id.* at 38. This French scholar has asserted that the rule *ex nudo pacto* is not even found in ninth, tenth, and eleventh century texts, and in the latter Middle Ages the promise under oath (never regarded too happily by the Church—how can one reconcile a distinction between a statement under oath and one not under oath with the good Christian ideal) tended to be equated with simple promises. *Id.* at 44, 49, 53.

²¹ *Id.* at 54, 55; text following note 11 *supra*.

²² *Id.* at 58.

²³ *Id.* at 77-79. In their works, the term "*pactum*" is substituted for the term "*conventio*."

indicated is the case in modern French law. In practice, one could, under this theory, ignore the question of cause once the agreement itself was established.²⁴ The category of innominate contracts just about disappeared and an end was made of the old forms.²⁵

The modern European codes.

The development of contract law between the twelfth century and the end of the eighteenth century, when the first drafts of the French Civil Code were being prepared, was a period which culminated in the age of reason—but not in the age of practicality.²⁶ By the eighteenth century, most continental writers—although learned in the Roman law and even more thoroughly acquainted with the *Corpus Juris Civilis* of Justinian—held to the view reached by the Church centuries earlier, that executory agreements were actionable regardless of their form.²⁷ The idea that all contracts must have a “legitimate cause” pervaded the basic contract provisions of the French Civil Code of 1804,²⁸ and the Codes which followed the lead of the French Code.²⁹ But obviously, the importance of cause in France and

²⁴ *Id.* at 80.

²⁵ *Id.* at 89. This final step came shortly after with one Huguccio who would have done away with the stipulation entirely since all promises must be kept, say the canons—an almost complete break from the strict Roman law. *Id.* at 94.

The sanctions in early Canon law for breach of contract are interesting. Basically, the bishop judged cases somewhat like an arbitrator, according to his conscience rather than strict Civil law. *Id.* at 98. Perhaps a better analogy would be to our modern administrative tribunals. They are generally composed of lawyers and lawyers generally plead before them. Yet, they do not feel themselves bound by the strict common law, particularly the adjective law. So the bishops ruled with a thorough knowledge of the digests but without the necessity of blindly following the rules they found there. The penalties culminated in excommunication—a very severe sentence. *Id.* at 158. These theories were derived from the legal writers of the Middle Ages. No reports of cases in the ecclesiastical courts of the 13th and 14th centuries have come down to us.

²⁶ The canonists influenced the thinking of the civilists; further, the Italian merchants came to accept the actionability of formless contracts. This was concurred in by French and German writers of the sixteenth and seventeenth centuries.

²⁷ This development is traced in von Mehren, *The French Civil Code and Contract: A Comparative Analysis of Formation and Form*, 15 LA. L. REV. 687, 703-08 (1955).

²⁸ Art. 1108.

²⁹ The writer first encountered the modern notion of cause when a student at the faculty of law, University of Paris, France, where he noted that the American penchant for prolific discussion of consideration and getting nowhere is only outmatched by the French when discussing *cause*. The classic French definition of cause is *le but immediate* or “the immediate aim,” but they are always careful to distinguish cause from simple motive. Professor Williston, to the contrary, discusses *causa* as motive and compares it with consideration as follows: “A cause or motive for the contract is indeed required in the French Code (Arts. 1131, 1133) and in many of the Codes based upon it, but as a spirit of liberality or the ‘satisfaction of a sentiment of generosity’ is sufficient cause, the requirement amounts simply to an inhibition of agreements based on illegality, mistake, or fraud; and in the German Civil Code and some other modern Codes, the requirement is altogether omitted.” 1 WILLISTON, CONTRACTS § 4 (rev. ed. 1936). And again: “Consideration is a present exchange bargained for in return for a promise. [RESTATEMENT, CONTRACTS § 75(1) (1932).] *Causa* is some adequate reason for making a promise, and

Italy is by no means comparable to that of consideration in the common law.³⁰ In fact, because the general practice in the civil-law jurisdictions is that a lawful agreement alone is sufficient to create a valid contract, Planiol, the great commentator on the French Civil Code, concluded that the doctrine of cause in French law is meaningless.³¹ Further, although the doctrine had been part of the older law of some other European countries, it was eliminated with the adoption of modern codes.³²

may be either a present exchange or an existing state of facts. As the Civil law is in force in Louisiana, the requirement of consideration does not there obtain. [LA. CIV. CODE, art. 1896.] 'By the cause of the contract . . . is meant the consideration or motive for making it.' A promise to the creditor of another to pay the debt is held to require no other cause or consideration than the existence of the debt. . . . [New Orleans, etc. R.R. v. Chapman, 8 La. Ann. 97; see Snellings, *Cause and Consideration in Louisiana*, 8 TUL. L. REV. 178 (1934).] 1 *id.* at § 111.

Generally speaking, good consideration under the common law would be good cause under the Civil law but not necessarily vice versa. Thus, a promise based upon past consideration as well as a promise to make a gift or an option not paid for might constitute cause. All agree that cause must in every case be distinct from consent or the object, but confusion seems to enter into every attempt to make this distinction. *La cause, dans la doctrine classique, n'est pas un pourquoi vague; c'est le but déterminant et immediate en vue duquel le débiteur s'engage.* (In the classical doctrine, cause is not a vague reason why; it is the immediate and determining end for which the obligor becomes obligated.) Cours de Droit Civil, License 2 ieme Année, p. 287. M. Julliot de la Marandière (Dean of the Paris law school) (1948). BERGER, THE ENCYCLOPÆDIC DICTIONARY OF ROMAN LAW 382 (Am. Philosophical Society, 1953), gives the following definition of *causa*: "One of the vaguest terms of the Roman juristic language. Starting from the basic meaning of cause, reason, inducement, the jurists use it in very different senses. Thus, *causa* indicates a legal situation in such phrases as *in eadem causa est*, or *alia causa est*. *Causa* is the reason for which some judicial measures (actions, exceptions, interdicts) were introduced by the praetor. *Causa* is also the purpose for which an action is brought in a specific controversy In the domain of the law of contracts, *i.e.*, in bilateral transactions, the Romans did not elaborate a special doctrine of *causa*. There are mentions of *causa* with regard to some specific contracts, but a general theory can hardly be drawn out" See, to the same effect, Lorenzen, *Causa and Consideration in Contracts*, 28 YALE L.J. 621, 632 (1919).

³⁰ In Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 4 (1951) appears the following differentiation: "The basic difference between civilan cause and common law consideration rests in these principles. In the civil law, agreement *without more* equals contract, as long as the agreement is a lawful one. In Anglo-American common law, agreement *plus consideration* equals contract. One theory subscribes to the view that a promise should be enforced because it is a promise, the other holds to the belief that a promise should not be enforced unless the promisor asks for and receives something in return for it."

³¹ TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, No. 1031, 1039 (6th ed.).

³² In this connection, it is not entirely accurate to characterize the requirement of cause in contracts as a continental approach. The requirement is not found in the German Civil Code, although that code is in many ways perhaps the most Roman of the continental codes. In Germany, unlike France, the reception of the Roman law was realized in part by legislation in 1495, obligating the judiciary to decide "according to the common law of the Empire" which was interpreted to mean the "*Corpus Juris Civilis*," with the result that in the next few decades, the highly formalistic native law sources dried up. HUEBNER, HISTORY OF GERMANIC PRIVATE LAW 20, 25 (1918). Modern German contract law is Roman in its essential outline. *Id.* at 463. The theory of cause was imported from Italy but in the last half of the nineteenth century, when there was a revival of native "germanic" influence, the discovery that there was slight justification for this theory influenced the drafters of the Civil Code of 1899 (BÜRGERLICHES GESETZBUCH §§ 780, 781) in favor of making a bare (nude) acknowledgment of liability

This was the status of the legal concept of cause in 1872 at the time it was codified in section 1550 of the California Civil Code, requiring all binding agreements to have "sufficient cause or consideration."³³

II. CAUSE IN CALIFORNIA

A. *The Field Code*

The 1872 Civil Code of California was based upon the draft of a New York Code by David Dudley Field.³⁴ Field visited Europe in 1836, where his study of the European Codes influenced him greatly. After returning to this country, he devoted his next forty years to various codifications of state and international law. But while Field's codification of procedural law met with success in 1848 in New York, he was unable to convince the New York legislators of the importance of his major work—the codification of substantive law. Success in this respect was to have its beginning in 1872 in California. Section 1550 of the California Civil Code is still in the identical language of article 744 of the original Field Code presented to the New York Legislature in 1865.³⁵

What was the intention of the drafters of the California Code when they included the term "cause" as an alternative to consideration in specifying the essential elements of all contracts under California law? There can be no question that the Californians of the 1870's should have known that the term was imported from France and Louisiana. The New York draft clearly indicated that the section was derived from the Louisiana and Napoleonic Codes.³⁶ Further, we have seen that it is equally clear that no consideration in the common-law sense is essential to a contract actionable on the basis of sufficient cause.

On the other hand, it does not necessarily follow that these nineteenth century legislators knew what they imported, since even twentieth century texts on the California law of contracts take no note of any difference between cause and consideration, and some even cite the code section with the simple statement that "every executory contract requires 'consideration'."³⁷ Although the term "consideration" has been discussed frequently enough in court decisions since 1872, there apparently have been no deci-

obligatory. *Id.* at 517. The Swiss Code of Obligations (§ 17) provides likewise. *Id.* at 518. Thus, there are countries which do not even attempt to discover if a motive, immediate aim, or other reason exists for an agreement to become enforceable.

³³ Except for the reference to consideration, this language is almost a translation of art. 1108 of the French Civil Code.

³⁴ Van Alstyne, *The California Civil Code*, CAL. CIV. CODE 4 (West 1954). The nineteenth century was accompanied by an upsurge of interest in codification generally with Jeremy Bentham in England and David Dudley Field in the United States.

³⁵ See CIVIL CODE, art. 744, (Field draft, New York, 1865, Weed, Parsons and C. Printers).

³⁶ *Ibid.* ("Code La. 1772, 1758, 1759; Code Napoleon, 1108").

³⁷ WITKIN, SUMMARY OF CALIFORNIA LAW 31 (6th ed. 1946); see also 12 CAL. JUR. 2d, *Contracts*, § 27 (1953).

sions discussing the alternative, "sufficient cause."³⁸ The doctrine of *consideration* did not exist in California when it was admitted to the Union. Yet the doctrine of *cause* disappeared by judicial inattention following enactment twenty-two years later of the Civil Code, incorporating that very term. Thus, it would appear that the California courts have assumed that *cause* is equivalent to legal consideration—a result opposite to that reached in Louisiana.³⁹

It is of interest to examine whether it might be said by hindsight that California "unnecessarily surrendered" to the common law. This can be accomplished fruitfully by discussing a few areas of the law where traditionally it has been important for lawyers to recall the doctrine of consideration for the purpose of ascertaining whether consideration exists in the case at hand. Let us examine certain specific types of agreements which can be enforced in both civil and common-law countries—without consideration in the former but only with it in the latter—and weigh the advantages or disadvantages.

