

# The Doctrine of Cause or Consideration in the Civil Law

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According to the Quebec Civil Code, there can be no valid contract without a "cause" or "consideration". This is stated in article 984 of the Code:

There are four requisites to the validity of a contract:  
Parties legally capable of contracting;  
Their consent legally given;  
Something which forms the object of the contract;  
A lawful cause or consideration.

Article 989 of the Code tells us what happens when there is no consideration, or when the consideration is not lawful:

A contract without a consideration, or with an unlawful consideration has no effect . . .

And article 990 defines the word "unlawful":

The consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order.

In so far as concerns the present study, the undefined terms in these articles are "contract", "cause" and "consideration". No definition of these terms is to be found in the Code. As to the term "contract", the codifiers intentionally omitted a definition. In their report, they pointed out that the Code Napoleon, which they had been charged to use as a model in preparing a code for Quebec,<sup>1</sup> did contain a definition of "contract,"<sup>2</sup> and definitions of various types of contracts.<sup>3</sup> But the codifiers felt that it was inadvisable to insert similar articles in the code they were drawing up. They comment:

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<sup>1</sup> See Delorimier, *Bibliothèque du Code Civil*, vol. 7, p. 613.

<sup>2</sup> Art. 1101 C.N.: "Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose".

<sup>3</sup> Arts. 1101 to 1106 C.N.

Après examen, les Commissaires ont omis entièrement cette section, comme ne contenant que des définitions d'un caractère purement scolastique. L'inconvénient d'insérer des définitions de ce genre dans un code est énoncé par les lois romaines, et devient manifeste par les critiques dont elles sont assaillies de la part des commentateurs qui ont écrit sur le code français. Presque toutes celles qui sont désignées sont démontrées inexactes et Toullier ajoute qu'elles n'ont aucune utilité pratique. . . . De plus, elles appartiennent à une classe de sujets qui, d'après leur nature et la raison, doivent être laissés au savoir des juges plutôt que restreints dans les termes inflexibles d'une législation positive. Les seules définitions qu'on puisse adopter sont celles qui sont impératives et sacramentelles, ainsi que celles qui contiennent quelque règle de droit, ou sont tellement inséparables d'une règle particulière que leur omission la rendrait obscure et inefficace.<sup>4</sup>

It is not necessary, for our purpose, to fix the limits of the word "contract".<sup>5</sup> It will be sufficient to note that what is generally regarded as a contract, or what, in other sections of the Code, is stated to be a contract, will be without effect unless it has "a lawful cause or consideration". Examples of transactions declared in the Code to be contracts are: gifts *inter vivos*, accepted by the donee (article 755); sale (article 1472); exchange (article 1596); lease (article 1600); mandate (article 1701); loan (article 1763); deposit (article 1797); partnership (article 1830); transaction (article 1918); gaming contracts (article 1927); suretyship (article 1933); pledge (article 1966); affreightment (article 2407) and insurance (article 2468).

Before we pass to the words "cause" and "consideration", it will be necessary to take notice of one characteristic of a contract that is universally admitted to be inherent in it, namely that it creates "obligations". Article 983 C.C. says that "obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of the law solely". While this introduces a new term into the discussion, it is a term that is not unfamiliar. The term "obligation" is used in both the Civil law and the Common law, and, in both systems, it is understood to mean a legally enforceable duty to do something or refrain from doing something. Contracts, then, always create obligations; their result is that some person is required to do something, and the doing of that thing can be demanded at law by the other party to the contract.<sup>6</sup>

This contract, which is thus productive of obligations (or of

<sup>4</sup> Delorimier, *op. cit.*, p. 616.

<sup>5</sup> See the interesting discussion of the term "contract" by W. H. Kerr in 3 *Revue Critique de Législation et de Jurisprudence*, pp. 162 and foll., reproduced in Delorimier, *Bibliothèque du Code Civil*, vol. 7, pp. 641 and foll., in which the definitions of the French, English and German writers are discussed.

<sup>6</sup> For convenience, obligations to refrain from doing will not be specifically referred to. The principles applicable are the same as in obligations to do.

one obligation only, as we shall see), is without effect, we are told, without a lawful cause or consideration. "Cause" and "consideration" are not defined in the Code and they are not explained in the codifiers' report. The purpose of the present article is to investigate the meaning of these words. At the outset, it must be said that the words "cause" and "consideration", in the law of Quebec, are synonymous. "Cause" comes from the old French law, "consideration" from the Common law. The commissioners charged with the preparation of the Code used both terms, but it is admitted by all commentators that the provisions of the Code take their inspiration from the Civil law alone, and that the words "cause" and "consideration", taken together, mean nothing more than is conveyed by the word "cause" alone. In this article, the term "cause" will hereafter be used in connection with Civil law doctrine; "consideration" in connection with the analogous Common law doctrine.<sup>7</sup> In dealing with this subject, it is customary, before trying to determine what *cause* is, to state what it is not. A cause, in ordinary parlance, is what effects or brings about a result. In the case under consideration, the result is the obligation undertaken by a party to a contract. If *cause* means merely what brings about the assumption of the obligations, we can see that there can be a great multiplicity of *causes* for a contract. A enters into a contract whereby he agrees to pay \$10,000 for a building that B agrees to sell him. A intends to use the building partly as a residence and partly as a place of business. What is the cause that impelled him to enter into this contract and commit himself to the payment of this sum of money? Was it the desire to find a suitable residence for himself and his family, or the need for quarters in which to carry on his business? Was it the persuasiveness of the real estate agent who induced him to enter into the deal? Was it the nagging of his wife, who was dissatisfied with the house in which they were living? Was it the fact that the building was cheap and offered the prospect of a good profit upon resale? As for B, what caused him to enter into the contract? Perhaps he needed money badly; perhaps he had a profitable deal in view, whereby he hoped to multiply the money he would realize from selling the property. In the ordinary sense of the word "cause", all these factors were perhaps causes contributing towards bringing about the contract, but none of them constituted the *cause*,

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<sup>7</sup> When the technical term "cause" is meant, it will be put in italics — *cause* — to distinguish it from the same word in its ordinary sense of that which brings about a result.

in the legal sense. For the most part, they were the *motives* that impelled the parties to enter into the contract.<sup>8</sup>

This is the first distinction to be made — the motives that influenced the parties to enter into the contract<sup>9</sup> are not the *cause* (nor, of course, are the persons whose persuasiveness overcame the “sales resistance” of the parties). Was the building itself the *cause* of the contract? No: the building was the *object* of the contract. Article 984 C.C., as we have seen, demands as a requisite “something which forms the object of the contract”. The building is the object with which the contract is concerned. That is the second distinction to be made.

Thus, in trying to determine what the *cause* of a given contract is, we must eliminate both the motives and the object. Since both of these are among the factors that “cause” the contract, we must conclude that the legal concept of *cause* involves a choice among the various impelling agencies, and the selection of one having certain characteristics. How this selection is to be made has occupied the attention of many of the great jurists, with — it must be admitted — a striking lack of agreement on the criteria to be applied. As Holland says: “It has long been settled in French law that every permissible agreement is legally binding, subject only to the proviso that every agreement must have a ‘cause’, the precise nature of which seems far from clear to the French commentators themselves”.<sup>10</sup> What is true of French law is true of the law of Quebec, since the articles of the Code Napoleon on the subject of *cause* are couched in terms having the same meaning as in the Quebec Civil Code, and are, like the latter, inspired by the writings of Pothier, who, in turn, took his inspiration from Domat.

At this point, therefore, no effort will be made to analyze and compare the views of the various writers on the subject. What I propose to do is to start with the doctrine of Domat and Pothier, set forth their rules, show that their rules have been adopted by Quebec lawmakers, and see to what extent they have been applied by the courts in actual cases. At the same time, I will try to compare the Civil law and the Common law principles in similar cases. As the last part of the article, I hope to analyze some of the various conceptions of *cause* to be found in the writings of the jurists, and to express an opinion, however hesitant, on their comparative merits.

<sup>8</sup> “A motive is in general a consideration which determines choice or induces action” (Webster’s New International Dictionary, Vo. “Motive”).

<sup>9</sup> Other than the motive of obtaining an equivalent (*contrepartie*) for the obligation assumed, as we shall see.

<sup>10</sup> Holland, *The Elements of Jurisprudence* (12th ed.) p. 284.

In discussing the origin of the theory of *cause*, Planiol points out that Domat created the theory.<sup>12</sup> He declares that Dumoulin did not know of it, and that the oldest writers on the *coutumes*, who sometimes mentioned *cause*, used it in an entirely different sense from the one given the word in the Code. According to Planiol, these writers, in speaking of *cause*, referred to what the Code describes as the *object* of the contract. The Roman jurists used the word *causa* on many occasions, and with a variety of meanings, but, as Planiol points out, never in quite the sense given to the word *cause* by Domat.

