BARGAIN AND NON-BARGAIN PROMISES

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1.

Modern contract law has long been deeply embedded in what we generally describe as a bargain-theory. Not that this is by itself a theoretical disadvantage. Most contractual promises are in fact part of bargains, just as most broken promises, at any rate those seeking legal action, cause commercial loss or "loss of bargain" to the promisee. The fact remains that not all agreements arising at law involve bargain-promises. Quite apart from gratuitous promises, promises of gifts, which we shall put aside as they raise issues of a different kind, there also are promises which closely relate to bargains though not themselves bargain-promises. These are, on the one hand, agreements or promises designed to adjust or modify an already existing contract, and, on the other, promises that create "options" by which one party gives the other a right to accept, at some time in the future, an offer (typically) for the sale of property.

As the law stands, however, neither of these promises is legally enforceable, that is, not straightforwardly or candidly enforceable as a promise. And this simply because neither being a bargain-promise, neither, in the accustomed formulation, satisfies the doctrine of consideration, in that the promisee pays no price for the promisor's promise and so has no action against him. Even so, as everyone knows, these promises have not been without legal recognition, notwithstanding the veto orthodox consideration imposes; still recognition that has been at best oblique, overshadowed by a panoply of special devices which, while not formally incompatible with the requirement of bargain or consideration, are nevertheless devices

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with a great theoretical deficiency: that they belie the fact that it is actual promises or agreements we here deal with — moreover, agreements which, precisely because they are so closely bargain-related, even if themselves not bargains, must be somehow more openly accommodated within a modern law of contract.

The important question, therefore, is how this accommodation is to be achieved: in particular, how the doctrine of consideration is to be overcome. A well-known view of course advocates its abandonment altogether. But this, we shall here argue, is an extreme sacrifice not only unnecessary but also misleading: misleading because, like most such extreme measures, it flattens certain elements or insights inherent in consideration that do need to be preserved. For, reconstructed or reinterpreted, the old doctrine can be shown to fit into a broader contract theory hospitable enough to accommodate the two types of non-bargain promises we have identified. We shall accordingly first contend for a reinterpretation of consideration, then discuss both modifying promises and (finally) option promises.

2.

As a first step, it is necessary to appreciate that consideration harbours behind its uniform appearance not just one but two doctrines, a primary and a secondary one, as we shall refer to either: the primary doctrine indeed basic and illuminating for any theory of contract, the secondary doctrine almost entirely dispensable because largely spurious. The primary as well as pristine purpose of consideration — indeed the very purpose which explains why the word "consideration" came into use at all in the context of informal promises (or simple or "parol" promises to distinguish them from "formal" promises like covenants) — was to identify the specific loss the promisee suffered on account of the promisor's failure to perform. The early actions on informal promises, it is worth recalling, were as actions of assumpsit openly delictual, being an offshoot of the action of trespass (or trespass on the case), actions in which the word "consideration" rather served to introduce an explanation as to how the plaintiff was led to his loss: that, for example, "in consideration" of the defendant having promised to take care, the plaintiff let him carry his goods or animals, or let him

repair his house, and so on. And just as in any other delictual action the plaintiff had to establish a nexus between the harm to him and the defendant's culpable act, so here the plaintiff had to show why he had relied on the defendant's promise, thereby exposing himself to material loss. So basic was this delictual element that "consideration" was, and continues to be, described as a "detriment", one necessarily moving from the promisee. Without loss or detriment, in other words, there is no consideration, and without consideration in this sense no promise actionable at law.[1]

Nor, it is worth remembering, did assumpsit turn into a so-called "contractual" action until recovery was allowed not only for injury to person or property caused by the defendant's negligence but also for economic loss, such as the promisee's loss of profit in a contract of sale. If having promised to supply goods on a certain day, A failed to do so, B could henceforth recover from A the difference between the contract and the market price; for A would have to go into a rising market to obtain the same goods. The market difference crystallised the exact loss the defendant sustained, regardless of whether this was taken as an instance of *damnum emergens* or *lucrum cessans*. So where, in its earlier delictual role, the action only enabled the plaintiff to recoup himself for loss for (broadly) physical injury, its newer role extended recovery to economic or financial damage arising as this did from B's lost opportunity of having the goods more cheaply from A than at the current (and presumably higher) market price. Yet loss of commercial opportunity or loss of profit was like any other material loss for which the law offers a remedy.