³⁸ It is of interest to note that California is not alone in failing to distinguish these terms. In 1920, Professor Max Radin noted: "[T]he most common conflict is that in which the question of the English 'consideration' and the Roman '*causa*' are involved. In his admirably thorough discussion of 'Causa and Consideration in the Law of Contracts,' Professor Lorenzen speaks of the conflict in the South African cases between the courts of the Cape, which held *causa* and consideration to be the same and applied the common law on this point, and those of the Transvaal and Ceylon and other regions which held the two were different and applied the Roman doctrine . . ." Radin, *Notes on Foreign Law*, 8 CALIF. L. REV. 86, 87 (1920). Both terms are criticized in Radin, *Fundamental Concepts of the Roman Law*, 13 CALIF. L. REV. 119, 131-135 (1925), although neither of these articles refers to the California Civil Code provision. An African jurist states that "*Causa* in its essential features was thus but the English *consideration*." de Villiers, *The Roman Contract According to Labeo*, 35 YALE L.J. 292, 293 (1925). Similarly, the Civil Code of Spain has been translated into English by a former Associate Justice of the Supreme Court of the Philippine Islands and although it has gone through four revisions in the twenty-nine years between 1918 and 1947, the term "*cause*" continues in the fifth edition to be translated as "*consideration*." FISHER, *CIVIL CODE OF SPAIN, WITH PHILIPPINE NOTES AND REFERENCES*, arts. 1261, 1274-77 (1947).

³⁹ The French Civil Code of 1804 (the Napoleonic Code) became the model of the Louisiana Code a few years later, which code likewise requires no common-law consideration in order to make a contract binding. See Canal Bank and Trust Company's Liquidation, 178 La. 575, 582, 152 So. 297, 298 (1933); *Tippins v. Pine Valley School*, 173 So. 566, 568 (La. App. 1937). The Louisiana Civil Code has the following provisions on the meaning of *cause*: Art. 1896. "By the *cause* of the contract, in this section, is meant the consideration or motive for making it; and a contract is said to be without a *cause* whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed, or had ceased to exist before the contract was made." Art. 1897. "The contract is also considered as being without *cause* when the consideration for making it was something which, in the contemplation of the parties, was thereafter expected to exist or take place, and which did not take place or exist. A gift in consideration of a future marriage is void by this rule, if the marriage does not take place."

In Louisiana, it has been held that, whenever there is any conflict between the English and French versions of the Code, the French is controlling. *Phelps v. Reinach*, 38 La. Ann. 547

B. Specific Categories of Contracts

1. Commercial firm offers.⁴⁰

Under the common law, an offer creates no obligation enforceable against the offeror until acceptance by the offeree, since it is wholly unilateral and involves no agreement between the parties. Until acceptance, the promise lacks any consideration. Similarly, under section 1586 of the California Civil Code, "a proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards."⁴¹

Today, the practices—and perhaps the necessities—of commerce are forcing a re-examination of the application of the doctrine of consideration to firm offers. The result has been a radical change in the law of certain eastern states. Under section 2-205 of the Uniform Commercial Code, now the law of three states,⁴² a *commercial* firm offer involving the sale of goods binds the offeror notwithstanding lack of consideration or acceptance, provided the offeror has put a time limit on the offer.

The approach of the Commercial Code is salutary, although somewhat

(1886). Since the English common law was never received in Louisiana, the doctrine of consideration has only recently been partially and with difficulty imported into the French law which was codified there in 1821. Thus, a bid on a subcontract has been held to be irrevocable under Louisiana law in *R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27 (E.D. La. 1948), *reversed*, 176 F.2d 198 (5th Cir. 1949); see 62 HARV. L. REV. 693 (1949). There, a general contractor bidder on a prime building contract requested bids for plastering work. After receipt of a bid for this work the general contractor submitted his bid for the building and was awarded the job. Nine days later the bidder on the plastering work asked permission to withdraw. When he refused to perform, the general contractor recovered the difference between the bid price and the price of a substitute plasterer. This case was reversed only because the district judge did not try the case with the Louisiana Civil Code provisions in mind but relied upon another case which could be distinguished. However, the door was left open on retrial for the plaintiff to prove that the pertinent articles of the code required Albert's offer be kept open a "reasonable time." (It should be noted that the *Farnsworth* case involved private rather than public contractors. The bid was for the Ethyl Plant at North Baton Rouge and no bid bond was required.) Citing this case, one commentator indicated that in Louisiana, although the code expressly prohibits withdrawal of offers prior to elapse of such reasonable time as from the terms of the offer or circumstances of the case he intended to give the acceptor, the cases "manifest a definite reluctance to apply this clear provision of the Code. This is probably due to the influence of the doctrine of common law consideration." He believes that any such tendency is ill-conceived and after noting that an amendment to the code provided for the purchase of an option he states: "The substance of this is that the amendment simply constitutes another unnecessary surrender to the common law doctrine of consideration that might be considered as a tacit legislative recognition that offers unsupported by 'consideration' may be withdrawn before acceptance. Yet one may well raise an eyebrow over Louisiana's curious conduct in doing an about face to follow the common law when the advanced thinkers at common law are eyeing the French recognition of the binding efficacy of an offerer's expression of will with unabashed admiration." Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 34 (1951).

⁴⁰ In Roman law the binding nature of an offer was not recognized or apparently even considered. See SCHULZ, *PRINCIPLES OF ROMAN LAW* 225 (Wolff trans. 1936).

⁴¹ In this respect, a firm offer, as well as other offers in general, should be distinguished from an option, which requires an agreement between at least *two* parties for its creation.

⁴² Ky. (1958), Mass. (1957), Pa. (1953) (see note 45 *infra*).

limited, since today firm offers are universally relied upon by merchants throughout the world. Indeed, one cannot in good faith withdraw an offer after specifically indicating to the offeree that it is firm. For this reason, such offers are held obligatory on the offeror in civil-law countries.⁴³ The Europeans are now attempting to codify their jurisprudential rules, and it is worth noting that section 2-205 of the Uniform Commercial Code and the firm offer provision of a 1950 proposal of the Commission for Reform of the French Civil Code are almost identical—although the French proposal would not limit applicability of the provision to commercial offers.⁴⁴

In the area of commercial firm offers, the doctrine of consideration can seldom, if ever, serve any useful purpose. This is the only area in which the doctrine is receiving any critical examination in California—but apparently no real endeavor is being made to secure a change in the law in the immediate future.⁴⁵ Yet, although commercial firm offers clearly represent one type

⁴³ See RIPERT & BINLANGER, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 152 (1952). See also, German Code (BÜRGERLICHES GESETZBUCH §§ 657, 145 *et seq.* (Ger. 10th ed. Palandt 1952) and Swiss Code of Obligations Schweizerisches Obligationenrecht §§ 8, 3, 5 (Sw. 6th ed. 1926). Latin American countries occasionally follow suit; see Mexican Civil Code (Codigo Civil, art. 1804 (1950)), which states: "Every person who proposes a contract to another, designating a period for acceptance, is bound by his offer until the expiration of the period." Nussbaum, *Comparative Aspects of the Anglo-American Offer and Acceptance Doctrine*, 36 COLUM. L. REV. 920 (1936).

⁴⁴ [1948-1949] TRAVAUX DE LA COMMISSION DE REFORME DU CODE CIVIL 705, art. 11 (1950). "The offeror may revoke his offer if it has not yet been accepted. However, when the offer sets a period for acceptance or such a period results from the circumstances of the case, the offer cannot be revoked before this period has expired, except in the case where the offer has not yet come to the attention of the offeree."

⁴⁵ The State Bar Committee on the Commercial Code, *Commercial Code*, 33 CAL. S.B.J. 443 (1958), states as follows: "The Code in its then form has been in effect in Pennsylvania since July 1, 1954. It is anticipated that the 1959 session of the Pennsylvania Legislature will adopt the amendments recommended by the editorial board as a result of suggestions made by the New York Law Revision Commission.

"Massachusetts has enacted the Revised 1957 Code to be effective late this year. Kentucky has done likewise, to be effective July 1, 1960. In Massachusetts and Kentucky the State Bar Associations and the State Bankers Associations have both endorsed the code. The Commercial Code Committee of the Ohio Bar Association has recently approved the code, and apparently will favor its introduction in the 1959 Legislature. We are advised that the code may also be introduced in 1959 in the Legislatures of Connecticut, Georgia, Illinois, Indiana, Michigan, Nevada, North Dakota, Utah, and Vermont. The present attitude of the New York Law Revision Commission is not known to us.

"It is likely that the code will be introduced in the California 1959 Legislature, but apparently no real endeavor will be made to pass it in its entirety without organized support.

"Your Committee does not wish to recommend action by the State Bar on the entire code at this time. We suggest that this be delayed until a further report of the New York Commission and action by the New York and other legislatures is available."

On January 28, 1959, Senate Concurrent Resolution No. 20 was introduced into the California Legislature providing for study of the U.C.C. with a report to the 1961 Session of the Legislature. No action has been taken on this resolution at the time of this writing.

Further limitations regarding Section 2-205 of the Uniform Commercial Code are discussed in Keyes, *Consideration Reconsidered, the Problem of the Withdrawn Bid*, 10 STAN. L. REV. 441,

of promise with respect to which the consideration requirement should be relaxed, the application of the doctrine to other agreements bears examination also.

2. *Options.*

An option differs from an offer in that it results from an agreement—which, like any other agreement, has been held to require an independent consideration in California and most American jurisdictions in order to be binding.⁴⁶ It seems logical that if one concludes that an offer which is *stated* to be firm should bind the offeror, *a fortiori* an accepted offer should also bind the offeror. Logically, if the acceptance is a return promise, it ought to supply the required consideration. It is only when the acceptance is in the form of something less than such a return promise that the problems of enforceability and lack of consideration arise.⁴⁷

It is submitted that in such cases the consideration requirement is often no more useful than it is with respect to firm offers.

3. *Donative agreements and gratuitous promises.*

Agreements to make a gift were enforceable under the laws of Justinian,⁴⁸ as they are—when reduced to writing—under modern French and German law. In France the writing must also be notarized, and in Germany, either notarized or attested in court.⁴⁹

In California and elsewhere in the United States it is not an easy matter

460-62 (1958). There we discussed one instance where we believe our present economic society may suffer if the doctrine of consideration were strictly applied. Where formal bidding procedures are used by public and private bodies as well as by individuals, no bidder should be permitted to withdraw after bid opening until either he or another bidder receives the award, or until all bids are rejected (assuming the right to reject all bids was reserved in the invitation for bids). *Id.* at 470.