Domat's doctrine of *cause* involves the consideration of three types of contracts: bilateral contracts (*contrats synallagmatiques*), in which both parties incur obligations; real contracts (*contrats réels*), in which one party only is bound, his obligation arising from the fact that the other party has delivered something to him, and gratuitous contracts (*contrats gratuits*), in which there is no mutuality of obligation and no previous delivery. In bilateral contracts, according to Domat, the consideration for each party's undertaking is the undertaking of the other party. In real contracts, like loan for use (*commodatum*)<sup>13</sup> or loan for consumption (*mutuum*),<sup>14</sup> the obligations of the borrower result from the reception of the thing or sum lent. In gratuitous contracts, where the beneficiary of course does not incur any obligation, the *cause* of the donor's obligation must be sought in the motive of the gift or gratuity. As Domat puts it: "Dans les donations . . . l'engagement de celui qui donne a son fondement sur quelque motif raisonnable et juste, comme un service rendu, ou quelque autre mérite du donataire, ou le seul plaisir de faire du bien. Et ce motif tient lieu de cause, de la part de celui qui reçoit et ne donne rien."<sup>15</sup>

Pothier, cited as an authority by the codifiers in connection with article 989 C.C., groups Domat's first two categories in one, under the heading of *contrats intéressés*. He says: "Tout engagement doit avoir une cause honnête. . . . Dans les contrats intéressés, la cause de l'engagement que contracte l'une des parties, est ce que l'autre lui donne, ou s'engage de lui donner, ou le risque dont elle se charge."<sup>16</sup> He continues: "Dans les contrats de bienfaisance, la libéralité que l'une des parties veut exercer vers l'autre, est une cause suffisante de l'engagement qu'elle contracte envers

<sup>12</sup> Planiol, *Droit Civil* (7th ed.), vol. 2, no. 1029.

<sup>13</sup> Art. 1763 C.C.

<sup>14</sup> Art. 1777 C.C.

<sup>15</sup> Domat, *Lois Civiles*, vol. 1, t. 1, s. 1, no. 6.

<sup>16</sup> Pothier does not mention undertakings to do or to abstain from doing, but these clearly constitute *cause* equally with undertakings to give.

elle. Mais lorsqu'un engagement n'a aucune cause, ou, ce qui est la même chose, lorsque la cause pour laquelle il a été contracté est une cause fautive, l'engagement est nul, et le contrat qui le renferme est nul."<sup>17</sup>

These concepts of Domat and Pothier have been criticized by some writers and approved by many others. So far as the Civil law in Quebec is concerned, it would seem that they have been adopted by the codifiers, and that they may be taken as the foundation of our doctrine of *cause* or consideration.<sup>18</sup> We shall see whether they form a complete system covering all situations, and whether the courts have departed from or supplemented them.

Why is it important to determine what *cause* is? For one reason only. Article 989 of the Code tells us that a contract without a consideration (*cause*) or with an unlawful one has no effect. Thus, *cause* is of prime importance, since no contract can exist without it.<sup>19</sup> It becomes necessary, therefore, in the case of any given contract, to make at least two inquiries. Firstly, is there a *cause*, and in what does it consist? Secondly, is the *cause* lawful? Unless we can find a *cause* and, so to speak, isolate it, we cannot have a valid contract. If, having found the *cause*, we perceive that it is unlawful (prohibited by law, or contrary to good morals or public order) we are in the same position as if there were no *cause*.

It results from the principles enunciated by Domat and Pothier that in every contract of a given type the *cause* will always be the same.<sup>20</sup> In bilateral contracts, the *cause* consists in the mutual undertakings of the parties. In the contract of lease, for example, the undertaking to give peaceable possession of the premises is the *cause* for the undertaking to pay the rent.<sup>21</sup> This *cause* will be the same in all contracts of lease. In the *real* contracts, like loan for use, which, according to the Code, is gratuitous,<sup>22</sup> the *cause* for the borrower's obligation to preserve the thing lent and return it in due course, according to Domat, is the reception of the thing

<sup>17</sup> 2 Pothier (Bugnet) Oblig., nos. 42 and foll., quoted in Delorimier, *op. cit.*, vol. 7, p. 687.

<sup>18</sup> According to Planiol, the same is true of the law of France: "Les articles du Code ont été inspirés par ces passages de Pothier et remontent ainsi par son intermédiaire jusqu'à Domat" (Planiol, *op. cit.*, vol. 2, no. 1032).

<sup>19</sup> As we shall see later, the French writers who are termed "anti-causalistes" insist that the notion of *cause* is quite unnecessary, and in some cases illogical. This view need not detain us, because not only the fact but the nature of *cause* seems to be settled in the law of Quebec.

<sup>20</sup> This helps to distinguish the *cause* from the motives in general, since the latter will be as varied as human desires.

<sup>21</sup> However, the tenant assumes a series of successive undertakings to pay rent at the stated intervals, and his undertaking will lack a *cause* as regards future payments of rent if the building burns down, and the contract becomes void.

<sup>22</sup> Art. 1763 C.C.

from the lender. It may, with all deference, be suggested that it is not the mere reception of the thing that constitutes the *cause*, but the reception of it coupled with an implied or express agreement on the part of the lender to permit the borrower to keep and use the thing for a fixed or uncertain period.<sup>23</sup> From a practical point of view, however, the question of the *cause* for the obligations of the recipients in the real contracts, such as loan, deposit and pledge, is not important. The Code itself states the obligations that are incumbent upon the borrower, depositary and pledgee. The Code places these obligations upon these persons as a sequel to the handing over of the object loaned, deposited or pledged. It may consequently be asserted that, in the case of these *real* contracts, the *cause* is invariable, regardless of the persons involved, and is intimately tied up with the physical transfer of possession of the object handed over.

In gratuitous contracts, in which one party agrees to do something for or give something to the other party, and the latter does nothing and gives nothing, the *cause* is stated by Domat to be "quelque motif raisonnable et juste, comme un service rendu, ou quelque autre mérite du donataire, ou le seul plaisir de faire du bien". Pothier puts it a little differently: "La libéralité que l'une des parties veut exercer vers l'autre est une cause suffisante de l'engagement qu'elle contracte envers elle". If we adopt Domat's statement, *cause* would seem to be variable, in gratuitous contracts, in that it would consist in the motives that prompted the particular donor to make the gift, and these would vary from one transaction to another. Pothier's definition, on the other hand, has the merit of giving us an invariable *cause* in gratuitous contracts: the desire to confer a benefit on the other party. That this is a "motive" for the gift does not make it any less a *cause*, since the *cause* in all contracts has an element of motive in it. That which is called *cause* is chosen from all the motives (and causes) because it is the final and conclusive one which impels the party who obliges himself to assume the obligation. The final motive that causes the lessee to undertake to pay the rent is that of obtaining the consent of the lessor to give him the occupation of the premises.<sup>24</sup> If, then, in dealing with gratuitous contracts, Pothier

<sup>23</sup> What constitutes the *cause* for the handing over of the thing by the lender, and whether a *cause* is required, will be discussed later.

<sup>24</sup> Most of the writers, in discussing *cause*, point out that in bilateral contracts the motives of the parties do not constitute the *cause*, but that the *cause* is rather that which, in the mind of the promisor, counterbalances the disadvantage he suffers by incurring the obligation. But here, too, there is the element of motive, which consists in the desire to obtain this counter-vailing advantage.

finds the *cause* in a motive that consists in the desire to benefit the other party to the contract, the finding is not as open to criticism as might at first appear. The element of desire is always present in contracts; in bilateral contracts, the desire is to obtain something, namely what the other party promises. In gratuitous contracts, the desire is to confer a benefit on the other party (and thereby, presumably, to obtain the feeling of gratification to which La. Rochefoucauld alludes when he cynically asserts that there are no really disinterested actions). In either case, the gratification of a desire is involved. Pothier's doctrine of *cause* in gratuitous contracts can therefore be justified in logic, and for us it has the great merit that it was adopted by the codifiers both in France and in Quebec.

As to *cause* in general, it is universally admitted that adequacy of *cause* is immaterial. If, in a bilateral contract, the *cause* for the obligation assumed by one party consists in an undertaking by the other party which is disproportionate to what the promisor obliges himself to do or give, this does not affect the validity of the contract (except in the case of minors). Article 1012 of the Code says: "Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.<sup>25</sup> Of course, if the disparity between the two obligations is so great that it is evident that there was fraud, the contract is annulable, but not on grounds having to do with *cause*. All that has just been said regarding sufficiency of *cause* seems to be equally applicable to consideration in the Common law. Pollock<sup>26</sup> points out that adequacy of consideration is immaterial, and he cites the famous case of *Bainbridge v. Firmstone*, "the case of the two boilers".<sup>27</sup> Pollock adds: "Great inadequacy of consideration may, however, be material in cases of fraud and the like, though material as evidence only".<sup>28</sup>

<sup>25</sup> Cf. article 1002 C.C.: "Simple lesion is a cause of nullity in favour of an unemancipated minor against every kind of act when not aided by his tutor, and, when so aided, against every kind of act other than acts of administration . . . subject to the exceptions expressed in this Code".

<sup>26</sup> Contracts (12th ed.) p. 136.

<sup>27</sup> (1838), 8 A. & E. 743; 53 R.R. 234: "If a man who owns two boilers allows another to weigh them, this is good consideration for that other's promise to give them up after weighing in as good condition as before. 'The defendant', said Lord Denman, 'had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did by promising to return them in good condition. We need not inquire what benefit he expected to derive.' The comment is that of Pollock, *op. cit.*, p. 137.

<sup>28</sup> See on this point *McCarthy v. Kenny*, [1939] 3 D.L.R. 556 (Ont.), in which it was decided that inadequacy of consideration is not ground to set aside a transaction. But if it is so gross as to amount to fraud, it is ground for cancellation. Relief is granted, not on the ground of inadequacy of consideration, but on the ground of the fraud evidenced thereby.