What we call the secondary doctrine of consideration has quite other origins. According to the traditional story, informal promises did not really begin being enforced as "contractual" actions until the sixteenth century, when the fully "bilateral" contract — a promise for a promise — was first upheld, the precise turning-point being *Strangborough v. Warner*,[2] a case of enormous theoretical significance. A promise against a promise, says its very short report, will maintain an action, "as in consideration that you do give to me 10 pounds on such a day, I promise to give you 10 pounds on

1. See Plucknett, *A Concise History of the Common Law*, 5th ed. (1956), 637 *et seq* ; Stoljar, *A History of Contract at Common Law* (1975), 28 et seq.

2. (1589), 4 Leon 3, 74 E.R 686. There are other early cases dealing with mutual promises, but this is the outstanding one.

such a day after". This has generally been interpreted as meaning that in the case of mutual promises, as such promises have been called, each promise is binding only because each constitutes "consideration" for the other. From this has sprung the broader idea at the root of the bargain-theory. Because, as was now said, bilateral contracts require mutual promises furnishing consideration for each other, and because such mutual promises, wholly exchange-oriented as they are, thus necessarily result in a bargain, the conclusion apparently followed that nothing but bargain-promises (moreover, only such promises between the bargainers themselves, excluding third parties) would or could constitute legally enforceable promises. As everyone also knows, after a long debate about the nature of this consideration (some, like Pollock, even seeing this as one of the common law's secret paradoxes) the view that has prevailed is to see mutual promises as legally enforceable, solely by dint of either promise being consideration for the other[3].

This view is profoundly misconceived, both historically and analytically. Historically, to mention this but briefly, bilateral or contractual promises must have been recognised long before the *Strangborough* decision, in effect ever since lost profits had become recoverable.[4] Analytically, the misconception runs deeper still. To say that mutual or bilateral promises are consideration for each other is not only misleading (how can a promise itself constitute consideration? where is the loss or detriment? is merely mouthing a promise a loss?) but, more importantly, it overlooks that "consideration" can here be used not just to refer to the reason for the promisee's loss but to the reason or motive moving either party to make a promise or counter-promise. If, to take a simple example, A says to B: "I promise to sell and deliver this article if you promise to pay the price," A clearly agrees to deliver on condition ("in consideration") that B will pay, or promise to pay. If B thereupon promises B can similarly be said to make a promise "in consideration" of A's promise, since B's obvious reason to make his promise to pay is to obtain the article A promised to supply. B, one may say, gives

3 For the debate, involving Pollock, Langdell, Ames, Williston *et al* , see (1912), 28 L Q Rev. 101; (1914), 30 L Q Rev 129, and *Selected Readings on the Law of Contracts*, (1931), 320 et seq

4. For the earlier cases, see Stoljar, op. cit n 1, 39, 42.

full consideration or thought to A's promise and finding it acceptable promises in turn; his counter-promise is thus in consideration simply of his wanting to accept and clinch a proposed bargain. Unless B does make such a counter-promise he would simply not indicate his own willingness to pay, for only upon there being such reciprocal willingness can there be a mutual transaction.