⁴⁶ See *Henry v. Lake Mill Lumber Co.*, 139 Cal. App. 2d 620, 293 P.2d 909 (1956) where it was held that a promise by an optionee to do something he was already bound to do for the benefit of the optionor does not constitute consideration which will support a legally enforceable option agreement.

⁴⁷ See, e.g., *ibid.*

⁴⁸ BUCKLAND, A TEXTBOOK OF ROMAN LAW 532 (2d ed. 1932).

⁴⁹ For a valid agreement to make a gift, under the French Civil Code, the agreement must be made in the form of a notarial contract (art. 931) and the donee must expressly accept the donor's promise to give (art. 932). Under art. 955, however, where the donee has attempted to kill the donor, has abused the donor, wronged him, or committed a tort against him, the gift is revocable. See 3 RIPERT & BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL 1156-58 (4th ed. 1951); see also CODE CIVIL, arts. 960-66 (Fr. 53d ed. Dalloz 1954). Under the German Civil Code the agreement must be judicially or notarially authenticated. BÜRGERLICHES GESETZBUCH, art. 518 (Ger. 10th ed. Palandt 1952). In Germany, a gift may be revoked on the ground that the donee has committed an act of grave ingratitude against the donor or one of his near relatives. BÜRGERLICHES GESETZBUCH, arts. 530-33 (Ger. 10th ed. Palandt 1952).

to bind oneself to give, due to the doctrine of consideration.⁵⁰ Yet occasionally common-law courts have gone to some lengths to avoid this result in particular cases. For example, in one case, in order to hold binding the gratuitous promise of a bank to insure the plaintiff's automobile, a court discovered consideration in an implied promise by the plaintiff to pay a reasonable commission for the service.⁵¹ But what of the case where circumstances are such that there could be no implied counter promise to pay a commission or to do something else? It has been commented that "if it is equitable to allow recovery where a plaintiff has reasonably relied on a gratuitous promise, it appears preferable that the court frankly adopt a rule supporting such recovery."⁵² For the courts to resort to strained theories of consideration, imputed from facts on which the plaintiff apparently did not rely, contributes little either to certainty in this area of the law or to equitable results as between one particular case and other similar cases.

Should any gratuitous promise be enforceable? A rule permitting recovery of damages in such cases seems harsh, absent circumstances which might give rise to an estoppel—*i.e.*, reasonable reliance on the promise, by the promisee, to his detriment. Yet, situations arise where the ability to make an enforceable gratuitous promise appears desirable. Assuming parties to the transaction who are not acting upon impulse and who understand the consequences of their acts, there is no very compelling reason for not permitting them to obligate themselves gratuitously if they so desire. The notarial and judicial contracts of the French and German codes permit this result and at the same time provide some protection from unconsidered acts. In the United States, the Uniform Written Obligations Act was proposed for this purpose, among others, in 1925.⁵³ The act would make binding all written promises containing an additional "express statement in any form of language that the signer intends to be legally bound."⁵⁴ The difficulty with the act is that it would render enforceable practically all written promises, gratuitous or otherwise, without the possibly sobering influence of notarial solemnity—a notary being a type of lawyer in Europe. The

⁵⁰ In California, *e.g.*, *Foltz v. First Trust and Sav. Bank*, 86 Cal. App. 2d 59, 194 P.2d 135 (1948). It has been held elsewhere that assent to accept a gift does not constitute "consideration." *Plowman v. Indian Ref. Co.*, 20 F. Supp. 1 (E.D. Ill. 1937); *Perreault v. Hall*, 94 N.H. 191, 49 A.2d 812 (1946). In this connection, it is to be noted that although a promise under seal was enforceable at common law without consideration, it was not generally subject to specific performance where no consideration was paid. However, the seal is without effect today in most states.

⁵¹ *Dufton v. Mechanics Nat'l Bank*, 95 N.H. 299, 62 A.2d 715 (1948).

⁵² 62 HARV. L. REV. 1069, 1071 (1949).

⁵³ 9C U.L.A. 377 (1957).

⁵⁴ Adopted in 1927 in Pennsylvania (33 PA. STAT. ANN. §§ 6-8 (Purdon 1949)) and from 1929 to 1933 in Utah.

additional European prerequisites—deliberation, solemnity, and actual knowledge of the legal consequences of the promise—should be met before a promisor is permitted to bind himself to the performance of a promise in the absence of a bargain. Accordingly, although it is not easy logically to fix such a rule in a system which permits enforcement of agreements made for a nominal consideration,⁵⁵ possibly the doctrine of consideration may still serve a useful purpose in this area of the law. Experience may show that while people may promise to give without reason, they rarely bargain in this fashion—the true nominal consideration is a rarity. Any change in present requirements for the creation of binding agreements should protect donors from their own unconsidered actions. As an alternative to the means employed for this purpose in civil-law countries the possibility of imposing a recording requirement with respect to such agreements might be considered.⁵⁶

4. Releases.

Formal requirements for releases are minimal under the European codes. No special form is required under German law.⁵⁷ While the French Civil Code appears to require a release to be in writing,⁵⁸ this is unnecessary for transactions governed by the commercial law.⁵⁹ Moreover, it has even been held that statutes which deny the possibility of proving a fact by witnesses alone can be circumvented by an oral contract of the parties agreeing to the admissibility of such proof.⁶⁰

The continental law of release has been praised by English writers because, like the Roman law, it dispenses with "those subterfuges which disfigure our law . . . Since a debt could be released for nothing there was no need or temptation to hold that a canary was a good consideration for a release of a debt of £500."⁶¹ However, this criticism of the common-law

⁵⁵ In accordance with the general "peppercorn" rule that the courts will not enter into an inquiry of the adequacy of the consideration for a promise, it has been held that the question of the adequacy of the consideration in naming a child should be left to the determination of contracting parties, in the absence of fraud or oppression. *Schumm v. Berg*, 37 Cal. 2d 174, 231 P.2d 39 (1951), reversing 224 P.2d 56. Nominal consideration is not always held sufficient to support an agreement. *E.g.*, *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453 (1861) (promise of money for which nominal consideration of one cent was given held unenforceable); *Fisher v. Union Trust Co.*, 138 Mich. 612, 101 N.W. 852 (1904) (nominal consideration of one dollar for promise of indeterminate value held not to satisfy the requirement of consideration).

⁵⁶ See text at notes 125-27 *infra*.

⁵⁷ *BÜRGERLICHES GESETZBUCH* art. 779 (Ger. 10th ed. Palandt 1952).

⁵⁸ Art. 2044.

⁵⁹ See *CODE CIVIL* art. 1341 (Fr. 53d ed. Dalloz 1954) and *CODE DE COMMERCE* art. 109 (Fr. 52nd ed. Dalloz 1956).

⁶⁰ Civ. June 8, 1896, *Dalloz Periodique*, 97.1.464; Jan. 6, 1936, [1936] *Dalloz Hebdomadaire* 115.

⁶¹ *BUCHLAND & MCNAIR, ROMAN LAW AND COMMON LAW* 222-23 (2d ed. 1952). When an agreement is to pay a fractional part of a liquidated claim, the rule of *Foakes v. Beer*, 9 App.

rules has no application to written releases in California, for section 1541 of the Civil Code expressly exempts such releases from the requirement of consideration. Here for some reason, the release was felt to warrant special treatment by the drafters of the California Codes, and they apparently followed the Civil rather than the common law. Nevertheless, the release is hardly the most important type of agreement in which application of the doctrine of consideration is questionable,⁶² and reliance on a writing is a formalism reminiscent of the seal—abolished in California for some time.⁶³ Perhaps the oral release deserves to be further considered in California.

5. *Love and affection, moral obligation, and past services.*

Agreements based on love and affection, moral obligation, and past services all have one element in common—they involve no bargain.

Love and affection are obviously valuable consideration to the ordinary layman who might agree to make a gift, since they are often valued above things upon which a dollar value may be set. But one does not bargain for love. It either exists or it does not, when the agreement is made, and—in theory at least—it is changed in no way by the agreement. If it already exists, it is past consideration and therefore represents no legal consideration⁶⁴—although this was not always the common-law rule.⁶⁵ On the other

Cas. 605 (1884) held that inasmuch as the debtor in paying a fractional part of his debt only performs a pre-existing legal duty, there is no consideration to support the creditor's promise to release the debtor from the remainder of the original debt. "According to English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money [and the agreement would be binding]. He might take a horse, or a canary, or a tomtit if he chose [since the obligor was under no pre-existing duty to deliver the horse, canary or tomtit] . . . ; but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound that was *nudum pactum*. . . . That was one of the mysteries of the English Common Law." Jessel, M. R., in *Couldery v. Bartrum*, 19 Ch. D. 394, 399 (C.A. 1881), quoted in VON MEHREN, *THE CIVIL LAW SYSTEM* 499 (1957), who notes that "this rule has given rise to much criticism and the courts, in their administration of it, have attempted with considerable success to limit its scope." See Ferson, *The Rule in Foakes v. Beer*, 31 YALE L.J. 15 (1921); Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 27 (1942).

⁶² In other states, attorneys often insert a recital of consideration into the release. But a recital of consideration is not conclusive proof of the fact that consideration has been given. RESTATEMENT, CONTRACTS § 82 (1932); CORBIN, CONTRACTS § 130 (1950).

⁶³ CAL. CIV. CODE § 1629, enacted in 1872.

⁶⁴ Moral obligation is insufficient consideration in most states. 1 WILLISTON, CONTRACTS § 148 (3d ed. 1957); 17 C.J.S. 437. Thus, under a cost-plus contract the Comptroller General held that provisions for reimbursement to contractor for losses and expenses "not compensated by insurance or otherwise," contemplates reimbursement only for such losses and expenses as are incurred by contractor in discharge of its legal—as distinguished from moral—obligations arising out of performance of contract. See 23 DEC. COMP. GEN. 884 (1944).

⁶⁵ Moral consideration was once sufficient to make binding written contracts. It entered the English law of contracts by the remarks of Lord Mansfield. See 8 A.L.R.2d 788 (1949), citing *Atkins v. Hill*, 1 Cowp. 284, 98 Eng. Rep. 1088 (K.B. 1775), and *Hawkes v. Saunders*, 1 Cowp. 289, 98 Eng. Rep. 1091 (K.B. 1782): "In the latter case, it is said that, where a man is under a moral obligation which no court of law or equity can enforce, and promises, the hon-

hand, love as a motivating factor suffices as cause under the continental law⁶⁶ where, for example, consummation by marriage is not required for an agreement based upon love to become binding.⁶⁷

Until recently California has with only minor deviations, followed the old common-law rule that mere moral obligation is not sufficient consideration for an executory promise.⁶⁸ Yet, since 1872 section 1606 of the California Civil Code has contained the following provision:

An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.