We have said that absence of *cause* is fatal to the validity of a contract. In bilateral contracts, absence of *cause* is of infrequent occurrence, but cases can be imagined. Pothier suggests a case: I promise to pay something to my debtor in consideration of his doing something he was already obliged to do.<sup>29</sup> Pothier asserts that the contract is null because it has an unlawful *cause*, at least where the debtor demanded the payment in return for carrying out his original obligation.<sup>30</sup> It would seem that absence of *cause* could as justifiably be given as the ground of nullity. Perhaps a better example cited by Pothier is the following: "Mais lorsqu'un engagement n'a aucune cause, ou ce qui est la même chose, lorsque la cause pour laquelle il a été contracté est une cause fausse, l'engagement est nul, et le contrat qui le renferme est nul. Par exemple, si croyant faussement vous devoir une somme de dix mille livres qui vous avait été léguée par le testament de mon père, mais qui a été révoqué par un codicile dont je n'avais pas connaissance, je me suis obligé de vous donner un certain héritage en paiement de cette somme, ce contrat est nul, parce que la cause de mon engagement, qui était l'acquiescement de cette dette, est une cause qui s'est trouvée fausse . . .".<sup>31</sup>

In unilateral contracts, questions of *cause* can and do arise much more often. Unilateral contracts are not necessarily gratuitous; they may be onerous. This principle was affirmed by the Quebec Court of Appeal in the well-known case of *Re Ross, Hutchison v. Royal Institution for the Advancement of Learning*.<sup>32</sup> The case arose from the following series of facts. In 1914, the late J. K. L. Ross subscribed \$150,000 to McGill University for the erection of a gymnasium to be known as the Ross Memorial Gymnasium, subject to the university devoting to the completion of the gymnasium a sum of \$100,000, which had been left by Ross's father to the university. In 1920, Ross subscribed \$200,000 to a campaign being conducted by the university, subject to the understanding that the \$150,000 previously subscribed (but not yet paid) was to be included in the \$200,000, and to the further understanding that he released the university from the obligation of building the gym-

<sup>29</sup> Pothier (Bugnet) *Oblig.*, no. 46.

<sup>30</sup> If the debtor did not demand it, the undertaking is valid, as constituting a gift that the creditor intended to bestow upon the debtor, according to Pothier. This seems open to very serious question. If the creditor wanted to make a gift, he had only to say so. Moreover, unless the contract was executed in notarial form, it would be ineffectual as a contract of donation. I would suggest that whether the debtor did or did not demand the new undertaking, it is equally void as being without *cause*.

<sup>31</sup> Pothier, *op. cit.*, no. 42.

<sup>32</sup> (1931), 50 K.B. 107 (Que. C.A.). The Royal Institution, etc., is the formal title of McGill University.

nasium. Of this subscription of \$200,000; Ross paid \$100,000, and then later asked and obtained a delay of three years for the payment of the balance, for which he gave a promissory note payable three years after date. Shortly before the note came due, Ross was declared bankrupt. The university filed with the trustee of his estate a claim for the amount of the note. The trustee refused the claim, contending that, under section 10 of the Bills of Exchange Act, the rules of the Common law applied, and that there was no "valuable consideration" as called for by section 53 of the Act.<sup>33</sup> The case reached the Quebec Court of Appeal, where a majority of the learned judges took the stand that the law applicable was the Civil law. On the basis of that law, the majority held that there was *cause* for the giving of the note, and hence that the contract was an onerous one.<sup>34</sup> The *cause* found by the court was a "moral consideration". Dorion J. thus stated the law: "En droit anglais le mot *considération* sousentend *valuable consideration*, tandis que dans le droit français la cause ou considération n'est que le motif qui détermine le consentement des parties. Ainsi il y a toujours une cause ou considération dans une donation, et cette cause c'est l'intention de faire du bien au donataire; c'est un contrat à titre gratuit, ou contrat de bienfaisance. . . . On soutient avec raison qu'un simple intérêt moral peut être une considération *valable* dans un contrat et qu'il en fait un contrat à titre onéreux. Mais encore existe-t-il une différence entre une considération morale et le désir de faire du bien. On sait à quelles controverses a donné lieu la *cause ou considération*; elle n'est en définitive que le motif qui détermine la volonté du contractant; cela va de soi, car on n'agit jamais sans motif, et le contrat sans considération se réduit à celui qui n'a pas été voulu." He went on to point out that the original subscription has rested upon no consideration, and that the increased subscription of 1920 was merely an acknowledgement of the earlier one, with the addition of a further

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<sup>33</sup> S. 53 provides that "valuable consideration for a bill may be constituted by: (a) any consideration sufficient to support a simple contract; (b) any antecedent debt or liability". It is not within the scope of this article to discuss whether the Common law or the Civil law is applicable to such a situation.

<sup>34</sup> The importance of this decision results from the fact that an agreement to make a gift cannot be enforced unless it is in notarial form (art. 776 C.C.). There is an exception in favour of a "don manuel", that is, a gift of moveable property accompanied by delivery, which may be made by private writing or verbal agreement. The court held that the giving of a note signed by the person making the gift could not qualify as a "don manuel". But see *contra*, *Pesant v. Pesant*, [1934] S.C.R. 249. Hence, if the transaction was in the nature of a gift, it was invalid, as not being embodied in a notarial deed.

subscription that also lacked consideration.<sup>35</sup> But the giving of the promissory note was the fulfilment of a debt of honour, which placed upon him a moral obligation, that of saving his honour. Bernier J. put it thus: "Pour former un contrat, on ne peut mettre en doute qu'une obligation de conscience ou une obligation naturelle est suffisante". He cited Pothier: "On appelle obligation naturelle, celle qui dans le for de l'honneur et de la conscience, oblige celui qui la contracte à l'accomplissement de ce qui est contenu".<sup>36</sup> The learned judge concluded: "Si le simple désir de satisfaire à un sentiment d'équité, de conscience, de délicatesse ou d'honneur peut constituer une cause suffisante d'engagement rentrant dans la classe des actes à titre onéreux, on doit en conclure que les engagements et les souscriptions de Ross en faveur d'une Université dont il était l'un des principaux gouverneurs et directeurs constitueraient une cause ou une considération suffisante pour les rendre obligatoires". He found that not only the note but the previous subscriptions as well were in the nature of onerous contracts, based upon a moral consideration. Bond J. dissented. He found that the rules of the Common law applied, and that under them there was no consideration. He declared: "Consideration is that which is given and accepted in return for the promise. Ulterior motives, purposes or expectations may be present, but in a legal point of view they are indifferent."<sup>37</sup> He further emphasized: "The consideration must in all cases move from the promisee". His decision was that the claim should be rejected. The case went to the Supreme Court of Canada,<sup>38</sup> where the decision of the Quebec Court of Appeal, maintaining the claim, was confirmed. The court held that the majority of the Court of Appeal were right in their reasoning, if the Civil law applied. But they went further, holding that at Common law there was consideration. The court found that the original subscription was in the nature of an onerous contract, in that the university undertook to build the gymnasium. The 1920 subscription had a consideration, in that the university agreed to divert the sum from the gymnasium fund and transfer it to the endowment fund. Then, the delay for payment, obtained by the giving of the note, was a consideration for the note. For-

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<sup>35</sup> Other than the consideration of the "intention libérale", which could not support a gift not in notarial form.

<sup>36</sup> Pothier (Bugnet) *Oblig.*, vol. 2, p. 85, no. 173, par. 3. Cf. Demolombe, vol. 24, nos. 351 and 352: "Une obligation naturelle peut d'ailleurs servir de cause à une obligation civile".

<sup>37</sup> The learned judge cited Pollock, *Principles of Contract* (9th ed.) p. 178; Leake on *Contracts* (7th ed.) p. 447, at p. 449.

<sup>38</sup> *Sub nom.*, *Hutchison v. Royal Inst. etc.*, [1932] S.C.R. 57.

bearance, the court pointed out, is always sufficient consideration under the Common law.<sup>39</sup>

In the *Ross* case, we find support for the following propositions at Civil law:

(a) An agreement to give to a charitable cause, where there is no *cause* other than the desire to confer a benefit on a worthy recipient, is not enforceable unless it is in notarial form.<sup>40</sup>

(b) An agreement to give, where the giver is under a moral or "natural" obligation, is an onerous contract, not a donation, and is enforceable whether in the form of a notarial deed or not. The moral or natural obligation constitutes such *cause* as will support an onerous contract.<sup>41</sup> We will later see that the Common law rule is quite different.

Another case of unilateral contract is the giving of a gratuitous option.<sup>42</sup> *A* offers to sell *B* a property for a set price, and agrees to keep the offer open for a specified time. If *B* accepts the offer within the specified time and before it has been withdrawn, no question can arise. It is a simple case of an offer and acceptance. But what if *A* advises *B*, before the expiration of the delay given for acceptance, that the offer is withdrawn? Can *B* nevertheless accept the offer at any time before the specified expiry date, and hold *A* to the bargain? The writers on the Civil law all seem to agree that *A* is bound by his undertaking to keep the offer open, and cannot retract it. But they do not discuss the question of

<sup>39</sup> *Corpus Juris Secundum*, vo. Contracts, s. 103, says: "The waiver of a right or forbearance to exercise the same is a sufficient consideration for a contract, whether the right be legal or equitable, or exists against the promisor or a third person, provided it is not utterly groundless. While an agreement is sometimes necessary, it may be express or implied, and actual forbearance has been held evidence of an agreement to forbear." See *Famous Foods Ltd. v. Liddle*, [1941] 3 W.W.R. 708: "Forbearance to sue is good consideration for a settlement. The fact that the cause of action on which plaintiff relied was unsound does not affect the matter, as he thought he had a good and valid claim." See also *Garden v. McGregor*, [1945] O.W.N. 691: Where a person makes no claim, and the other party, mistakenly believing himself liable, undertakes to pay damages, there is no consideration, since there was no forbearance.

<sup>40</sup> See to the same effect in the Common law, Pollock, *op. cit.*, p. 135.