There is more. To create an agreement for a future exchange, the counter-promise as well as signalling the end of the negotiating stage must announce the existence of a definite bargain now cemented by irrevocable promises — irrevocable by virtue of the promisor's offer having been accepted by the promisee's promise in return or counter-promise, promise and counter-promise being indeed the only way in which future exchanges can be bindingly agreed on. In this light, *Strangborough* has a simple explanation. It seems that the prospective lender tried to revoke his promise to lend the money after the borrower had already promised to repay. All that the case therefore decides is that a promise can no longer be revoked once it is counter-promisingly accepted. Admittedly it is not clear what loss the borrower could have sued for on the lender's breach, since the former might have been hard put to show a real detriment to himself, unless going into the money market meant paying higher interest for the loan. But this is quite another point. What for present purposes the decision means, and can only mean, is that once the counter-promise is given, neither promise can any longer be withdrawn to the other's detriment. Indeed *Strangborough* thus only makes explicit what must have been recognised, albeit implicitly and perhaps only dimly, a good deal earlier. For when lost profits were held to be recoverable in assumpsit, it must have been understood that the parties' preceding agreement for a future exchange was legally enforceable. Otherwise a seller failing to deliver could have escaped contractual liability by the plea of having already revoked his promise, there being no promise on which he was suable.

In this light, moreover, there is therefore a very straightforward test as to why or when bargain-promises are legally binding. The test lies in the material or commercial loss the promisor's breach causes the promisee; the latter now has to obtain an alternative performance at a higher price. Even where B commits what is known as an anticipatory breach, one occurring before, often well before, the specified time for performance, the promisee has a choice: he

can wait for the due date of performance and then sue for his loss, or he may sue immediately on the promisor's premature repudiation, when the loss is again the difference between the contract and market price at the time the action is brought. In other words, bargain-promises are legally enforceable not because the mutual promises furnish "consideration" for each other, nor because (as it is sometimes thought) we have now something called "reciprocity" or "mutuality" between the parties concerned; rather because there is a proper promise and a breach giving rise to a loss which the law is ready to remedy. Of course we may put this in terms of consideration; even then, however, consideration only refers to the promisee's loss together with the reasons for the latter's expectation or reliance on the promisor's performance, a failure of which being the cause of the promisee's lost opportunity or profit or bargain. So seen, furthermore, it turns out to be quite wrong to describe consideration as, in the famous phrase, the "price" one pays for another's promise. For in giving his counter-promise, the promisee as yet "pays" nothing; all he does is to agree to a proposed exchange in the future. The upshot is that a notion of material and remediable loss tells us quite enough as to why certain promises are enforced: it is, once we think of it, rather the notion the primary doctrine of consideration tried to catch. We shall shortly see that material loss also lies behind the enforceability of certain non-bargain promises.

All this is not in the least to deny that bargain-promises, especially those in relation to sale, are, if not the only, certainly the most characteristic loss-creative promises of all. Hence it is not at all surprising that it is around synallagmatic promises that contract law has so much evolved. French law offers another pertinent example, with its notion of "cause". For a contract to be valid, the Civil Code (articles 1108 and 1131) provides that, amongst other conditions, it must have a lawful cause. Though it does not define this cause, there is now general agreement that cause responds to the question *cur debitur*: why did the promisor undertake what he did? The full story behind this is extremely complex, but greatly simplified comes to this.[5] Medieval law, having first adopted the

5. See more fully Capitant, *La Cause dans les Obligations* (Paris), 116 et seq; also Mazeaud, *Lecons de Droit Civil*, (Paris 3rd ed. 1966), 206 *et seq* ; Carbonnier, *Droit Civil — Les Obligations*, (Paris, 1976), 100 *et seq*; and Ghestin, *Droit civil Le Contrat*, (Paris, 1980), 524 *et seq*

rule of *pacta sunt servanda*, following canonist teaching of good faith, later held that not every pact or promise deserved enforcement, especially if no reason was given for it. Later, civilians would not even enforce formal promises if no cause was shown; while canonists, going a step further, began to recognize contracts for sale or lease as enforceable even without cause shown, this because, as was said, the cause appeared on the face of the transaction: *causa sunt sui ipsius*. On the other hand, promises *sine causa* were, and still are, dismissed as suspect, especially donative ones *a titre gratuit*, unless there is clear proof of the promisor's definite intention to benefit the promisee. The latter point of course marks an interesting departure from the common law; but, however this be, the more interesting question at present is why synallagmatic promises became readily enforceable while non-bargain promises required an explicit cause. The true answer surely cannot be, though this is the answer French writers currently give, that synallagmatic promises do contain a cause, namely the *equivalent voulu*; for this only amounts to saying that an exchange is enforced because it is an exchange. Perhaps it would be more helpful to say that synallagmatic promises are precisely those most likely to lead to loss to the promisee, an economic or commercial or material loss. Hence, as in consideration, loss becomes again the vital element.