This provision has been said to mean that a moral obligation is sufficient to support an express promise only where a good and valuable consideration once existed⁶⁹—moral obligation is insufficient in the absence of a prior legal obligation.⁷⁰ Thus on the one hand, the moral obligation to pay a debt discharged in bankruptcy is held sufficient consideration for a new promise to pay;⁷¹ and on the other hand, in *Dow v. River Farms Co.*⁷² it was held that section 1606 would not justify enforcement of a promise by a corporation to pay its retired president a bonus and pension, where the promise was made after the retirement. The *Dow* case is also illustrative of the doctrine that past performance does not support a promise of new compensation.⁷³ This general California rule on moral obligation was much narrower than the view taken by other common-law jurisdictions having no

esty and rectitude of the thing is a consideration. . . . Statements which seem to support this broad view may be found in some early American cases. . . . [See *Drury v. Briscoe*, 42 Md. 154 (1874); *Robinson v. Hurst*, 78 Md. 59, 26 Atl. 956 (1893); *Shenk v. Mingle*, 13 S. & R. 29 (Pa. Sup. Ct. 1825)]." Mansfield's doctrine lasted a few years longer this time—about twenty-seven years, when it was in effect overruled. "The principal that a moral consideration is a good consideration, in its broad scope, was challenged and practically overthrown by the note to the case of . . . [Wennall v. Adney, 3 Bos. & Pul. 247, 249, 127 Eng. Rep. 137, 138 (C.P. 1802)], wherein the writer of the note lays down the doctrine, or rule, which has been generally approved and adopted by the courts, as follows: 'An express promise . . . can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.'"

⁶⁶ 1 CORBIN, CONTRACTS § 131 (1950).

⁶⁷ *Ibid.*

⁶⁸ *Brownfield v. McFadden*, 21 Cal. App. 2d 208, 68 P.2d 993 (1937); *Estate of McConnell*, 6 Cal. 2d 493, 58 P.2d 639 (1936).

⁶⁹ *Ibid.*

⁷⁰ *Foltz v. First Trust & Sav. Bank*, 86 Cal. App. 2d 59, 194 P.2d 135 (1948).

⁷¹ *Davison v. Anderson*, 125 Cal. App. 2d Supp. 908, 271 P.2d 233 (Super. Ct. App. Div. 1954).

⁷² 110 Cal. App. 2d 403, 243 P.2d 95 (1952).

⁷³ See also *Dugan v. Pettijohn*, 134 Cal. App. 2d 133, 285 P.2d 339 (1955).

similar broad statutory provision.⁷⁴ Indeed, the trend of modern authorities is to the effect that a pre-existing legal liability is not essential—an executory promise has sufficient support where the promisor has earlier received from the promisee something in the form of a pecuniary or material benefit, under circumstances which are said to create a moral obligation on the part of the promisee to pay for what he received, even though there was no liability prior to the executory promise.⁷⁵ The essence of the problem then is, “what are these circumstances?” However, weighing degrees of moral injustice for the purpose of finding a binding agreement in some instances but not in others is not, in our opinion, any more in the province of a court of law than is weighing the value of a monetary consideration. As a result, moral consideration, intended to operate as a such, should either be adequate or inadequate consideration as a general rule. California courts, however, seem to see exceptions to their rule regarding the necessity of a pre-existing legal obligation to support an agreement based upon moral consideration utilizing two means of avoiding moral injustice in selected cases: they either “find” that there is a legal consideration or they simply ignore the rule previously enunciated.⁷⁶ This leads to uncertainty and inequity where neither means is utilized. Perhaps a statutory change either toward the civil-law doctrine or “clarifying” the intent of the Civil Code in the case of many moral obligations resulting in a promise would be advisable if the courts continue this tendency.

6. *Waivers of the statute of limitations.*

Prior to 1951, California followed the minority rule that an advance waiver of the statute of limitations is valid,⁷⁷ although a majority of other jurisdictions hold that a waiver of the statute incorporated into the original agreement is void as opposed to public policy.⁷⁸ Section 360.5 of the California Code of Civil Procedure now limits the life of such waivers to four

⁷⁴ 8 A.L.R.2d 798-803 (1949).

⁷⁵ *Ibid.*

⁷⁶ *E.g.*, in a decision rendered more than 30 years ago, *Coulter v. Howard*, 203 Cal. 17, 262 Pac. 751 (1927), it was held in California that a real estate broker who performed the service of procuring a purchaser for a land owner—but without a written agreement with a request from the owner as is required by statute—may recover on a subsequent written agreement with the owner to pay a commission. In a 1936 district court of appeal decision, *Medberry v. Olcovich*, 15 Cal. App. 2d 263, 59 P.2d 551, moral obligation was held sufficient to support the promise of the father of a minor, who negligently drove a car injuring a guest, to the father of the guest to pay hospital bills. However, the Supreme Court of California, in denying a petition for hearing, refused to recognize the binding effect of the moral consideration but somehow found a legal consideration instead. *Medberry v. Olcovich*, 60 P.2d 281 (1936). In the recent California case of *Desny v. Wilder*, 46 Cal. 2d 715, 299 P.2d 257 (1956), a moral obligation was held to support an executory promise to pay for past services even though previous to such promise there was *no legal liability* or promise, perfect or imperfect.

⁷⁷ *Brownrigg v. De Frees*, 196 Cal. 534, 541, 238 Pac. 714, 716 (1925).

⁷⁸ See 4 STAN. L. REV. 415, 420 n.25 (1952).

years. However, negotiations for the compromise of a debt or claim will generally give rise to an estoppel against pleading the statute of limitations,⁷⁹ if the acts, promises, or representations relied upon occurred prior to the expiration of the limitation period.⁸⁰ An estoppel is a traditional substitute for the requirement of consideration. Therefore, the only real problem concerns those cases where a promise is renewed after the statute has run. Such a promise gives rise to a new obligation in French law⁸¹—since the moral obligation remains and since the original obligation was one which was valid without notarization, as would be required for a gift, no such formality is required for its renewal.⁸² It is difficult to find logical reason for distinguishing a promise renewed in good faith after the statute of limitations has run from a promise renewed after a discharge in bankruptcy. Yet this is the California result. Under the French approach both types of promises would be enforceable.

⁷⁹ In *Schaefer v. Kerber*, 105 Cal. App. 2d 645, 234 P.2d 109 (1951), the court upheld as against demurrer the sufficiency of a complaint alleging an estoppel to plead the one-year statute of limitations, the allegations being that the plaintiff, who was injured on May 8, 1948, brought action on June 17, 1949; that on or about March 1, 1949, she was told that she would be informed as to the company's disposition of her claim; that the company knew she was acting without legal aid; that the company did not inform her of the disposition of her claim until about May 16, 1949—at which time it advised her that it recognized no liability—in order to prevent the plaintiff from filing a lawsuit until after the statute of limitations had run, so that the claim would be outlawed. See also *Benner v. I.A.C.*, 26 Cal. 2d 346, 159 P.2d 24 (1945); *U.S. Casualty Co. v. Industrial Accident Comm.*, 122 Cal. App. 2d 427, 265 P.2d 35 (1954). In *Berkey v. Halm*, 101 Cal. App. 2d 62, 224 P.2d 885 (1950), defendants promised plaintiff that an oral contract would be reduced to writing and would be executed by them, and they repeatedly acknowledged the existence and validity of the contract and accepted the benefits which accrued from plaintiff's performance. It appeared that the delay of which defendants complained was induced by their own conduct, promises, and representations. The court held that the complaint alleged sufficient facts, which, if established by evidence, would estop defendants from setting up the bar of the statute of limitations.

⁸⁰ *Atlas Finance Corp. v. Kenny*, 68 Cal. App. 2d 504, 157 P.2d 401 (1945); *Bank of America Nat'l Trust & Sav. Ass'n v. Williams*, 89 Cal. App. 2d 21, 200 P.2d 151 (1948). In the *Williams* case, a suit was brought in 1947 to have a check and other property standing in the names of certain of the defendants declared to be the property of the named defendant and to have such property applied to payment of judgments obtained by the plaintiff in 1932 and 1934. Defendant pleaded the five-year statute of limitations applicable to actions on the judgments. The complaint claimed that defendant was estopped from pleading the statute of limitations because some time in the past he falsely informed plaintiff that he had no assets, and so fraudulently induced the plaintiff not to investigate his assets and not to try to enforce the judgments until 1946. In that year, a \$26,000 check in the defendant's name as payee was discovered. The court held that any false representation or concealment made after the judgments could not operate to remove the bar of the statute, and defendant was not estopped from pleading it. A bare promise to pay a debt or claim will not, in the absence of fraud or of a specific agreement not to take advantage of the statute, estop a debtor or defendant to plead the statute of limitations. *Herman v. Brown*, 91 Cal. App. 2d 758, 205 P.2d 1086 (1949); *Bank of America Nat'l Trust & Sav. Ass'n v. McRae*, 81 Cal. App. 2d 1, 183 P.2d 385 (1947).

⁸¹ 2 RIPERT & BOULANGER, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL* 469, § 1342 (1952).

⁸² See note 49 *supra*.

7. *Modification of contracts.*

Allied to the problem of moral obligation is the more difficult problem concerning the binding effect of an agreement to render a performance required by an existing contract, but for an increased or decreased consideration. An existing contract might be modified with respect to the extent of the obligations of either party under it—for example, parties may desire to increase or decrease the amount of work to be performed, the quality of goods to be delivered, or the price to be paid.

Strangely enough, in California the necessity of consideration in contract modification depends upon whether the original agreement was oral or written. Section 1698 of the California Civil Code apparently requires new consideration for an enforceable executory agreement to modify a written contract, for it provides that "a contract in writing may be altered by a *contract* in writing, or by an executed oral agreement, and not otherwise."⁸³ Section 1697, on the other hand, expressly permits alteration of an oral contract by consent of the parties expressed in writing "without a new consideration." By way of contrast, a New York statute which evidently follows the civil-law approach permits any contract to be modified without new consideration, provided that the modification is in writing.⁸⁴ For some peculiar reason California has decided to follow the civil-law rules only with respect to modification of binding oral agreements.

a. Compromises. The obligation on a contract may be diminished under the California Civil Code by agreement of the parties, if an accord is reached and the obligee accepts the substituted consideration thereunder, thus extinguishing the original obligation.⁸⁵ An executory accord is binding on the parties but in California it does not discharge the original obligation until it is executed and satisfaction is made.⁸⁶ How can this rule be avoided and the original obligation be extinguished? This may be accomplished simply by calling the accord a "substituted contract"—that is, if a court so desires it may find a new bilateral agreement rather than a compromise of

⁸³ Emphasis added.

⁸⁴ N.Y. PERS. PROP. LAW § 33(2); REAL PROP. LAW § 282.

⁸⁵ *Accord*: "An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." CAL. CIV. CODE § 1521. *Effect of accord*: "Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed." CAL. CIV. CODE § 1522. *Satisfaction*: "Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction." CAL. CIV. CODE § 1523.