<sup>41</sup> See *Legris v. Baulne* (1914), 23 K.B. 571 (Que. C.A.), where a father, on his deathbed, gave his son two cheques in execution of an earlier verbal promise to buy him land and build a house for him. It was held that the earlier agreement was enforceable as based on a natural or moral obligation, and that the note therefore had a good consideration on which to found an onerous contract. The point here was that the giving of the cheques was not a "don manuel", for reasons it is not necessary to discuss. Nor was it in the form of a will. Hence, unless it was an onerous contract, the son would have no claim against the executors of the father's estate. See also *Pesant v. Pesant*, [1934] S.C.R. 249, where a mother's natural obligation to provide for her daughter was held sufficient consideration for a note that was made to be presentable only after the mother's death.

<sup>42</sup> *I.e.*, an option for which no payment is exacted.

cause for A's undertaking.<sup>43</sup> In *Clendenning v. Cox*<sup>44</sup> the headnote reads:

An option given by the owner of real estate to purchase it at a stated price, within a given time, when accepted, is binding and cannot be withdrawn. The party to whom it is given has an action against the owner for specific performance of the sale. The improved chance of selling afforded by giving the option is a sufficient lawful consideration under article 989 C.C.

The *cause* here implied is analogous to that which is found in gaming, insurance and other contracts where one party obliges himself to pay a sum of money for a return if a specified event should occur. Admittedly, there is a difference, in that in insurance the other party binds himself to pay if the event occurs, while in the case of the option, the beneficiary of the promise (or the "promisee", as the Common law aptly terms him) is under no obligation at all. But, in principle, there is an analogy between the person insured, who assumes the burden of paying the premium, and the offeror, who assumes the burden of keeping the offer open. Each is animated by the prospect of future return, the one if the event insured against should occur, the other, if the offer is accepted. In insurance, which is a bilateral contract, there is (again in Common law parlance) a promise for a promise, even though one promise is conditional, which is quite permissible at Common as well as Civil law. In the case of the option, there is only one promise, but we have seen, and will see again, that this is by no means fatal. In the unilateral contract of gift and acceptance, the *cause* is the liberal intention, the desire to benefit the donee. This is a motive, true, but it is the immediate impelling motive. Similarly, in the contract of option, there is an immediate impelling motive in the envisaged prospect of putting through a profitable deal.<sup>45</sup> At Common law, a gratuitous option is nothing more than an offer, which can be withdrawn at any time before acceptance. The Quebec Court of Appeal had occasion to apply that principle in *Renfrew Flour Mills v. Sanschagrín*.<sup>46</sup> The Renfrew Flour Mills,

<sup>43</sup> See Mignault, vol. 5, p. 198; Demolombe, vol. 24, no. 65; Aubry & Rau (5th ed.), vol. 4, pp. 481-482; Cass. 22 janv. 1868 (S. 68.1.293).

<sup>44</sup> (1913), 45 S.C. 157 (Que. Superior Ct.)

<sup>45</sup> Billette, in his interesting thesis, "La Cause des Obligations et Prestations", says the *cause* of unilateral options is "l'acceptation aléatoire de l'offre" (p. 138). By "offre", he seems to refer to the main offer, not to the undertaking to keep the offer open. Presumably, the meaning is that the *cause* for the option is the gamble upon whether the offer will be accepted or not. Billette, it may be mentioned, is violently opposed to any theory of *cause* which involves the introduction of an element of motive. He insists that *cause* must always be objective, while motive is subjective. Yet the Civil law seems committed to motive, or something very much like it, at least in unilateral contracts.

<sup>46</sup> (1928), 45 K.B. 29 (Que. C.A.).

in Ontario, offered to sell flour to Sanschagrín, who lived in Quebec. The offer stipulated that it was to be accepted within eight weeks "otherwise this offer is to be withdrawn". Before the expiration of the eight weeks, the offeror wrote saying "Please consider our offer . . . withdrawn". Sanschagrín protested, and placed an order for the quantity of flour stated in the offer. Not receiving delivery, he sued for damages. The Court of Appeal held that the law of Ontario applied to the transaction<sup>47</sup> and that the principle applicable was the following:

Even when, on making the offer, the proposer expressly promises to allow a certain time for acceptance, the offer may nevertheless be retracted in the interval before acceptance, if no consideration has been given for the promise.<sup>48</sup>

There having been no consideration, the offer could be withdrawn at any time before acceptance. Of course, an onerous option is valid, both at Civil law and at Common law. An example is the case of a lease, one term of which is that the lessee shall be entitled to purchase the leased property within a set period.<sup>49</sup> The offer cannot be withdrawn before the expiration of the time allowed by the contract for its acceptance. The same is true where, in an ordinary option, the prospective purchaser gives the offeror something in consideration of his agreement to keep the offer open for a fixed time. As *Corpus Juris Secundum* says: "An option is a contract to keep an offer open".<sup>50</sup>

A word may be said here about the *cause* in contracts in which the rôle of one party consists only in handing over something. An example, already referred to, is loan for use, stated by the Civil Code to be a "contract by which one party, called the lender, gives to another, called the borrower, a thing to be used by the latter gratuitously for a time, and then to be returned by him to the former".<sup>51</sup> As Pothier points out, the contract cannot come into existence until the thing is handed over.<sup>52</sup> This being so, is there any point in trying to find a *cause* for the lender's part in the contract? It is clear, as Pothier points out,<sup>53</sup> that the contract of loan for use is one of "bienfaisance", because it is gratuitous. But the lender does not incur any obligation; he merely gives the

<sup>47</sup> Because the offer had been communicated in Ontario.

<sup>48</sup> Benjamin on Sale (6th ed.) p. 87.

<sup>49</sup> See Cass. 22 janv. 1868 (S. 68.1.293).

<sup>50</sup> An onerous option is here referred to. In my studies of the Common law, I have relied largely upon *Corpus Juris Secundum* and upon Pollock on Contracts (12th ed.).

<sup>51</sup> Article 1763 C.C.

<sup>52</sup> Pothier (Bugnet) Prêt à Usage, art. 1, no. 6.

<sup>53</sup> *Idem.*, no. 5.

use of something for a time.<sup>54</sup> The giving of the thing has a motivation similar to the one in donations, namely, to confer a benefit on the recipient. But most of the authors seem to feel that there is no purpose in seeking a *cause* to justify the handing over of the thing. The handing over, they reason, is a concrete fact, which does not, like the incurring of an obligation, require a *cause*.<sup>55</sup> But the Code calls loan for use a contract, and presupposes that the thing is handed over after a stipulation has been made that the thing is to be used for a specified time and then returned. It would seem, then, that the handing over is merely the carrying out of an antecedent, or even contemporary, agreement between the parties, and that the absence of *cause* (or the presence of unlawful *cause*) for the lender's obligation would invalidate these contracts. Thus, if a thing is loaned to be used for an immoral purpose, the contract will lack a legal *cause*, and will be invalid.<sup>56</sup> And it is the lender's undertaking that constitutes the unlawful *cause*, not that of the borrower, whose obligation is the perfectly lawful one of returning the thing at the stipulated time. The same reasoning will apply to all *real* contracts, including *dons manuels*, and, if it is sound, leads to the conclusion that *cause* is as essential on both sides in all these contracts as it is in contracts formed by mutual promises unaccompanied by delivery.<sup>57</sup>

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<sup>54</sup> He may have to reimburse the borrower if the borrower incurs extraordinary and necessary expense for the preservation of the thing lent (art. 1775 C.C.), but this obligation arises, if it does arise, from extraneous causes and not directly from the contract.

<sup>55</sup> A case may be imagined where a person would enter into an undertaking to lend a thing. This would not be the contract of loan for use; it would be a promise to lend, which would be converted by the handing over of the thing into the contract envisaged by the Code.

<sup>56</sup> Whether the thing can be reclaimed, and in what circumstances, will not be discussed here.

<sup>57</sup> The *cause* of gratuitous *real* contracts, which do not have the stigma of unlawfulness, is the same liberal intention that constitutes the *cause* in donations. If the intention is coupled with an unlawful purpose, the *cause* will be unlawful, and the contract will be invalid. A case may also be imagined where a thing is lent or given under the mistaken impression that the borrower or donee is the son of a close friend of the lender or donor (or has some other quality entitling him, in the eyes of the lender or donor, to such liberality), but it turns out that he is not the son of this friend (or has not the imagined quality). Can the loan or donation be annulled? An analogous situation arose with regard to a will in *Russell v. Lefrançois* (1883), 8 S.C.R. 335, where the testator left a bequest to "my beloved wife Julie Morin", and it turned out that she was not his wife at all, but the wife of another man. Although *cause* is not mentioned by the Code as a requisite for wills (which are not contracts), the court extended the doctrine to cover the situation, and held the bequest invalid as based on a false *cause*, which is admitted by all the authors (and the Code Napoleon) to be the same as no *cause*. In the supposititious case above, the loan or gift would likewise be void for lack of *cause* (assuming, as was done in the *Lefrançois* case, that the quality of the borrower or donee was the determining factor that moved the lender or donor to enter into the contract).