3.

If, as we have said, it is loss that provides, for promises, a simple test for the remedial intervention of the law; how does this affect promises that stand outside the orthodox bargain-theory, including promises made for the purpose of modifying or adjusting a contract that already exists? Though, as we have seen, promises, once made and accepted, can no longer be revoked, we may nonetheless wish to change them, either by rescinding a contract altogether or by altering some of its terms. Any such modification, it is obvious, has to be consented to on both sides since both have to agree to new or altered terms taking the place of the old. Without such mutual consent or agreement there is simply nothing to specify the exchange as altered and therewith nothing to indicate what, in the case of a breach, would be the promisee's loss. Just as both sides have to agree if they are to create a promisor-promisee relationship in the first place, so they may terminate or qualify this rela-

tionship in the same way, if their consents change concordantly. Thus they may agree not to go on with their relationship, at least not on the same terms, since they cannot remain in that relationship save according to their agreed intentions. One promisor, to be sure, cannot alone change the bilateral relationship (this is, precisely, what is meant by a breach or repudiation of a promise); but together they can. What is more, where they do change their contractual terms, we have not an entirely "new" ' contract, but an old contract incorporating altered terms. Accordingly, if A and B make a contract of sale (contract 1) which they amend or alter by stipulating that, say, A is to deliver more for the same price, or B to pay more for a lesser quantity, the enforceability of the "new" contract (contract 2) is the same as that of contract 1, chief among them the test whether either contract (1 or 2) leads, if broken, to a material and remediable loss. In other words, only the content changes, as an enforceable contract it remains the same.

The trouble has of course been that the modifying agreement does not fit our established principles of contractual enforceability, the doctrine of consideration in particular. Had we kept consideration in (what we called) its primary or pristine niche, there would have been little difficulty about this: the altered contract would, if broken, have caused the same type of loss (loss of bargain) the old contract would, except that the new (altered) contract was the only one it was left for the promisor to break. Since, however, consideration developed in its secondary (or bargain) sense, this had the unfortunate consequence of requiring the modification to be itself a bargain, it being far from realised that this condemned the modifying agreement to legal invalidity since to ask for a bargain-consideration for such an agreement was to ask for the conceptually impossible. The simple reason is that a modification characteristically involves not a detriment but a benefit or concession to the promisor, while the promisee consents to getting something less from the exchange than originally agreed (contract 1), something less to the extent to which he is now helping to overcome the (promisor's) performatory difficulty for which the modification is sought. The benefit-detriment dichotomy contained in orthodox consideration doctrine cannot now coherently hold since modification rather reverses the two parties' roles, with the promisor now suffering the detriment and the promisee gathering the benefit.

Still, the orthodox rule firmly remains that a modificatory agreement, required as it is to constitute a contract in its own right, has to be supported by consideration — the party seeking or defending its enforceability must show he paid a "price" for it, if only a peppercorn.[6] Great difficulties have come from this.

One is to obscure, in modification, the central role of mutual consent. In fact with modification treated as a matter of a new bargain, this not only distracted attention from the fact that a modifying agreement, too, required full and free consent; more importantly, it implanted the idea that modification called for new devices as it normally fell short of an agreement satisfying the bargain-theory. For a modifying agreement, informed consent is often even more important than where they negotiate a contract afresh. Because what on the face of things may appear nothing more than a simple alteration of existing terms, may in reality be due to the unequal pressures from one side. A may indicate that unless certain terms are altered, the existing contract may fail to be performed; B thereupon might fall in with A's requests, lest he otherwise end up with a lawsuit instead. The law, it is true, has not been unaware of these extortionate possibilities, yet it has dealt with them under the aegis of the doctrine of consideration, especially its sub-doctrine of "sufficient" consideration, as though the parties were not modifying an old contract but making a new one entirely. Now "sufficient" consideration did try to cope with what in such modifying situations could well be seen as one party's deficient consent, but it did this by no means openly. So, in some familiar decisions, a captain's promise to increase seamen's wages was held unenforceable, partly because the promise was against "policy", partly because not supported by sufficient consideration the seamen being already bound to work the vessel home, whereas in another case a similar promise for higher wages was upheld, on the ground that the promise was made in recognition that conditions had become more hazardous. Not until very recently has it been recognised that a