In *Edgar v. Hitch*, 46 Cal. 2d 309, 294 P.2d 3 (1956), the buyer defended an action for the unpaid balance due for hay sold at \$42.50 per ton on the ground that the price was \$32.50 per ton and that the plaintiff had cashed buyer's check for this amount, marked "paid in full for all hay." The California Supreme Court held that the trial court must determine whether or not there was an accord and satisfaction.

⁸⁶ *Scheeline v. Moshier*, 172 Cal. 565, 158 Pac. 222 (1916); *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58 (1890).

the old one.⁸⁷ The theory is that by substituting a new agreement the parties contemplate extinction of the original, not its modification. Consideration is not a problem since the new bilateral agreement—called a novation by the code⁸⁸—is adequately supported by the new exchange of promises. However, if triers of fact may choose this approach at will, they are free to avoid the code requirement of satisfaction under an accord before obligations under an original agreement are extinguished, and also, they may ignore section 1698 of the Civil Code and its requirement that modification of a written contract be supported by consideration. Again the result is that certainty in this area of the law is jeopardized.

b. Refusals to perform without additional compensation. It appears to many lawyers that the theory of consideration perhaps finds its strongest justification in the case of a refusal to perform a contract without additional compensation. According to majority opinion, an agreement to perform an existing obligation at an increased price lacks consideration⁸⁹—justice frowns upon the contracting party who “holds up” his promisee by refusing to continue performance of badly needed work without an agreement for additional pay.⁹⁰ This rule is avoided where different or new consideration is offered.⁹¹ But such consideration is frequently difficult to discover. Although the payment of so much of an *unliquidated* or *disputed* claim as is admittedly due is sufficient consideration,⁹² often the original contract is liquidated and there is no dispute in regard to its interpretation.

⁸⁷ *E.g.*, *Armstrong v. Sacramento Valley Realty Co.*, 179 Cal. 648, 178 Pac. 516 (1919).

⁸⁸ “Novation is the substitution of a new obligation for an existing one.” CAL. CIV. CODE § 1530. “Novation is made: (1) By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation . . .” CAL. CIV. CODE § 1531. “Novation is made by contract, and is subject to all the rules concerning contracts in general.” CAL. CIV. CODE § 1532.

⁸⁹ “Especially common is the situation where the builder or contractor undertakes work in return for a promised price and afterwards finding the contract unprofitable, refuses to fulfill his agreement but is induced to fulfill it by the promise of added compensation. On principle the second agreement is invalid. . . . [T]he great weight of authority supports this conclusion.” 1 WILLISTON, CONTRACTS § 130 (rev. ed. 1936) (with citations from most of the states). In government contracts, contracting officers may modify or amend existing contracts, and such modifications or amendments may include provisions for increasing payments to contractors, if the interest of the United States will be served thereby, but such action presupposes some new consideration moving to the United States as result of modification or amendment. See 21 DECS. COMP. GEN. 31 (1941).

⁹⁰ See example and citations contained in STUDY OF UNIFORM COMMERCIAL CODE-SALES 307 (Law Revision Commission, State of New York, Leg. Doc. No. 65C, 1955) (p. 641 of complete report).

⁹¹ Thus RESTATEMENT, CONTRACTS § 84 (1932), states: “Consideration is not insufficient because of the fact . . . (c) that the party giving the consideration is then bound by a duty owed to the promisor . . . to render some performance similar to that given or promised, if the act or forbearance given or promised as consideration *differs* in any way from what was previously due.” (Emphasis added.)

⁹² WILLISTON, CONTRACTS § 129 (rev. ed. 1936).

Only if there is an "*honest dispute* over the interpretation of the *original agreement*" does its settlement furnish a sufficient consideration for the new promise.⁹³ But where price, nature and scope of work, and other terms are clearly described in the original agreement—*viz.* a simple purchase order—an honest and reasonable dispute may not exist.⁹⁴ Then, for any genuine consideration, it would seem necessary for the parties to rescind, completely abandoning the original agreement; a new agreement at the modified price might be made thereafter.

Where the rescission is factual and clear, the modification clearly operates to replace the original agreement. Thus, when a prime contract with the federal government has been terminated before work has commenced, and a second contract is executed with the same parties for the identical work, but at a different price, rules have developed as follows: Where the second contract was at a lower price, the Supreme Court has held that the second contract governed—if the contractor desired to retain his rights under the first agreement he should not have accepted the second.⁹⁵ Then,

⁹³ *Id.* § 130. Similarly, it has been held that a new oral agreement to pay less than the original price set forth in a written contract is invalid for want of consideration. Moffitt v. Hieby, 149 Tex. 161, 229 S.W.2d 1005 (1950); 4 VAND. L. REV. 175 (1950); 12 AM. JUR., CONTRACTS § 89 (1938).

⁹⁴ RESTATEMENT, CONTRACTS § 76 (1932): "*Any consideration that is not a promise is sufficient to satisfy the requirement of § 19(c) [simply stating the formal requirement of consideration in all contracts] except the following: (a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed . . . to the promisor . . .*" (Emphasis added.)

The "privilege to pay damages" has been argued as a ground for modification of a contract without "other" consideration. Swartz v. Lieberman, 323 Mass. 109, 80 N.E.2d 5 (1948), concerned an agreement to manufacture 500 wooden display stands at 65¢ each. Several months later the plaintiff notified defendants that, owing to increases in cost of labor and materials, plaintiffs must charge 75¢ instead of 65¢. Defendants agreed to pay the increased rate. Defendant paid at the rate of 65¢ and the plaintiffs sued for the balance, citing several Massachusetts cases. The court held that plaintiff's *refusal* to proceed without added compensation constituted *new* consideration for the new promise. It was contended that the plaintiffs did not "refuse" to perform. However, the court found such a refusal because the plaintiffs said they "would have" to charge more. "[I]t could be found that the latter [defendant] was given to understand that he must pay more if the plaintiffs were to go on." *Id.* at 112-13, 80 N.E.2d at 7. This principle is limited primarily to Massachusetts. The general rule would deny such recovery "except for a special doctrine developed in Massachusetts and receiving some scattered approval elsewhere." Annot., 12 A.L.R.2d 78, 81 (1950) (containing citations from most of the forty-odd states following the majority view). With regard to the rather illogical and singular position of the Massachusetts decisions, it appears necessary that the original contract be deemed rescinded or abandoned. It would be absurd to hold the buyer bound to pay the greater price (later agreed upon) and, at the same time, entitled to recover damages for the contractor's refusal to perform at the original price.

⁹⁵ See *United States ex rel. International Contracting Company v. Lamont*, 155 U.S. 303 (1894), where the Government made a contract with International to do dredging work at 19.7 cents per cubic yard but refused to permit performance and readvertised the same physical work, leaving out a provision about the eight-hour law and setting different dates for its commencement and completion. International bid again, 13.7 cents per cubic yard, baving in the

where the second contract was at a higher price, the Court of Claims held that the same rule applied—"if that is the law, when it works to the advantage of the Government, it is the law when it works to the advantage of the citizen."⁹⁶ Thus, in both cases the second agreement replaced the first contract, which had clearly been rescinded by the Government.

But this solution is normally only theoretical—infrequently would the parties to a contract be willing entirely to release each other, even momentarily. Ordinarily there will be no evidence that in fact this was done. In general, it is more likely that all the correspondence of the parties will point to a mutual intention that they should continue to be obligated under the old contract until the new one is executed and becomes binding.⁹⁷ That is, the rescission is conditioned upon the creation of the modified contract.

meantime commenced a mandamus suit against the proper official of the Government to compel him to execute the first contract and thus keeping the Government aware that it did not intend to waive its rights under its first contract. International was awarded a contract pursuant to its second bid and the work was performed and the lower price paid. The Court held that International's mandamus suit must fail because, by making the second contract, it had lost its rights under the first, stating: "Nor does the fact that in making his second contract, the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them, he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences." *Id.* at 309-10.

⁹⁶ See *Winters v. United States*, 114 Ct. Cl. 394, 410, 84 F. Supp. 756, 760 (Ct. Cl. 1949), where the plaintiffs were awarded a contract as low bidders on a construction contract, but could not obtain payment and performance bonds. The Government then terminated their right to proceed and sent out a second invitation for bids. Plaintiffs bid again and were awarded the second contract at a higher figure than under the first contract—this time with a surety bond, the Government reserving its rights under the first agreement. Although work was completed, a part of the contract price was withheld against plaintiffs alleged liability for failure to secure bonds on the first contract. The plaintiffs argued that the Government's second contract operated as a waiver of its rights under the first. The Government argued that there was no consideration for the waiver. The Court of Claims acknowledged that the majority view would relieve the Government from liability on the second agreement for lack of consideration (based on the argument of economic coercion). But it limited recovery of the Government to \$1,800 which was the limit of recovery on the bid bond on the first contract (rather than the difference in price between the first and second contracts) distinguishing the *Lamont* case (note 95 *supra*) by stating: "If, then, one were looking for changes, however trivial, to constitute a consideration for a rescission and novation, one could find them in the instant case as well as in the *Lamont* case. But the Supreme Court did not rest its decision upon the fact of those changes, though it noticed them, nor do we rest our decision upon that ground. We regard the *Lamont* case as holding that it is a legal impossibility for the Government and a contractor to have at the same time two contracts for the same work, at different prices. If that is the law, when it works to the advantage of the Government, it is the law when it works to the advantage of the citizen." *Id.* at 760.

⁹⁷ See Annot., 12 A.L.R.2d 78, 90 (1950). The rule that a promise to pay more for that which the promisee is already contractually obligated to do lacks consideration is supported in *Willard v. Hobby*, 134 F. Supp. 66 (E.D. Pa. 1955); *Orsini v. Lathrop Co.*, 12 Alaska 641 (D.C. 1950); *Western Lithograph Co. v. Vanomar Producers*, 185 Cal. 366, 197 Pac. 103 (1921); *Shanks v. Fisher*, 126 Ind. App. 402, 130 N.E.2d 231 (1956) (holding that evidence showed no special

Is this too harsh? Has a freedom been unnecessarily lost? Conceivably these results may be demonstrated to be satisfactory in practice.⁹⁸ But is there an anomaly in permitting one to renege on a good faith oral second bargain to pay more, regardless of the reason for doing so?