Another example of a unilateral contract is suretyship. The surety usually assumes without compensation the obligation of paying the debt, if the principal debtor fails to pay. Thus, the contract is one of pure liberality as between the surety and the principal debtor, and has the same *cause* as all gratuitous contracts. But this is unimportant. Whether or not there is *cause* as between the surety and the principal debtor, the surety will be bound as regards the creditor. What we must seek is the *cause* as between the surety and the creditor. This is not far to seek; the *cause* is simply the *cause* in consideration of which the principal debtor is indebted to the creditor. The surety merely becomes an added party, assuming conditionally the same obligation that the principal debtor assumed purely and simply.<sup>58</sup> If there is no *cause* for the principal debtor's obligation to the creditor, then there is no valid debt to be guaranteed, and the surety will not be bound.<sup>59</sup> If there is an unlawful *cause* for the principal debtor's undertaking, the surety can set it up in avoidance of his obligation.<sup>60</sup>

The contract of "mandate is gratuitous unless there is an agreement or an established usage to the contrary".<sup>61</sup> The *cause* for the obligations assumed by the mandatary will be the same liberal intention that we have noted in the contracts of donation.<sup>62</sup>

In the contract of simple deposit, which is essentially gratuitous,<sup>63</sup> the depositary undertakes gratuitously to take care of a thing that is placed in his hands by the depositor. The *cause* for his doing so is the same liberal intention as in the case of mandate and loan. The *cause* for the depositor's obligation to compensate the depositary for any expenses incurred by him<sup>64</sup> is the undertaking assumed by the depositary.<sup>65</sup>

<sup>58</sup> It is true that, as to the surety, the *cause* is a past one (at least where he binds himself subsequently to the original transaction), but in the Civil law a past consideration is as good as a contemporary one. The Common law rule is otherwise.

<sup>59</sup> Art. 1932 C.C.: "Suretyship can only be for the fulfilment of a valid obligation . . ."

<sup>60</sup> Art. 1958 C.C.: "The surety may set up against the creditor all the exceptions which belong to the principal debtor and are inherent to the debt . . ."

<sup>61</sup> Art. 1702 C.C.

<sup>62</sup> As for the mandator, the *cause* for his obligations is the undertaking assumed by the mandatary.

<sup>63</sup> Art. 1795 C.C.

<sup>64</sup> Art. 1812 C.C.

<sup>65</sup> As we have seen, it is at least arguable that all the *real* contracts are really bilateral contracts, the handing over of the thing being effected in pursuance of an undertaking to hand it over (or, in the case of deposit, to receive it). However, they differ from onerous bilateral contracts in that the *cause* for one of the parties is a desire to benefit the other party, and does not consist in the obligation assumed by the latter. In truth, it would seem ridiculous to suggest that the *cause* for lending a thing is the undertaking of the borrower to return the thing.

The contract of pledge, generally termed a *real* contract, since delivery is essential to its existence, is really an onerous bilateral contract, the thing being handed over as security for the payment of a debt. If the thing is handed over at the time of the creation of the debt, the *cause* is that of the debt; if it is handed over later, the *cause* will be either an undertaking in the original contract or a forbearance agreed to by the creditor. The *cause* of the creditor's obligation to return the thing upon being paid is the same as in the case of loan. It is bound up with the possession of the thing which belongs to the debtor.

### *Unlawful Consideration*

All contracts, unilateral and bilateral, onerous and gratuitous, are invalid if the consideration (*cause*) is unlawful.<sup>66</sup> And "the consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order".<sup>67</sup> We thus have three types of unlawful *cause*: (a) contrary to law; (b) contrary to good morals; (c) contrary to public order. As for *cause* contrary to law, examples are not hard to find. If I agree to pay someone \$100 in consideration of his committing a crime, the *cause* of my obligation is unlawful, and the contract is invalid.<sup>68</sup> And where a contract is prohibited by statute, even though not declared void by the statute, it will be invalid.<sup>69</sup> And where a penalty is imposed by an act of Parliament upon a transaction, the transaction will be illegal, though it is not expressly prohibited by the act.<sup>70</sup> The rules are the same at Common law. An interesting case cited by Pollock is *Bensley v. Bignold*,<sup>71</sup> where the court held that a printer who failed to imprint his name on the work printed could not recover for his work or materials (there was a statute requiring him to print his name on works of the kind). It was immaterial that the statute did not specifically prohibit, but merely imposed a penalty.<sup>72</sup>

*Cause* contrary to good morals presents greater difficulty. There are many acts which are not forbidden or punished by law, but which are generally considered immoral to such a degree that

<sup>66</sup> Art. 989 C.C.

<sup>67</sup> Art. 990 C.C.

<sup>68</sup> "has no effect" (article 989 C.C.).

<sup>69</sup> *Macdonald v. Riordan* (1899), 8 K.B. 555 (Que. C.A.); 30 S.C.R. 619.

<sup>70</sup> *Montreal Trust Co. v. Abitibi Power Co.*, [1937] O.R. 939. This was an Ontario case, but the result would be the same under Quebec law.

<sup>71</sup> (1822), 5 B. & Ald. 335.

<sup>72</sup> Other examples of *cause* contrary to law are obligations entered into by wives "with or for" their husbands in violation of article 1301 C.C. See (1951), 29 Can. Bar Rev. 345, at p. 362.

the law will not lend its assistance to any attempt to enforce agreements entered into with a view to them. Among such immoral agreements may be mentioned those providing for extra-marital relations and those facilitating the establishment of houses of ill-fame. It is obvious that it would be impossible to set definite limits in this matter. There must always be borderline cases and even disagreements over what constitutes immorality. But, in the main, the authors seem to agree that the rules to be applied are those to be found in the principles of morality commonly accepted by those societies that adhere to Christianity.<sup>73</sup> Agreements to carry out acts that are contrary to such moral principles are unenforceable at law. What of agreements, perfectly innocent in themselves, which nevertheless have an ulterior purpose that is immoral? Common examples of this are contracts having to do with disreputable houses. A lease of an immovable is entered into, both parties being aware that it is to be used for immoral purposes. According to the principles we have enunciated, the *cause* for the lessee is the undertaking of the lessor to give him possession of a building for a fixed period, which is not illicit. The *cause* for the lessor is the promise of the lessee to pay the rent, which is equally licit. Since it is clear that the transaction is immoral, it becomes necessary to ask ourselves what is the factor that renders the *cause* illicit in these cases, and whether it is necessary to modify our conclusions on the nature of *cause*. We have already said that in onerous bilateral contracts, the undertaking of each party is the *cause* for the undertaking of the other party. It is lawful to agree to give peaceable possession of a house, and to agree to pay rent for it. Therefore, if these undertakings are to be considered unlawful (or immoral) it must be by importing into the *cause* a notion of purpose or intention. Thus, the agreement of the lessor is not merely to give possession of a house, but to give possession

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<sup>73</sup> Demogue (vol. 2, no. 773 bis) contends that morality is to be determined according to prevailing public opinion at a given time. But Planiol & Ripert (vol. 6, no. 229) point out the difficulty of such a criterion. They say: "D'autre part, en admettant que le juge doive s'en rapporter à l'opinion du pays où il rend justice, comment déterminait-il cette opinion qu'il devrait suivre? Ferait-il une sorte de referendum par une observation des faits, qu'il lui sera d'ailleurs impossible de pratiquer de façon scientifique et complète? Le résultat serait généralement, et particulièrement dans la société actuelle, la consécration de maintes pratiques immorales, tolérées ou même favorisées par le plus grand nombre. Le juge ne doit pas suivre la masse, quand manifestement elle se fourvoie, mais au contraire la diriger, non pas en faisant prévaloir des conceptions personnelles isolées, mais en s'appuyant sur l'opinion des éléments sains de la population, gardiens d'une tradition ancienne, qui a fait ses preuves, et dont s'inspirent, quant à l'essentiel, aussi les hommes de caractère conservateur que ceux qui veulent, d'un esprit loyal et désintéressé apporter à notre organisation sociale des modifications radicales."

of a house for purposes of prostitution.<sup>74</sup> Similarly, the undertaking of the lessee is tainted; the rent he is to pay is not merely a sum of money, it is money to be paid for the promotion of immoral purposes.<sup>75</sup> These principles have been applied by the jurisprudence. In *Lecker v. Balthazar*<sup>76</sup> and *Balthazar v. Quilliam*,<sup>77</sup> it was held that the lessor in such cases could not claim the stipulated rent. In *Paul v. Cousineau*,<sup>78</sup> the lease was declared null and void at the instance of a subsequent acquirer of the property. In *Bruneau v. Laliberté*,<sup>79</sup> it was held that fire insurance on the furniture in a house of ill-fame is an immoral contract, and would not be enforced by the courts. An action for a premium on such insurance was rejected.

Since the solution of questions of morality is left to the judge presiding over a case, and since views on this subject may and do vary, it is not surprising to find that what shocks one court leaves another unperturbed. An instance of this is the series of cases having to do with double mandate. In *Murphy v. Lafrenière*,<sup>80</sup> it was held that a person cannot be the paid mandatary of two parties who have opposing interests, such as a buyer and seller, or the two parties to a contract of exchange. In this case, the agent, unknown to one party, was to receive a commission and share of profits from the other. In these circumstances, a note given by the mandator to the agent in payment of his services is given for an immoral consideration, it was held. The test, according to the court, is conflict of interest.<sup>81</sup> In *Aubut v. Gareau*,<sup>82</sup> it was held that the transaction was immoral even if the mandator knew that the agent was acting for the other party. In such a case, it was decided, the parties were in *pari delicto*, and neither could address himself to the courts for redress. Yet in *Brouillette v. Lepage*,<sup>83</sup> the same court held: "Le double-mandat de l'agent, agissant comme tel pour les deux parties intéressées dans la vente et achat d'un im-

<sup>74</sup> It is quite irrelevant that the use to which the premises are to be put is not expressed; it nevertheless coalesces, so to speak, with the undertaking so as to form part of the *cause*.

Cf. *Billette, op. cit.*, no. 83. *Billette* speaks of *destination* instead of purpose, but the distinction is not easy to grasp. The result seems the same, whichever term is used. See also *Planiol & Ripert, op. cit.*, vol. 6, no. 277.

<sup>75</sup> See *Planiol, op. cit.*, vol. 2, no. 1039, where he points out that the giving of money in consideration of the commission of a crime is just as criminal as committing the crime. The criminality is equal on both sides.