6 There are nevertheless signs of new perceptions about this see *W T Alan & Co Ltd v El Nasr Export and Import Co*, [1972] 2 Q B. 189 at 213, J H Baker, "From Sanctity of Contract to Reasonable Expectation ?" (1979), 32 Current Legal Problems 17 at 29. And see more basically, Stoljar, "The Modification of Contracts" (1957), 35 Can Bar.Rev. 485

modification might be vitiated by "economic duress", quite independently of consideration, as where a shipbuilder, after a devaluation, insisted on an increase in the contract price.[7]

However, our broader point is that we do not even need a "new" contract to modify an old; what we need is an agreement altering existing conditions, but such that the new contract, if broken, similarly leads to loss, now on its own (old and new) terms. With a genuine "new" bargain usually absent in any case, modification began to be seen as based essentially on new devices, one that of "waiver", the other "estoppel" (or "promissory estoppel" as it is now more frequently called), both devices which, while certainly allowing some forms of modification, nevertheless had this side-effect: that they concealed the consensual basis on which contractual modification rests. A waiver typically occurs where parties alter existing terms quickly and informally, as where A, having promised to deliver goods on a certain day but having difficulty performing on that day, B thereupon "waives" the condition of performance on the stipulated day, with the result that the contract remains but a term is changed. Conversely, B may have difficulty in accepting or paying for the goods on the original date; A "waives" the condition; the contract again survives but with B's own performance postponed.[8] A waiver thus consists of one party requesting a modification of a term or terms, a request which the other accepts — the waiver thus amounting to an agreement even though not so described. In other words, a separate notion of waiver was here employed to avoid having to find a new contract with its own consideration or standing on its own feet, precisely because, in the typical case of almost any such waiver, the old contract would still largely dominate, so that it would be inevitably apparent that the modification consisting as it did of a concession by the promisee to the promisor (the concession being of course the term waived or replaced) ran counter to what the secondary (or bargain) theory of consideration wanted a contract to be.

7 See *The Atlantic Baron*, [1979] Q.B 705, and for the seamen's cases. *Stilk v Myrick* (1809), 2 Camp 317, 170 E.R 1168, *Hartley v Ponsonby* (1857), 7 E & B. 872 at 879; 119 E R 1471 at 1473-4.

8 See e g., *Hartley v Hymans*, [1920] 3 K.B. 475; *Besseler Waechter Glover & Co v South Derwent Coal Co Ltd*, [1938] 1 K.B. 408

Estoppel raises problems of a kindred sort. If, for example, a lessor agrees to a reduction of his lessee's rent for a period, he is now said to be estopped from revoking what he agreed.[9] Here, again, we have an agreement modifying an earlier one, although the fact that just this is now in play is somewhat submerged — submerged, that is, because estoppel doctrine has, generally speaking, been tending to emphasise a separate element of reliance at the expense of agreement, this perhaps only to display its doctrinal independence as a device. Now A's promise to modify a certain term certainly conveys that B, as promisee, can "act on" it; but this does not *necessarily* mean that there has to be a reliance, in the sense of a detrimental reliance; what the arrangement means to achieve is for the parties to continue in their on-going relationship, albeit on altered terms. In a rent-reduction case, it makes in any case little sense to say that the lessee/promisee "relies" (i.e., relies to his detriment or disadvantage) since the rent is halved to ease *his* burden, not the lessor's; indeed it is the latter who suffers a detriment, the contract having for him rather less value than before.[10]