Some courts refuse to look behind the modification provided it contains an understanding that the original agreement is rescinded.⁹⁹ Thus, in one recent case¹⁰⁰ a contract was made for the sale of 2,000 corn crib roofs, at

circumstances sufficient to avoid application of the general rule to an oral promise to pay more than was specified in the original building contract); *Veneto v. McCloskey & Co.*, 333 Mass. 95, 128 N.E.2d 337 (1955) (subcontractor's adoption of trench method under contract calling for earth removal was not consideration for increase in payment and promise to pay; increase was gratuitous and did not modify original contract); *Denton v. Mitchell*, 262 S.W.2d 639 (Mo. App. 1953); *Rexite Casting Co. v. Midwest Mower Corp.*, 267 S.W.2d 327 (Mo. App. 1954); *Finocchiario v. D'Amico*, 8 N.J. Super. 29, 73 A.2d 260 (Super. Ct. 1950); *Buker v. Mt. Vernon Contracting Corp.*, 1 App. Div. 2d 735, 146 N.Y.S.2d 879 (3d Dep't 1955); *Arzani v. People*, 149 N.Y.S.2d 38 (Sup. Ct. 1956) (promise to pay more for highway construction work obtained by a contractor—who relied upon his capacity to breach a contract—held to lack consideration; the evidence failed to show that the original contract for highway construction was terminated at the time the defendant promised to pay half of the plaintiff's excess labor cost caused by union interference); *Westland Construction Co. v. Chris Berg, Inc.*, 35 Wash. 2d 824, 215 P.2d 683 (1950). Evidence was sufficient to support jury finding that agreement for extra compensation was based upon adequate consideration, being basis of agreement to modify original contract, in *L. W. Severance & Sons, Inc. v. Angley*, 332 Mass. 432, 125 N.E.2d 415 (1955). View that additional payment may be required for continuing work after "unforeseen difficulties" arise is supported in *Evergreen Amusement Corp. v. Milstead*, 206 Md. 610, 112 A.2d 901 (1955) (post-contract agreement to pay contractor for extra dirt used in grading job was binding, on theory of unforeseen difficulty).

⁹⁸ However, little logic seems to be at its base and considerable experience in favor of the rule would seem to be necessary in order to overcome anomaly.

⁹⁹ RESTATEMENT, CONTRACTS § 76 gives the following example: "A enters into a contract with B to build a house, according to certain plans, for ten thousand dollars, which B agrees to pay. When the work is half done A finds that he will lose money by performing the contract, and informs B that the work will stop unless B promises to pay two thousand dollars additional for its completion. B makes the promise and A thereupon completes the building. There is no sufficient consideration for B's promise to pay the additional sum. If unforeseen difficulties justifying A in rescinding the contract exist, there is sufficient consideration for a promise of additional payment." Corbin asks: "Why are able judges so easily convinced that a simultaneous 'rescission' eliminates the difficulty created by a pre-existing duty? It is because they think that justice requires its elimination and the enforcement of the promise of more pay. It carries out the intention of the parties. This fact should make us pause before we apply the old rule in cases still to come. There may still be good reasons for applying the rule. Enforcement of the new promise may be the consummation of fraud or economic duress; the contractor may have planned it that way. In such a case, performance of the pre-existing duty should not be held to be sufficient consideration, for reasons of policy. In the absence of any such reason, it is believed that the new promise may properly be enforced. It may be that express words of 'rescission' tend to strengthen the conclusion that the promisor was willingly recognizing a moral obligation. Moreover, various courts have recognized the power of a creditor to discharge his debtor by a gift process. If, in a case of the present sort, it is clear that the party who promises additional compensation means to make a gift, with no element of fraud or duress, there is no strong reason why the court should not enforce the new promise." 1 CORBIN, CONTRACTS § 186 (1950).

¹⁰⁰ *Siebring Mfg. Co. v. Carlson Hybrid Corn Co.*, 246 Ia. 923, 70 N.W.2d 149 (1955).

\$60 each for one size and \$44.50 for another size. Shortly thereafter, the plaintiff seller informed the defendant buyer that a steel strike prevented his getting steel. They then agreed by telephone that the steel should be obtained on the black market and that the prices should be raised to \$72 and \$50, respectively. Deliveries and payments were made on the new basis for a short time until the defendant indicated that it would require remaining deliveries to be at the original prices. The court held that the oral modification bound the defendant to pay the increased prices. It concluded that an agreement to rescind the written agreement was implied and therefore that the modified agreement needed no "new consideration" to be binding. Yet, there was no evidence of any agreement to "rescind," let alone evidence of a rescission *prior* to the new promise to pay the higher price.

The recent case of *D. L. Godbey & Sons Const. Co. v. Deane*¹⁰¹ indicates that California may be approaching a similar rule. There the parties to a contract agreed upon a change in the mode of measurement of the work. It was held that there was sufficient consideration for one party's promise to pay in accordance with the new measurement, even though the total amount proved to be more than it would have been under the old method and even though there was no evidence whatever in the work actually done. It was noted that, although the performance was exactly as required by previous duty, the new method of computing the compensation might have resulted in a decrease.

The later case of *Bush v. Vernon*¹⁰² held that a substituted oral agreement was enforceable because a previous written lease was "rescinded," even though the "rescission" was dependent on the oral agreement.

Should California continue to ignore its code provisions and by "judicial legislation" follow the lead of New York,¹⁰³ or of those states which have adopted the rule of the Uniform Commercial Code that "an agreement modifying a contract . . . needs no consideration to be binding"?¹⁰⁴ Or

¹⁰¹ 39 Cal. 2d 429, 246 P.2d 946 (1952).

¹⁰² 135 Cal. App. 2d 33, 286 P.2d 903 (1955).

¹⁰³ Note 84 *supra*.

¹⁰⁴ UNIFORM COMMERCIAL CODE § 2-209. One possible danger inherent in a rule permitting modification of contracts without consideration may be seen in the case of a government cost-type contractor whose subcontractor is seeking additional compensation for a loss he has suffered. Except for the requirement of consideration, there may be, in a given case, no incentive for the contractor not to give the subcontractor the additional compensation where the contractor will be reimbursed by the government for the actual cost of his subcontracts. An attempt to make a contractual arrangement without consideration will not result in a subcontract having been formed and a prime contractor may have difficulty in seeking reimbursement for any payments he has made to the "subcontractor." The California rule (CAL. CIV. CODE § 1697) permitting modification of an oral contract by a writing "without a new consideration" would be inapplicable with respect to modification of most government subcontracts or purchase orders, since a writing is generally required by the terms of the prime contract if the original subcontract or purchase order is over a certain minimal sum. These agreements would fall within

should the law attempt to protect the business man from modifications which are "forced" upon him by the economics of the situation facing him in his day-to-day operations?

Section 1698 has been strongly criticized and the California courts have tended to skirt its enforcement by finding a subsequent oral agreement which is substituted for and revokes the written agreement, making the section inapplicable.¹⁰⁵ The only limitation on this approach is that the new agreement must not be within the Statute of Frauds. The consideration for a substituted agreement apparently has always been satisfactory to these courts.¹⁰⁶ However the flexibility which this device allows the California courts may lead in practice to a lack of uniformity which will continue to reduce certainty as to the effect of modified business transactions.¹⁰⁷

c. Modification by merger of contract and deed. Finally, one other method of avoiding the consideration requirement in contract modification cases should be noted. This method involves application of the doctrine of merger of a contract of sale in a subsequent deed. The applicability of the doctrine of merger to a deed containing an obligation not imposed by the antecedent contract and not supported by any additional consideration—tendered by the grantor as a full performance of the contract—is not precluded by the fact that the grantee accepts the deed under protest. A deed being unilateral, the grantee is bound not by signing the instrument, but by accepting it, and the defense of lack of consideration for a covenant in a deed is bypassed where the doctrine of merger is applicable.¹⁰⁸ However, the

CAL. CIV. CODE § 1698, which requires a consideration unless the agreement is executed. *Harvey v. De Garmo*, 129 Cal. App. 487, 18 P.2d 971 (1933); *American Bldg. Maint. Co. v. Indem. Ins. Co.*, 214 Cal. 608, 7 P.2d 305 (1932). This danger is less evident in the case of modification of government prime contracts without consideration, since contracting officers lack authority to execute agreements made without consideration flowing to the government—the Comptroller General has held that where, upon readvertisement for bids for furnishing coal after refusal of contractor to continue deliveries at contract price, the sole bid received was that of the defaulting contractor at a price higher than that specified in the original contract, acceptance of that bid would be unauthorized, since it would be tantamount to modification of the original contract to provide for increase in price without any consideration moving to the government. 27 DECS. COMP. GEN. 343 (1947). However, there is no all-pervading Comptroller General to watch over the procurement of purchasing agents of business in general, or, for that matter, of most aspects of procurement by purchasing agents of government contractors.

¹⁰⁵ See 44 CALIF. L. REV. 158 (1956).

¹⁰⁶ See note 87 *supra*.

¹⁰⁷ See Appendix, *Contract Modification: Possible Progress by Statute (infra)*.

¹⁰⁸ See Annot., 52 A.L.R.2d 647 (1957). In *Snyder v. Roberts*, 45 Wash.2d 865, 278 P.2d 348 (1955), a grantor sought damages for breach of a covenant in a deed to restore the grantor's adjoining property to its original level and to build a retaining wall for lateral support thereof. The vendee's obligations under the antecedent contract of sale had been fully executed prior to execution of the deed. The covenant in question was not imposed by the antecedent agreement, but the deed was accepted by the vendee under protest and was not supported by any new consideration. The court held that the vendee might rely on the doctrine of merger, and that

doctrine aids only additional provisions in *deeds*—where an obligation imposed upon a vendee by a *contract* of sale has been omitted from the subsequent deed, the obligation is held not to be merged in or superseded by the deed. The antecedent agreement controls and the deed does not constitute a waiver.¹⁰⁹ But if consideration is waived in adding a provision in the deed, why is it not when a provision is subtracted therefrom? The answer cannot be that the presumed intention of the parties is to be found in the latest instrument, for if this were the case, the deed would operate as a waiver. The inconsistency in the two rules is clearly difficult to justify.

CONCLUSION

It seems apparent that continued application of the doctrine of consideration to certain types of agreements bears re-examination. There are at least four possible approaches which could be taken at this time to the problem of what should be required to make a promise legally enforceable under California law.¹¹⁰

1. *Maintain the status quo.*

After studying the vagaries of the doctrine of consideration, some writers nevertheless come to the conclusion that it needs little or no change.¹¹¹ The best evidence that this alternative is not entirely satisfactory, however, may be found in decisions of the courts themselves—especially in recent years—in California and elsewhere. They have evinced a definite tendency toward the civil-law approach to the problem of enforceability of various agreements. Yet this trend seems unconscious and perhaps haphazard—it is far from complete and may never be so. Further, in the many

the lack of consideration and the fact that the vendee had accepted the deed under protest would not prevail over its proper application.