<sup>76</sup> (1908), 15 R.J. 1 (Que. Superior Ct.).

<sup>77</sup> (1913), 23 K.B. 46 (Que. C.A.).

<sup>78</sup> (1915), 24 K.B. 264 (Que. C.A.).

<sup>79</sup> See *contra*, in France, Req. 4 mai 1903, S. 1904.1.509.

<sup>80</sup> (1928), 34 R.J. 466 (Que. Superior Ct.).

<sup>81</sup> To same effect: *Lemieux v. Seminaire de St. Sulpice* (1912), 18 R.L. 434.

<sup>82</sup> (1918), 27 K.B. 474 (Que. C.A.).

<sup>83</sup> (1925), 38 K.B. 143 (Que. C.A.).

meuble n'est pas *de se* immoral et illégal, et il peut selon les circonstances lier les parties envers l'agent". The distinction was made that in this case the mandator did not suffer, since she got the full price she had asked for her property. And in *Craddock Simpson v. Sperber*,<sup>84</sup> it was held: "There is no legal objection to a real estate agent getting a commission from each party on an exchange of properties, if there is no prejudice to either party by reason of the agent's double mandate and no collusion or fraud".

Another line of cases has to do with gambling. Article 1927 C.C. says: "There is no right of action for the recovery of money or any other thing claimed under a gaming contract or bet. But if the thing have been paid by the losing party he cannot recover back unless fraud be proved."<sup>85</sup> The denial of the right of recovery has been extended by the courts to loans made by a participant in a gambling game to another participant, to enable him to gamble.<sup>86</sup> But where the lender does not participate in the wagering, and merely lends money to a participant so that the latter may pay his "bookie", he can sue and recover on a note given in reimbursement.<sup>87</sup> And in any case, a cheque given in repayment of a loan made by a participant to another after the game was over could be sued on.<sup>88</sup>

The cases on stifling of prosecution also come under the head of immoral consideration. An undertaking to make a payment in consideration of a prosecution not being initiated, or, if started, in consideration of its being withdrawn, cannot be enforced.<sup>89</sup> But see *Doucet v. Lanoix*,<sup>90</sup> where it was held that a loan made for the purpose of enabling the borrower to make a payment to ensure the withdrawal of a complaint against his son by paying the costs connected with his arrest and detention was not null as being for an illegal or immoral consideration.<sup>91</sup> The court argued that the

<sup>84</sup> (1925), 63 S.C. 492 (Que. Superior Ct.).

<sup>85</sup> Pollock (*op. cit.*, p. 274) says that the Common law is to the same effect. However, he points out that a note given for a gaming debt has not an illegal consideration; so as to affect an innocent third party. It merely has no consideration at all. Bucketing transactions, where there is no intention to buy or sell, are an example. See *Prudential Exchange Co. v. Edwards*, [1938] 1 W.W.R. 22.

<sup>86</sup> See *Guerin v. Bourgoing*, [1944] S.C. 245 (Que. Superior Ct.). In this case, it was held that the *cause* was illicit. Mignault (vol. 8, pp. 318-319) says: "Les avances faites avant ou pendant une partie de jeu, par un joueur à l'autre, pour lui permettre de commencer ou continuer le jeu, constituent une dette de jeu privée d'action civile".

<sup>87</sup> *Dandurand v. Archambault*, [1943] S.C. 309 (Que. Superior Ct.).

<sup>88</sup> *Poirier v. Bergeron*, [1945] S.C. 332 (Superior Ct. Que.). In this case, it was also held that gambling is not illegal.

<sup>89</sup> *Viens v. Senecal* (1922), 33 K.B. 544 (Que. C.A.).

<sup>90</sup> (1913), 22 K.B. 473 (Que. C.A.).

<sup>91</sup> *Ci. Larochelle v. Bluteau* (1928), 34 R.L. 328 (Que. C.A.).

*cause* was the sum lent, not the motive for which it was lent.<sup>92</sup> In any case, money repaid to the person from whom it was stolen, with a view to preventing prosecution for the theft, cannot be reclaimed, even if the payment was made by a third party, in this case the father of the culprit.<sup>93</sup> In *Dame St. Hilaire v. Turcotte*,<sup>94</sup> a mother was held to be entitled to recover a sum paid in similar circumstances, where, however, there was no proof that her son had actually stolen the sum lost, and she made the payment in consequence of threats of prosecution.<sup>95</sup>

The third type of unlawful consideration is the consideration contrary to public order. That such a consideration vitiates the contract in which it is embodied is a rule of Common law as well as of Civil law, although what constitutes public policy will not always be envisaged in the same way under the two systems, or even in different countries under the same system. As it was put in *James v. British General Ins. Co.*,<sup>96</sup> "It may well be that the considerations of public policy in Ontario are different from those entertained here [in England]." In *Besant v. Wood*,<sup>97</sup> Jessel M.R. said: "It is impossible to say what the opinion of a man or a Judge might be as to what public policy is". In general, a matter may

<sup>92</sup> With all deference, it may be suggested that this reasoning is specious. The destination of the funds, as pointed out, formed a part of the *cause*. If the destination was immoral, the contract was vicious and unenforceable.

<sup>93</sup> This was decided in *U.S. Fidelity & Guaranty Co. v. Martin* (1926), 41 K.B. 328 (Que. C.A.). Mr. Justice Dorion, in this case, admitted that the payment made by the father had an immoral *cause*, but he applied the motto *nemo auditur propriam turpitudinem allegans*. He intimated, however, that if the person whose funds had been stolen had been paid more than the amount of his loss, a claim for repayment would have been well founded upon the principle of *enrichissement sans cause*. (This seems like doubtful doctrine. Whether the victim received more or less than he had lost, the father would still have to allege *propria turpitudine* in trying to recover.)

<sup>94</sup> (1926), 40 K.B. 262 (Que. C.A.).

<sup>95</sup> This case is distinguishable from the *Martin* case, in that the element of reimbursement was not present, the son not having been shown to have deprived the complainant of the sum lost. Moreover, the pressure exerted upon the mother amounted to "violence and fear", which vitiated her consent to the contract (art. 994 C.C.).

The rules of the Common law are similar to those of the Civil law on this question (stifling prosecution). In *Morgan v. McFee* (1908), 14 C.C.C. 308 (Ont. High Ct.), at p. 311, it was held: "In general any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon or compounding any public offence, is invalid. To render the agreement void, it is not necessary that there should be committed the criminal offence of "compounding a felony". See at p. 316 of the report an annotation on "Compounding criminal prosecution".

See also *Jones v. Merionethshire Permanent etc.*, [1892] 1 Ch. 173, where it was held that an engagement by relatives of a person threatened with arrest for embezzlement, to pay a part of the sum stolen in consideration of forbearance to sue, was invalid since there was an implied undertaking not to prosecute.

<sup>96</sup> (1927), L.R. 2 K.B. 311, at p. 324.

<sup>97</sup> (1879), L.R. 12 Ch. D. 605, at p. 620.

be said to be one of public policy when it transcends the interests alone of the parties involved in the contract under consideration. Thus, for example, it has been held that article 1301 of the Quebec Civil Code, which forbids a married woman to act as surety for her husband, is a provision of public order. So is the prohibition against gifts between consorts.<sup>98</sup>

Without any attempt at an exhaustive enumeration, contracts contrary to public policy may be grouped under various heads. (A) *Contracts that seek to interfere with the general organization of the state and the functioning of public officials.*<sup>99</sup> (B) *Contracts having to do with family relations.* The laws fixing the relations between consorts, the authority of the parents over the children, the obligation to furnish alimony, all are rules of public order, which cannot validly be contravened by private agreement. Under this heading come contracts providing for voluntary separation between consorts. At Common law, such contracts seem to be perfectly valid,<sup>100</sup> but in Quebec they are held contrary to public policy.<sup>101</sup> A somewhat related type of contract is that in contemplation of divorce. The Common law rule is that such contracts are not contrary to public policy where they are not collusive, that is, where actual grounds of divorce exist and where the contract is not entered into for the purpose of inducing one of the consorts to take divorce proceedings that would not otherwise have been taken.<sup>102</sup> In Quebec, where there is no divorce law,<sup>103</sup> an agreement providing for the institution of divorce proceedings and regulating the financial relations of the parties after the divorce would undoubtedly be considered contrary to public policy. But where divorce proceedings were pending, an agreement by the husband to pay the wife alimony during her lifetime was held valid.<sup>104</sup> A

<sup>98</sup> See *Auge v. Banque d'Hochelaga* (1908), 34 S.C. 481 (Que. Ct. of Review).

<sup>99</sup> See *Lapointe v. Messier* (1914), 49 S.C.R. 271, where the mayor of a municipality received from a contractor certain moneys as a share of the profits on a municipal contract. It was an illegal transaction and contrary to public policy.

<sup>100</sup> *Kuhler v. Kuhler* (1920), 54 D.L.R. 351 (Sask.); *Ross v. Ross*, [1930] 2 D.L.R. 42 (B.C.).

<sup>101</sup> See *Decary v. Pominville* (1889), M.L.R. 5 S.C. 366 (Que. Superior Ct.). In this case, a contract between a husband and his father-in-law, which provided that the husband and his wife should live separately and that the wife would not sue for separation, was declared unenforceable. Cf. *Planiol & Ripert*, vol. 2, no. 364; vol. 6, no. 241.

<sup>102</sup> See *Dulko v. Dulko*, [1946] 4 D.L.R. 471; *Hutton-Potts v. Royal Trust Co.*, [1950] 1 D.L.R. 50; *Dennis v. Moni*, [1945] O.W.N. 340; *Prockiw v. Prockiw*, [1947] 3 D.L.R. 504, [1948] 4 D.L.R. 140.

