SELF-INTEREST IN LAW.

In a thought provoking article a writer in *The Hibbert Journal* for July, 1925, under the title "Self-interest in Law," propounds the thesis that in our modern law generosity is viewed with some skepticism and that, in fact, our law encourages the preservation of one's own interests at the expense of those of others.

To support his conclusion, the writer instances the common law doctrine of consideration, and says that its "*arrière pensée* is unmistakable: nothing for nothing. It is peculiarly English." It is an admitted principle, as the writer of the article recognizes, that a man makes a binding promise in law when he covenants under seal to do or to refrain from doing some act. The obligatory characteristic of the covenantor's promise does not depend upon the answer to the question, did the covenantor receive some benefit, a *quid pro quo*, for his promise. Indeed many simple contracts are enforceable despite the fact that the promisor who is being sued on his promise has received no benefit, and will receive no benefit under the contract. A. guarantees in writing the re-payment of any advances made to B. by C. up to five hundred dollars within two years from the date of the agreement. Thereupon C., in pursuance of this contract, advances five hundred dollars to B. yet A. who was only motivated by his friendship for B. and who receives no benefit himself will, in the event of B.'s default, be liable on his promise. An accommodation party to a bill of exchange (*i.e.*, a person who has signed the bill as drawer, acceptor or endorser without receiving value therefor) is liable on the bill to a holder for value and it is immaterial whether when such holder took the bill he knew such party to be an accommodation party or not.[1]

The principle that mere inadequacy of consideration is not a valid objection to the enforceability of an agreement, between two parties is another token of the submission that the rationale of the doctrine of consideration is not founded upon the promisor receiving that equivalent for his promise, which his selfish interests might dictate.

The prevailing notion of consideration appears to be based upon an analysis of the agreement and its surrounding circumstances, in

[1] See The Bills of Exchange Act, R.S.C. 1906, chap. 119, s. 55; *Muir* v. *Cameron* (1853), 10 U.C.Q.B. 356.

order to ascertain whether the promisee was to suffer a legal detriment at the request of the promisor and in exchange for his promise.[2]

The case of *Scotson* v. *Pegg*,[3] it would appear, is the only modern authority in the English Common Law which might be taken to support the proposition that benefit, and benefit alone, to the promisor affords a valid consideration for his promise.

The English courts refused to give expression to the will of the parties as readily as was done by the Roman Law, and insisted on some external guarantee of the seriousness of the promise and the intention of the promisor to enter into a legal obligation. Admitting with the writer of the article as anyone must, the obscurity of the origins of the theory of consideration, is it not quite as possible or even as probable that the *arrière pensée* of the consideration doctrine, was the endeavour on the part of the judges to obtain some definite extrinsic test of the seriousness of the promisor's intention rather than the arid dogma, nothing for nothing?

The writer of the article in question professes to find another example evidencing that "altruism is a cash transaction in English law," in the law regulating the duties and liabilities of gratuitous bailees. He states that a man who voluntarily undertakes to look after another's goods "cannot be expected to show any *greater* interest in the goods of another than in his own—unless, of course, he is paid."

It is undoubted that the standard of care which a gratuitous bailee must observe, in order to avoid liability, is higher than that suggested by the writer. The Judicial Committee of the Privy Council in the case of *Giblin* v. *McMullen*,[4] held that a gratuitous bailee is bound to observe that care in respect to the subject-matter of the bailment which a reasonably prudent man—not necessarily the bailee himself, that is for the judge or jury to decide—would take of his own property of a like description. Still it may be said, this is a recognition of self-interest by the courts. However, it may be noted that the raising of this standard of care does not necessarily depend upon the bailee receiving any compensation therefor. A gratuitous bailee is bound to use what skill he has, and he is liable to the bailor for any loss which ensues from his failure to use that skill.[5]

[2] See Anson's Law of Contract, 16th ed. p. 96; Pollock: Principles of Contract, 9th ed. pp. 177 and 185; Lord Dunedin in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* [1915] A.C. 847 at p. 855.

[3] (1861), 6 H. & N. 295.