¹⁰⁹ *Chainey v. Shostrom*, 119 Cal. App. 237, 6 P.2d 353 (1931). In consideration of the vendor's consent to his entering into an oil and gas lease, the vendor agreed that the vendor should receive half of the royalty until the purchase price had been paid, and two-fifths thereafter. A subsequent escrow agreement, executed when the deed was delivered to an escrow holder, provided that a two-fifths share of the royalty would be distributed to the vendor for the life of the lease, but the deed made no mention of the royalty. The court deemed it unnecessary to enter into a discussion of whether the contract reserved an interest in land to the vendor which was waived because not reserved in the deed, as contended by the vendee, and held that, according to both the terms of the contract and the terms of the escrow agreement under which the deed was delivered, at all times the intention of the parties was that the vendor's right to share in the royalty should continue for the life of the lease, even after the payment of the purchase price and the transfer of title. The deed transferring title could not be relied upon as a waiver of the rights of the vendor under the contract, and the deed did not affect the right of the vendor to continue to receive the agreed share of the royalty.

¹¹⁰ See *Pritchard v. Norton*, 106 U.S. 124 (1882), where the Supreme Court held that the question of consideration was not one of procedure but went to the substance of the right itself.

¹¹¹ Page, *Consideration: Genuine and Synthetic*, 1949 WIS. L. REV. 483, 512, 513.

decisions discussing the doctrine of consideration, how few are those which weigh its merits by criticizing the value of the institution and observing both its imperfections and its advantages, even with respect to the facts of the case at hand.

That the process of change is slow and apparently lacks direction may be attributed at least in part to two major factors—lack of familiarity with the alternative systems and reluctance to abandon what is traditional.

The statement has been made that "Anglo-American lawyers are so accustomed to the idea that a contract not under seal must be supported by a consideration that it is difficult for them to conceive of a rational system of contracts without such a doctrine."¹¹² Most of us are unacquainted with any legal system where the doctrine of consideration does not exist, in spite of the fact that it is non-existent outside legal systems based on Anglo-American jurisprudence. Occasionally a writer, familiar with both systems, has concluded in favor of the civil-law approach, without, however, indicating instances where Anglo-American requirements lead to disadvantageous results.¹¹³ It is not surprising, in these circumstances, that such change as is forced upon us appears to lack direction.

Perhaps even more significant is a deep reluctance to depart from traditional, tested ways:

The teacher and law writer, having developed, with hard historical labor, a "theory" of consideration, continues to support the theory and to note with regret and disapproval the cases that are in substantial conflict with it, while perhaps giving it lip service and creating an appearance of harmony by the use of fiction and implication.¹¹⁴

Nevertheless, others have reached the different conclusion that intention to contract and legality ought generally to suffice.¹¹⁵ Twenty years ago the

¹¹² Lorenzen, *Causa and Consideration in the Law of Contract*, 28 YALE L.J. 621, 640 (1919).

¹¹³ See von Mehren, *The French Civil Code and Contract: A Comparative Analysis of Formation and Form*, 15 LA. L. REV. 687 (1955). This article, however, contains some excellent material on the history of the doctrines of cause and consideration.

¹¹⁴ 1 CORBIN, *CONTRACTS* § 198 (1950). This reluctance has its French counterpart: only a decade ago the French Commission for Reform of the Civil Code, in proposing to continue the concept of cause in its new draft, explained that it "hesitated to give up a theory which is now classic in French law." [1946-1947] TRAVAUX DE LA COMMISSION DE REFORME DU CODE CIVIL 196 (1948), quoted in VON MEHREN, *THE CIVIL LAW SYSTEM* 585 (1957). Compare: "[T]he reasons underlying the legal system should not be inquired into; otherwise, much of what is certain would collapse." Neratius, quoted in SCHULZ, *PRINCIPLES OF ROMAN LAW* 98 (Wolff trans. 1936).

¹¹⁵ Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 646 (1919). Holdsworth concluded against the doctrine, admitting that it "prevents the enforcement of many contracts which ought to be enforced if the law really wishes to give effect to the lawful intentions of the parties to them; and it would prevent the enforcement of many others if the judges had not used their ingenuity to prevent considerations." *The Modern History of the Doctrine of Consideration*, 2 B.U.L. REV. 87, 174, 206 (1922). Similarly, Professor Max Radin

English Law Revision Commission recommended abolition of the requirement of consideration because it is rendered ridiculous by the possibility of a "nominal" consideration, and because "the doctrine may also have the effect of defeating the reasonable expectations of a party in the very common case of a gratuitous promise to keep an offer open for a stated period."¹¹⁶

We would do well to give serious thought to whether we should indulge our fondness for a traditional concept at the expense of a common-sense freedom to contract without unnecessary roadblocks—in French law, the theory of the autonomy of the will.¹¹⁷

2. *Adopt the modern civil-law doctrine of cause.*

Why is it that we cannot find agreements which are not against public policy enforceable *solo consensu*, as can continental lawyers today? Indeed, a second possible approach to the problem of enforceability of promises might be to adopt the doctrine of cause as it is applied in modern civil-law countries—possibly through an appropriate amendment of section 1550 of the Civil Code.¹¹⁸ Although cause in civil-law countries may today be largely meaningless—almost all seriously intended agreements which are not against public policy are enforceable—reintroduction of the doctrine in its modern form into the law of California would have tremendous importance. Consideration, with all its limitations, would be abolished from our law.¹¹⁹

stated in 1925 that "It may be doubted whether the concept will prove of much value or vitality in the future development of Anglo-American law." *Fundamental Concepts of Roman Law*, 13 CALIF. L. REV. 119, 131 (1925).

¹¹⁶ LAW REVISION COMMITTEE, SIXTH INTERIM REPORT, STATUTE OF FRAUDS AND THE DOCTRINE OF CONSIDERATION 16 (1937).

¹¹⁷ *L'autonomie de la volonté*. This principle is found in art. 1134 of the French Civil Code which states that agreements *tiennent lieu de loi à ceux qui les ont faites* (become the law as between those who make them).

¹¹⁸ In a famous case on the eve of the American Revolution, Lord Mansfield, a Scot steeped in the Civil law of the European continent sitting as a judge in an English court, held consideration to be unnecessary in order that written promises be binding. *Pillans v. Van Mierop*, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765). Sir William Blackstone was writing his *Commentaries on the Law of England* at this time and incorporated Justice Mansfield's theory with the words that the doctrine of consideration "was principally established to avoid the inconvenience that would arise from setting up mere verbal promises" and that the doctrine "therefore does not hold, in some cases, where such promise is authentically proved by written documents." 2 BLACKSTONE, COMMENTARIES 445, 446 (1765). But the House of Lords refused to accept the new theory of contracts and rejected it thirteen years later, in *Rann v. Hughes*, 7 T.R. 350, 101 Eng. Rep. 1014 (H.L. 1778). As a result the doctrine of consideration was received into most of the states in the Union. The House of Lords was sufficiently impressed with the law of the covenant to believe it satisfied the wants of the day. Except for this action of the Lords, the American law respecting binding written contracts would largely coincide with continental law and the abolition of the effect of the seal would not have had to wait one and one-half centuries—nor would its abolition necessarily have been attended with the absence of any satisfactory substitute.

¹¹⁹ All good consideration is good cause. See note 27 *supra*.

This would clearly be progress in *some* cases. Nevertheless, this broadside approach would ignore completely any value which experience may show the doctrine of consideration to have, and therefore would not necessarily be the most rational and direct attack on our problems.¹²⁰

Some observers have praised the continental viewpoint for its freedom from historical anachronisms and have found it more satisfactory than our own, because of the role which speculative and systematic thought played in its evolution.¹²¹ But this conclusion is a far from sufficient basis, in a practical world, for choosing one doctrine over the other. The many consideration decisions of common-law courts may prove sounder than are the reasons by which they are justified—the test of a pragmatic system.

Perhaps the doctrine of consideration is as much a habit for laymen today as it is for lawyers—they may attach little weight to promises without a bargained-for consideration. Any reappraisal of the doctrine must recognize that no one desires to be bound by every promise he makes. Rather, one normally wishes only to be bound where another party is also, to what both parties regard as a serious undertaking.¹²² It therefore seems preferable for both courts and the legislature to sift the various types of agreements to determine where consideration presently works and where it does not, rather than to approach the problem with a wholesale solution.

3. *Adopt a seal substitute.*

We might approach the civil-law solution more selectively by attaching to certain written or recorded agreements a function which was once served by the common-law seal—that is, such agreements would not be subject to

¹²⁰ "[C]onsideration is not here defended as a perfect legal device in the best of all possible worlds. Its excrescences should be removed by legislation or judicial decision, and its principal alternative, promissory estoppel, should be expanded slowly by careful judicial empiricism. Even 'pure' gift-promises might be made enforceable with extreme and unusual safeguards. With these improvements, one need never—well, hardly ever—apologize for the doctrine of consideration." Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 963 (1958).

¹²¹ VON MEHREN, *THE CIVIL LAW SYSTEM* 708, 709 (1957). From his writing, I can only conclude that Professor von Mehren's opinion respecting the superiority of the Civil-law system seems to be based almost entirely upon the grounds that it developed more rationally and as a consequence must necessarily be preferable to a system that developed on pragmatic and historical bases; no other reason is given by him for this opinion, since he was only seeking "conclusions suggested by a comparative study of the evolution of contract in the Civil and common laws." *Id.* at 710.

Some claim the principle that all agreements should be enforceable is a postulate of pure reason such as those derived by Kant. See ROUSSIER, *LE FONDEMENT DE L'OBLIGATION CONTRACTUELLE DANS LE DROIT CLASSIQUE DE L'EGLISE* (1933). Some base the theory upon mere social responsibility and the conscience. Others put it upon the religious basis of keeping the faith, because to break a promise is to commit the sin of telling a lie, according to the older Christian fathers of the Middle Ages. *Id.* at 13–16. However, if these reasons alone were adequate, clearly we should lean toward the Civil-law system here.

¹²² Perhaps this is the underlying meaning of cause on the European continent today, for an agreement made on a frolic is one for which the law finds no cause.

challenge for lack of consideration. The effect of this proposal would be to permit parties to bypass the consideration requirement at their election, with respect to categories of agreements where the legislature finds the necessity and value of the requirement doubtful.

The difficulty with the written¹²³ as compared to verbal agreements is that neither a writing nor witnesses are today really significantly more perfect evidences of the seriousness of an undertaking, although they are undoubtedly to be preferred over mere oral agreements.¹²⁴

Adoption of a recording device might offer somewhat greater protection from hasty and ill-advised promises than would writing alone.¹²⁵ Agreements which are sometimes of dubious enforceability—*e.g.*, agreements to give, firm offers, oral releases, and agreements based on love and affection—might be recorded like deeds, or alternatively the instrument might be deposited with the parties' attorneys. The latter approach would be not unlike the continental notarial contract,¹²⁶ moreover, it would permit confidentiality.

It must be conceded, however, that this proposal affords no solution for the most difficult problem respecting contract modifications, for it does not

¹²³ See text at note 55 *supra*.