<sup>103</sup> In Quebec, divorces can be obtained only by an act of the federal Parliament.

<sup>104</sup> *X v. Z* (1935), 43 R.J. 219 (Que. Superior Ct.). The contract was, however, declared unenforceable since it violated the prohibition of article 1265 C.C., in that it altered the marriage conventions.

similar agreement was upheld in *Bigelow v. Reddy*.<sup>105</sup> (C) *Contracts unduly interfering with the integrity and independence of the individual*. A man cannot validly contract himself into slavery.<sup>106</sup> A contract by which a worker presumes to abandon the benefit of laws set up for the protection of workers in general would be void as against public policy. The most usual cases under this head, however, are those involving contracts by which a limitation is placed upon the right of a party to carry on an occupation or trade. The rule generally applied, both at Common law and at Civil law, was well stated by Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Gun Co.*:

The true view at the present time, I think, is this: "The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public — so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is a fair result of all the authorities."<sup>107</sup>

In *Grossman v. Schwartz*<sup>108</sup> it was held that the agreement of a partner not to compete for a period of one year after leaving the firm in which he was a partner was illegal and against public policy because it was unrestricted as to territory and far wider than required for the protection of the stipulator. A similar judgment in *Dominion Blank Book v. Harvey*<sup>109</sup> dealt with the case of a salesman, who on entering the employ of the plaintiff as a salesman, undertook not to offer for sale either for himself or for others, for five years after leaving plaintiff's employ, merchandise similar to that handled by plaintiff. The court found that since there was no limit as to time, and the period provided was unreasonably long, the agreement was contrary to public order.<sup>110</sup> Greater lati-

<sup>105</sup> (1940), 78 S.C. 277 (Que. Superior Ct.).

<sup>106</sup> Art. 1667 C.C. provides: "The contract of lease and hire of personal service can only be for a limited term, or for a determinate undertaking".

<sup>107</sup> [1894] A.C. 535, at p. 565.

<sup>108</sup> [1943] K.B. 145 (Que. C.A.).

<sup>109</sup> (1941), 79 S.C. 274 (Que. Superior Ct.).

<sup>110</sup> One of the *considérants* of the judgment was: "Considérant que la liberté de contracter doit se concilier avec la liberté individuelle de travail et de l'industrie".

In the Manitoba case of *Maguire v. Northland Drug Co.*, [1935] S.C.R. 412, the Supreme Court found that the retention by the employer of the

tude is ordinarily allowed in agreements for the sale of businesses. In *Allard v. Cloutier*,<sup>111</sup> it was held that, in an agreement for sale of a business, a clause by which the seller agreed not to establish a new business within one mile of the business sold was valid, even if not limited as to time. However, in *Tirbutt v. Laurie*,<sup>112</sup> a judge of the Quebec Superior Court held that when the defendant sold his business to plaintiff, at the same time agreeing not to "engage in a similar line of business for a period of ten years" under penalty of \$10,000, the contract was unreasonable in that it was unlimited as to place. The agreement was contrary to public policy, and could not be enforced.

Many other heads of public policy might be referred to, including freedom of commerce and industry, the right of workers to belong to unions, the prohibition of monopolistic practices, and many others. It is not within the scope of this article to deal exhaustively with these or, indeed, with unlawful *cause* as a whole. I have merely tried to give examples of some typical cases involving the consideration of *cause* contrary to law. Limitations of space will likewise prevent a consideration of the results of nullity for unlawful *cause*, particularly as regards claims for repayment of sums paid under contracts founded on unlawful *cause*.

### *Summation and Discussion*

The conclusions at which we have arrived may be summed up as follows. In onerous<sup>113</sup> bilateral contracts, the consideration for each party is the undertaking of the other party.<sup>114</sup> Some authors seem to hold that it is the thing the other party is obliged to give or do that constitutes the *cause*, but that is confusing the *cause* with the *object*.<sup>115</sup> Planiol and Ripert<sup>116</sup> contend that it is not precisely the mutual obligations, but the execution of these obligations that

services of the employee was consideration for an undertaking by the employee to refrain from doing certain things after leaving the employer's service, but that the agreement was not enforceable because the stipulated restriction on the employee's liberty of action went beyond what was reasonable. Moreover, the court held that where such an agreement was had in any particular, it was bad altogether. Cf. *Mason v. Provident Clothes*, [1913] A.C. 724.

<sup>111</sup> (1920), 29 K.B. 565 (Que. C.A.).

<sup>112</sup> (1927), 65 S.C. 492 (Que. Superior Ct.).

<sup>113</sup> If there is merit in my analysis of gratuitous *real* contracts (*supra*), they constitute a class of gratuitous bilateral contracts. See in support of my view on this matter: Capitant, *Des Obligations*, pp. 45-46.

<sup>114</sup> This is the doctrine of Demolombe, Baudry-Lacantinerie et Barde, Jossierand and others, including Domat. Mignault says: "Si le contrat est synallagmatique, chacune des obligations sert de cause à l'autre" (vol. 5, p. 201).

<sup>115</sup> See article 1058 C.C.: "Every obligation must have for its object something which a party is obliged to give, or to do, or not to do".

constitutes the *cause*. This, according to these writers, explains why the contract can be cancelled if one party fails to carry out his undertaking.<sup>117</sup> But this argument is unsound. According to article 1065 C.C., the creditor has the option of demanding specific performance or the dissolution of the contract. If failure to execute constituted lack of *cause*, there would be no contract, since an essential element would be lacking, and hence no question of specific performance.<sup>118</sup> Another argument advanced by Planiol and Ripert is that if one party does not carry out his obligations the other party can advance as a ground for refusing to carry out his own the exception *non adimpleti contractus*. But where one of the undertakings is for immediate performance and the other is executory only at a later date, the exception clearly cannot be advanced as a defence against a demand for the performance of the former.<sup>119</sup> The contract is complete in all its elements, including *cause*, and the party who has undertaken immediate performance can be forced to carry out his undertaking.<sup>120</sup>

In gratuitous bilateral contracts (the so-called *real* contracts) the *cause* for the party who delivers the thing is the intention to benefit the receiver. The *cause* for the latter is the receipt of the thing coupled with the undertaking of the other party to allow him to retain it for a specified time.<sup>121</sup>

<sup>116</sup> Vol. 6, p. 352. See in the same sense Capitant, *op. cit.*, pp. 33 and foll. But at p. 55 he asserts that the obligation of each is the cause of the other's obligation.

<sup>117</sup> Art. 1065 C.C.: "Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages."

<sup>118</sup> Moreover, the term "set aside" (French version: "resolution") presupposes the existence of a valid contract.

<sup>119</sup> Assuming, of course, that the performance of the claimant's undertaking is not yet due.

<sup>120</sup> Even if both undertakings are for immediate performance, and it be admitted that one party cannot be forced to perform unless the other tenders performance of his own undertaking, this does not make the carrying out of the respective obligations the *cause*. The contract exists and is obligatory upon the parties as soon as it is entered into, provided it contains all the elements called for by article 984 C.C. If it provides for the delivery of a specific thing "certain and determinate", the purchaser becomes the owner by the consent alone of the parties, although no delivery is made (art. 1025 C.C.). It is true that the party obliged to deliver need not do so unless payment is tendered (art. 1496 C.C.). But this is merely a right of retention, and does not affect the validity of the contract (Planiol and Ripert, vol. 10, no. 156, p. 165). The buyer is obliged to pay only upon delivery, unless otherwise agreed (art. 1533 C.C.), but this right to defer payment until delivery is merely a condition the law implies in the contract, and does not mean that the contract is not complete when the mutual undertakings have been entered into.

<sup>121</sup> In the contract of deposit, the rôles are reversed: the receiver is the

In gratuitous unilateral contracts (donations), the *cause* is the desire to benefit the donee.

We have seen that there is another class, that of unilateral onerous contracts, where the *cause* is an existing moral or natural obligation. Here, there is no undertaking by the other party to the contract, but he may have made an earlier performance (for example, in the case of an agreement to make a payment because of services previously rendered without any intention to ask for payment). In other cases, there may have been no performance on the part of the other party, but a mere relationship (kinship). In all cases, however, the undertaking of the promisor is assumed because he is under a moral or natural obligation, and wishes to discharge this obligation. The *cause* of the obligation may be a relationship, the rendering of services, or (as in the *Ross* case) a desire to preserve one's reputation as a man of honour. But the *cause* of the new undertaking is the moral or natural obligation itself.

#### *Adequacy of the Doctrine of Cause*

Billette, in his interesting thesis, already referred to, says:

Qu'en fait, la notion de cause soit absolument indispensable, nous n'oserions l'affirmer. Il n'est pas absolument nécessaire à l'humanité de bénéficier de l'état de civilisation actuelle. Elle pourrait retourner aux époques quaternaires ou tertiaires, déterminées par les sciences géologiques ou anthropologiques, se nourrir de chair crüe, et se livrer au sport de la chasse au mastodonte, qu'elle n'en disparaîtrait pas complètement de la surface du globe. . . . Il n'est pas non plus indispensable d'avoir atteint le degré de logique dont l'humanité s'enorgueillit, bien que dans le domaine juridique, elle paraisse plutôt reculer qu'avancer, ce qui n'empêche pas certains qui en manquent totalement,<sup>122</sup> d'arriver quand même.

The point made seems to be that the Civil Code with its doctrine of *cause* is the product of the wisdom of the ages, which brought about the present high state of civilization in France and in the other countries following the same tradition. The writer contends that the effort made by some of the French authors, inspired by extraneous, particularly Germanic, influences, to cast doubt upon

one who confers the benefit, and the owner of the thing incurs obligations having for *cause* the undertaking of the depositary to receive and care for the thing.