[4] (1868) L.R. 2 P.C. 317; see also *Ferguson* v. *Eyer* (1918) 43 O.L.R. 190.

[5] See Beale: Gratuitous Undertakings, 5 Harv. L. Rev. 222; *Wilson* v. *Brett* (1843), 11 M. & W. 113.

Furthermore, if a gratuitous bailee does an act or omits to do an act in respect to the goods bailed, in contravention of the bailor's order or direction given at or before the time of bailment and to which the bailee assents, he will be liable for any consequential loss although he may use such care as a reasonably prudent man would use with his own goods of a like description.[6]

The author does not mention any other cases of gratuitous undertaking. There is found little encouragement in such cases for selfishness on the part of an actor. In *Baxter* v. *Jones*[7] the defendants, a general insurance agent, gratuitously undertook to have an additional policy placed on the plaintiffs' property and also to notify the companies already having policies of this additional insurance. A loss occurred and owing to the defendant having failed to give the notices, the plaintiff was unable to collect the full amount of the policies on the property destroyed. The Court of Appeal held that the defendant having undertaken to perform the business, though gratuitously, was liable for the negligence which caused the loss to the plaintiff.[8]

The writer of the article is on sounder legal ground, when he states that there is no legal duty cast upon a man to prevent a blind man from walking over a cliff or to rescue a child from drowning. Apart from liability arising from misfeasance in undertaking some affirmative action, such as setting the child adrift in a boat during a storm, there does not appear to be imposed by law a duty on any man to act the Good Samaritan.[9] A court, even with the aid of modern psychology, would find it very difficult to determine the culpability of a particular man in such a case. He may become excited at the prospect of danger to another and paralyzed by the emergency. Despite the sincere endeavours of modern legislatures, it must be recognized that all activities of the individual cannot be regulated by what is called law. Some ends are best achieved, by leaving some phases of human conduct to the honour and social instincts of the individual. Law must, in the interest of certainty, act in gross; whereas moral rules are necessarily individual in their application. In refraining from laying down any rules which would place upon a man the positive duty to act the Good Samaritan, do not our courts encourage and stimulate independence and ability to look after him-

[6] See *Streeter* v. *Horlock* (1822), 1 Bing. 34.

[7] (1903), 6 O.L.R. 360.

[8] See also *Wilkinson* v. *Coverdale* (1793), 1 Esp. N.P. 74; *Elsee* v. *Gatward* (1793), 5 T.R. 143; *Balfe* v. *West* (1853). 13 C.B. 466; *Wills* v. *Browne* (1912), 1 D.L.R. 388; *Parker* v. *McAra* (1913), 10 D.L.R. 37.

[9] See Pollock: The Law of Torts, 12th ed. p. 439 *et seq.*

self in the stranger, rather than foster primarily self-interest in the passer-by?

The same question may be asked with reference to the case of *Greyvensteyn* v. *Hattingh*,[10] in which, the writer points out in his article, the Privy Council held that the defendants were entitled to drive away a storm of locusts from their lands in the direction of the plaintiffs' cultivated fields and that they were not responsible for the destruction of the plaintiffs' crops by the locusts. The plaintiffs were quite as able as the defendants to avert this common danger and drive off the locusts. It would be a surprising result if the law imposed a liability on a farmer for damage caused by a crow on a neighbour's farm after it had been driven away from the farmer's field. The law virtually says, let the neighbour put up a scare-crow of his own.

Even apart from modern legislation, such as Workmen's Compensation Acts, Homestead Exemption Acts, there seems discernible in our modern law a departure from the hard individualism of the strict common law towards a socialization of its rules. From the era of equality of action, is there not in process a transition to a period of equality of satisfaction? This seems to be apparent in the law of property. Take for example the development of the laws regulating the use of water by riparian owners, nuisances and the rights of licencees and invitees. In the law of contract, the idea of absolute freedom of contract is now qualified by restrictions imposed by reason of some principle of public policy, because of the needs of the community as a whole. Yet in this compromise between individual and social claims, the former, even in the interest of the group, must be given a high place in our jurisprudence. Self-interest after all is the mainspring of most enterprise.

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[10] [1911] A.C. 355.