In California it has been held that the requirement of consideration cannot be waived, *American Nat'l Bank of San Francisco v. A. G. Somerville, Inc.*, 191 Cal. 364, 216 Pac. 376 (1923), and that a mere recital that money has been paid by one party to the other in return for a promise does not satisfy the requirement of consideration where the party who allegedly received the sum shows that in fact it was never paid to him, *Bard v. Kent*, 19 Cal.2d 449, 122 P.2d 8 (1942).

¹²⁴ One might think that the ubiquitous requirement of a writing on the continent for agreements above a given small amount of money would somehow protect against poorly conceived promises. However, in France, although the Civil Code does require that contracts exceeding a given amount (equal today to about twelve dollars) must be in writing, it expressly excepts transactions falling under the Commercial Code from its application. CODE CIVIL, art. 1341 (Fr. 53d ed. Dalloz 1954). (A brief history in France, England, and the U.S. of the amount of money necessary in order that the Statute of Frauds be involved is traced in Keyes, *Toward a Single Law Governing the International Sale of Goods, A Comparative Study*, 42 CALIF. L. REV. 653, 661 n.24 (1954). Article 931 of the Commercial Code states that sales of goods may be proven by oral testimony "whenever the court believes such testimony should be admissible.") Further, and more strange to the Anglo-American lawyer, are French decisions that statutes of frauds can be circumvented by an oral contract whereby the parties agree to the admissibility of proof by witnesses alone. Civ. June 8, 1896, Dalloz Periodique, 97.1.464; Jan. 6, 1936, [1936] Dalloz Hebdomadaire 115. Thus, to the extent that the Civil law would substitute the requirement of a writing for our requirement of consideration, the justification for the former is largely ephemeral in France.

¹²⁵ Defects of incapacity and fraud are not protected against by recording deeds and would likewise fall outside the scope and purpose of an extension of the statute covering recordation of agreements.

¹²⁶ In France, the *acte notarie* (see text at note 49 *supra*), an instrument drawn by a lawyer (*notarie*), the original of which remains in his files.

prevent one party to a contract from "forcing" another to record a modification in order to receive what is already his due.¹²⁷

4. *Restate the Code requirement.*

The consideration requirement presently found in the California Civil Code¹²⁸ might be restated to permit a given number of well thought-out exceptions. This approach would permit either outright elimination of the requirement, or adoption of an alternative to it—such as writing or recordation—depending on its value in particular types of cases. This case-by-case method of dealing with the problem of consideration was once used by the New York Law Revision Commission.¹²⁹

We should recognize that in many cases consideration is a mere formal legal requirement—a peppercorn will do.¹³⁰ In some areas of the law, the doctrine continues to have value and should be retained. But where the formalism is useless, it should no longer be required.¹³¹ Where a formality has value, by way of guaranteeing the sober, serious nature of an undertaking, we should not invariably content ourselves with nominal consideration. Rather, we should select a requirement that can in fact be defended as contributing to the desired solemnity.¹³²

It is suggested that the testing of these respective approaches should be more actively carried out by an enlightened legislature and that this should be done, not on the basis of history alone—which has been a limiting factor

¹²⁷ Modifications present more difficulties. While recordation should prove satisfactory in order for a businessman to be absolutely certain that a compromise he has made will stand up in court, this may not be true of a modification which involves an increase in price, since he might still be "forced" to record the modification in order to receive the agreed-upon consideration from the other party. Here it would seem that the modification might be approved by a court of competent jurisdiction if there is no added consideration from one of the parties at the time the modification is executed. However, this may prove impractical due to the fact that the court would necessarily have to deliberate in an economic matter; still, it may be found that recordation is at least an improvement over the present highly uncertain state of the law with respect to contract modifications.

¹²⁸ See notes 1 and 2 *supra*.

¹²⁹ See N.Y. LAW REVISION COMMISSION, 2D ANN. REP. 81 (1936); Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849 (1941).

¹³⁰ California follows the majority rule upholding sufficiency of a nominal consideration. *Chrisman v. Southern Cal. Edison Co.*, 83 Cal. App. 249, 256 Pac. 618 (1927).

¹³¹ The firm commercial offer is an example of a category which has been demonstrated to have outmoded requirements of the doctrine of consideration and could be excepted therefrom by statute. This will be accomplished if article 2 of the Uniform Commercial Code is adopted in California.

¹³² It must be remembered that we are not here concerned with a method to correct the abuses of truly unconscionable bargains, since they cannot be solved through application of the doctrines of either cause or consideration. See UNIFORM COMMERCIAL CODE, *Sales*, § 2-302 (1950 draft), which states: "If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or strike any unconscionable clauses and enforce the rest of the contract or substitute for the stricken clauses such provision as would be implied under this Article if the stricken clause had never existed."

of so much previous study¹³³—but on pragmatic lines which will blend the experience of history—particularly the recent history of our own contemporary society—with the different results derived in Europe from reason and morals originating from the age of religion in order to achieve an appropriate modern approach.

¹³³ Many studies have been limited to the historical derivation of cause and consideration—e.g., FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* (1949); von Mehren, *The French Civil Code and Contract: A Comparative Analysis of Formation and Form*, 15 LA. L. REV. 687 (1955); or a simple comparison without evaluation—e.g., BUCKLAND & McNAIR, *ROMAN LAW AND COMMON LAW* 227 (2d ed. 1952), where it is stated that "Whether the common law did well to adopt consideration as the basis of simple contract, and whence that doctrine was evolved, are questions which do not concern us here."

APPENDIX

Contract Modification: Possible Progress by Statute

At the federal level, we have had some limited experience with statutory elimination of the consideration requirement in contract modifications, limited however to cases involving the national defense. At the beginning of American participation in World War II, Congress determined that if federal contracts could not be modified without additional consideration flowing to the Government, occasions might arise where the prosecution of the war would be adversely affected. As a result, Title II of the First War Powers Act was enacted, permitting amendment of war contracts without regard to ordinary contract law: "The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war, in accordance with regulations prescribed by the President for the protection of the interest of the Government, to enter into contracts and into amendments . . . without regard to the provisions of law relating to the making, performance, *amendment*, or *modification of contracts* whenever he deems such action would facilitate the prosecution of the war." 55 Stat. 839 (1941) (emphasis added), superseded by 72 Stat. 972 (1958), [1958] FED. COM. ANN., PUBLIC LAWS & ADMIN. MATERIAL 1059 (1959). In 1951 "the national defense" was substituted for "the prosecution of the war." 64 Stat. 1257 (1951).

Exec. Order No. 10210, 16 Fed. Reg. 1049 (1951), the principal implementation of Title II provides in Part 1, Para. 4, that departments and agencies may modify or amend contracts whenever the secretary thereof or his duly authorized representatives determine the national defense will be thereby facilitated. Amendments and modifications may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished, irrespective of the time or circumstances of the making, or the form, of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

While Title II does not include authority to modify a contract after it has been terminated because of default, and does not apply to a contract which has been fully completed, 24 DECS. COMP. GEN. 723 (1945), see also 27 DECS. COMP. GEN. 5 (1947), request for relief may be considered and granted after full performance of the contract and after final payment, provided such requests are filed during performance of the contract and before final payment has been made under the contract. 31 DECS. COMP. GEN. 685 (1952).

Contracts may be amended without consideration when actual or threatened loss will impair the productive ability of a contractor whose continued operation as a source of supply is found to be essential to the national defense. See Army Procurement Procedures 30-406.1a (May 5, 1954). Such amendment may also be effected where a contractor suffers a loss caused by an act of the Government toward the contractor in its contractual—rather than sovereign—capacity. See Army Procurement Procedures 30-406.1b (May 5, 1954). Denial of relief under

the act is not judicially reviewable in the absence of some showing by the contractor that there was "an abuse of discretion, or that the action taken was arbitrary, capricious or so grossly erroneous as to imply bad faith." *Theobald Industries, Inc., v. United States*, 115 F. Supp. 699, 700 (Ct. Cl. 1953), *cert. denied*, 347 U.S. 951 (1953). Procedures applicable to the processing of requests for amendments without consideration are found in Army Procurement Procedures 30-406.2 (May 5, 1954). Such an amendment may provide any of the following types of relief for the contractor: (1) the contract may be terminated without cost to either party; (2) the contract price may be increased as necessary to avoid impairment of the contractor's productive capacity or as deemed desirable to provide an equitable adjustment for Government action threatening a loss to the contractor; (3) the contract delivery schedules may be revised; or (4) other action as appropriate. Army Procurement Procedures 30-406.1c (May 5, 1954).

While this extraordinary authority to amend contracts has been extended ever since the end of the war, its exercise in recent years has been limited, first by agreement (see letter from Dep't of Defense to Sen. Eastland, Aug. 27, 1957, 103 CONG. REC. 15064 (1957)), finally by statute. 72 Stat. 972 (1958), [1958] FED. CODE ANN., PUBLIC LAWS & ADMIN. MATERIAL 1059 (1959). In the new statute it is provided that:

"Sec. 1. The Authority conferred by this section shall not be utilized to obligate the United States in an amount in excess of \$50,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or an assistant head or his deputy, of such department or agency, or by a Contract Adjustment Board established therein.

"Sec. 2. Nothing in this Act shall be construed to constitute authorization hereunder for:

- "(a) the use of the cost-plus-a-percentage-of-cost system of contracting;
- "(b) any contract in violation of existing law relating to limitation of profits;
- "(c) the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding;
- "(d) the waiver of any bid, payment, performance, or other bond required by law;
- "(e) the amendment of a contract negotiated under Section 2304(a)(15), title 10, United States Code, or under section 302(c)(13) of the Federal Property and Administrative Services Act of 1949, as amended (63 Stat. 377, 394), to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or
- "(f) the formalization of an informal commitment, unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures. . . .

"Sec. 3. (a) All actions under the authority of this Act shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be detrimental to the national security. . . ." See also implementing regulations, Armed Services Procurement Regulations, CCH GOV'T CONTRACTS REP. ¶ 33,834.

Title II has not been a model for states to follow with respect to private contracts, obviously, since modification of government contracts under the statute requires a determination that the action would facilitate "the national defense." The federal law governs most interpretations of prime contracts and is described as the "general law" of contracts. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); 45 CALIF. L. REV. 212 (1957); Keyes, *Consideration Reconsidered—The Problem of the Withdrawn Bid*, 10 STAN. L. REV. 441, 462-66 (1958). Congress would certainly hesitate to make such a radical change in the general law of contracts as the entire elimination of the consideration requirement in contract modifications. To do so would cause a major discrepancy between federal law and the law of almost all of the states. It is more likely that any legal reform involving modification of contracts will be left to the states, although a congressional enactment in the general law of commerce was once contemplated by a provision of the proposed Uniform Commercial Code. However, this provision was deleted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, who felt that their functions were primarily in the field of state rather than federal law. For a discussion of this provision, see Keyes, *Toward a Single Law Governing the International Sale of Goods, A Comparative Study*, 42 CALIF. L. REV. 653, 654 (1954).