If the transactions are not gratuitous, they are onerous bilateral contracts, for example, loan at interest, warehousing contracts. Here, of course, the liberal intention is replaced, as *cause*, by the undertaking of the other party to make payment.

<sup>122</sup> He seems to be referring particularly to Capitant, whose theories he disputes with the utmost vigour, but he may also have in mind the German jurists, whose legal system does not accord importance to the notion of *cause*.

the validity of the doctrine of *cause* is without merit, and is based upon a complete lack of logical sense.

According to Billette, when the Code says that a contract must have a cause, it is merely stating a fact, which can admit of no argument. If it be objected that it is a truism, he answers that a truism nevertheless is something that is true. As to the nature of *cause*, he quarrels with many of the conclusions of the jurists, and agrees with others, while advancing some new ideas of his own, particularly on the nature of *cause* in *liberalités*.<sup>123</sup> What I am concerned with here is the question of the suitability of the doctrine of cause to the conditions of modern living, not with the conflicting versions of the doctrine.

Now, is it true that the abandonment of *cause* would be a backward step in the direction of the stone age?<sup>124</sup> Is *cause* a highly moral concept, the discarding of which would mean a relapse into a more sinful condition? We have seen that one author considered *cause* the embodiment of the maxim *donnant donnant*. That sounds like good materialist dogma, rather than moral principle. Another eminent French writer, Rouast, writing on *Enrichissement sans cause*, points out that *cause* in the doctrine of unjust enrichment is the same as *cause* in contracts.<sup>125</sup> He justifies *cause* on the basis of a theory of natural justice, the "equilibrium of patrimonies".<sup>126</sup> If a person is enriched at the expense of another,<sup>127</sup> it must be in consideration of a *contre-partie*, which will consist, in the various types of contracts we have analyzed, of those things that constitute the *cause*. If this *cause* for the enrichment or impoverishment can be established, then there is justification, and the balance between the respective patrimonies has not been unjustly disturbed.<sup>128</sup> This puts *cause* on a high moral plane, where, in my opinion, it belongs. Without concurring in all of Rouast's conclusions, I think he is right in assigning to *cause* an origin in elementary justice, since the negative side of *cause* would be the

<sup>123</sup> He finds the *cause* in a "merit" on the part of the beneficiary. But our law seems committed to the "intention libérale" as the *cause* of these contracts.

<sup>124</sup> That is, assuming that a contract could exist at all without a *cause*. If Billette is right in saying that the necessity for *cause* does not result from its being required by law, but is grounded in pure logic, it would follow that the abandonment of *cause* would be impossible, since a contract could not come into existence without it.

<sup>125</sup> *Revue Trimestrielle de Droit Civil*, 1922, pp. 35 and foll. The *cause* in the doctrine of enrichment without cause could, of course, result from other sources than contracts (e.g., wills, legal dispositions). But in so far as enrichment results from a contract, the *cause* of the enrichment will be the same as the *cause* of the contract, according to Rouast.

<sup>126</sup> *Ibid.*, p. 93.

<sup>127</sup> Or if one is impoverished to the benefit of another.

<sup>128</sup> *Ibid.*, pp. 75 and foll.

unjustified taking by a person of something belonging to another, or the unjustified assertion by a person of a claim against another. Thus, *cause* has a moral basis.

*Cause* also has definite practical value. It serves to tie together the two undertakings in a bilateral contract. Without it, each would be without justification. If a thing sold is proved not to have existed at the time of the sale, the contract is void for lack of an object. But the obligation of the purchaser was complete; he had undertaken to pay a certain sum. It is only because of the connection between his undertaking and that of the vendor that he cannot be held to pay the price. And this connection is *cause*. It cannot be anything else.<sup>129</sup> Moreover, in dealing with illegality in contracts, the notion of *cause* seems necessary. If a house is leased for immoral purposes, its object, which is a house, is not illegal, since the object itself has no moral aspect. But the undertaking of the lessor, which is the *cause*, provides the immoral intention or destination that makes the contract unlawful. Even in gratuitous contracts, *cause* is of value, since the liberal intention that constitutes the *cause* will be lacking if the person benefited turns out to be other than the one intended to be benefited.

Let us look at a contemporary legal system that seems to disregard *cause*. In Switzerland, *cause* is not mentioned at all as an element in contracts.<sup>130</sup> The Swiss Code of Obligations relies upon what the authors call the "theory of confidence" (*la théorie de la confiance*). An author describes it as follows:<sup>131</sup> "A contract is presumed to contain all the conditions on which, according to the will of the promisor, his obligations are to depend, and which, even though they are not set forth in the contract, the other party, according to the rules of good faith and exercising the degree of attention that may reasonably be expected of him, ought to recognize as such. If the promise is made in view of a *contre-*

<sup>129</sup> Planiol contended that it was illogical to say that two contemporaneous promises could be the "cause" of each other, since a cause must always precede its effect (*Droit Civil*, vol. 2, no. 1038). This has not been taken too seriously by later writers, and quite properly (see Planiol and Ripert, vol. 6, pp. 358-359). It leaves out of account the mental processes of the parties, each of whom envisages the undertaking of the other as the equivalent he is to receive for his own promise.

<sup>130</sup> The Swiss Civil Code has met with wide approval among legislators. Many of its dispositions were used in the Polish Code of Obligations of 1933; it served as the inspiration of the Code of Liechtenstein; it was apparently adopted *in toto* in Turkey in 1926; and many of its dispositions were adopted by the Soviets, by Mexico, and in its codes of 1940 and 1945 by Greece (see Arminjon, Nolde & Wolf, *Traité de Droit Comparé* (1950), vol. 2, p. 417).

<sup>131</sup> What follows is a translation of part of an article entitled "Quelques Remarques sur la Cause des Obligations en Droit Suisse" by M. A. Simonius, in the volume, "Etudes de droit civil à la mémoire de Henri Capitant" (1939) at pp. 759 and foll.

*partie*, that is one of the conditions. But it is rarely the only one. Others, equally determinative of the effect of the obligation, may enter: for instance, certain qualities of the object or of the personality of the other contracting party, certain events, facts of all sorts. That is why the Swiss doctrine does not mention *cause* specially as an element in the formation of the contract. It includes it in the larger notion of the conditions (*Voraussetzungen*) that enter into it. In case of contestation, it is the judge's task to distinguish these conditions from the motives (which must remain outside the contract) by interpreting each declaration of will in the sense the person to whom it was addressed attributed to it or should have attributed to it. This point of view, which, so to speak, amounts to the abandonment of *cause* as a technique, presents certain advantages, it would appear. It permits the simplification of certain questions."<sup>132</sup>

In summing up, Professor Simonius says:

Pour le Droit suisse actuel, la cause n'est pas réellement une notion technique. Son maintien dans quelques textes de la loi qui portent les auteurs à s'en occuper s'explique par les raisons historiques.<sup>133</sup> Le Droit suisse s'efforce néanmoins, en appliquant une autre méthode, de tenir compte de la volonté des contractants dans toute la mesure qui est compatible avec la sécurité des relations juridiques.

Il semble donc loisible de dire, si l'on se place au point de vue de la doctrine française, que le Droit suisse est 'causaliste' en principe, mais 'anticausaliste' en ce qui concerne sa technique.

What are we to conclude from the fact that this apparently successful legal system has abandoned the "technique" of *cause* (while, according to Professor Simonius, retaining the principle)? Ought we to do likewise, or should we not rather say: "Submit your innovations to the test of time and evolutionary development, as we have our system of *cause*, and await the result. As for us, our doctrine has served us well, and we are satisfied with it from the viewpoints of logic, morality and utility." It seems to

<sup>132</sup> For instance, error of cause is no longer a special case of error. In addition a definition of *cause* becomes unnecessary (and there is great controversy in France on the precise meaning of the term) either in gratuitous or in onerous contracts.

<sup>133</sup> The chief text referred to is article 62 of the Swiss Code of Obligations: "Celui qui sans cause légitime, s'est enrichi aux dépens d'autrui, est tenu à restitution."

"La restitution est due, en particulier, de ce qui a été reçu sans cause valable, en vertu d'une cause qui ne s'est pas réalisée, ou d'une cause qui a cessé d'exister."

Professor Simonius explains that "cause" here does not mean *cause* in the sense of the Civil law. It means the title in virtue of which the enrichment is claimed to be justified. The German text does not mention "cause". It says: "Wer in ungerechtfertigter Weise aus dem Vermögen eines Andern bereichert worden ist . . .".

me that no conclusion adverse to the Civil law doctrine of *cause* is to be drawn from the fact of the existence of another system that does not emphasize it. The Civil law doctrine, as applied by the courts in France and in Quebec, has worked out admirably, and has justified itself as part of an endeavour to give expression in law to the moral principles accepted by our society. As admitted by Professor Simonius, the doctrine of *cause* is inherent in the Swiss system, which draws its inspiration largely from the French law, and from the Roman law of which the modern Civil law is a direct descendant.<sup>134</sup>

Under the conditions of our society, therefore, and under the moral standards that serve as its basis, the doctrine of *cause* is thoroughly justified, and may be expected to serve its useful function throughout any foreseeable future.

### Office During Good Behaviour

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character, and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject. (Hamilton: *The Federalist*. No. LXXVIII)

<sup>134</sup> The abandonment of *cause*, then, in the Swiss system, and in those inspired by it, is more apparent than real. Absence or illegality of what we call *cause* would undoubtedly undermine the contract by removing one of what Professor Simonius calls the "conditions" either expressed or assumed that are attached to it under the "theory of confidence". The result, and the reason for the result, would be the same as under the Civil law system.