Indeed, unless we understand this consensual dimension of estoppel, however much it may operate differently in other contexts elsewhere, we cannot really appreciate its full promissory potentialities: that, in particular, estoppel, like waiver, is but a by-way to promissory liability. What is worse, as estoppel is treated as a separate, almost extra-contractual, doctrine, it brings forth a separate crop of technicalities for which, however, there is in the end little justification theoretically. For instance, it is commonly said that estoppel operates only by way of defence, as a shield, or operates only temporarily. It is true that estoppel so operated in earlier applications, when principally used to enjoin one party from dishonouring a representation made in respect of land or premises, on the strength of which the other entered a continuing relationship such as that of lessor and lessee or licensor and licensee. But as applied in contractual contexts, limiting estoppel to a strictly

9. *Central London Property Trust Ltd v High Trees House Ltd*, [1947] K B 130, which is of course the stock illustration here.

10. The difficulties an estoppel-approach is capable of causing even in a relatively straightforward case are amply illustrated in the judgments of *Je Maintiendrai Pty Ltd v Quaglia and Quaglia* (1980), 26 S.A.S.R. 101 (F C).

defensive or temporary role brings about rather absurd results. Suppose a lessee does not pay his rent, though it was generously reduced, is the lessor to be unable to recover it? Can we allow the lessee to argue that since the promise can only estop, the lessor cannot sue for the reduced rent; nor anymore sue for the old rent since that was reduced by the lessor? Or suppose the lessor instead of reducing the rent, makes other concessions such as making renovations at his own expense: can he now maintain that since estoppel only operates defensively on behalf of the tenant, he himself cannot be sued? Should the lessee not be able to "stop" the lessor from resiling from his promise; what sense does it make anyhow not to enforce the modified contract as a whole? Why, furthermore, should estoppel be only a temporary device capable of suspending but not altering previous rights? In some situations, admittedly, a modificatory promise only purports to vary a term for a limited time (as where a rent is reduced for a period, or a notice to quit is suspended while renewing negotiations go on). But in other situations a modification may well contemplate more permanent effects, indeed effects courts have not always been reluctant to uphold.[11]

It is worth brief mention that the consensual basis of contractual modification is more fully, or at least more directly, recognized in the related case where the aim is not just to alter a contract but to discharge or terminate it altogether. The law, as everyone knows, provides two methods of discharge, the deed of release and the accord and satisfaction, both indeed long regarded as contracts in their own right, the former because of its formality of the seal, the latter because the "satisfaction" adds to the "accord" a sufficient consideration by itself.[12] Both methods are nevertheless not easy to rationalise in the light of modern law. As for the deed, we no longer accept the "magic" of the seal: form alone seems increasingly irrelevant, for if there is actually full consent, form is not needed and if such consent is wanting, form is apt to hide that deficiency.

11 A good example is *Jackson v Cator* (1800), 5 Ves jun 688, 31 E.R 806, one of the earliest instances of estoppel in this field

12 The two methods, both very old law, have hardly changed over the centuries, except that the requirement of a deed has been partly relaxed where a covenant is only varied rather discharged· see, e g , *Goss v Nugent* (1833), 5 B & Ad. 58 at 64-5, 110 E R 713 at 715-6, *Berry v Berry,* [1929] 2 K.B 316.

An accord and satisfaction does look like something more akin to a bargain, in that the accord needs to be coupled with a special benefit (or "satisfaction") accruing to the creditor. Yet since this benefit can be ludicrously small (a feather, it is traditionally said, will be enough), the accord reveals itself as quite unbargain-like as an exchange, such that its real enforceable strength, as that in the case of the deed, becomes rather this: that the parties adopting either method can be seen as having deliberately agreed to terminate their current obligations. Thus the "form" of the deed and the "satisfaction" in the accord, instead of antique relics, now serve a more rational purpose, that of a cautionary function — to ensure that where a creditor agrees to take less than he is owed (and a creditor can be under great pressure so to agree, especially where a debtor might claim not to have enough money to repay in full), the creditor's consent to forego all or part of the debt is given deliberately and in full knowledge of the facts, thus given virtually as a gift.[13]

The upshot is that it is to the parties' consent we again return, inevitably so, since to determine what promises the parties mutually made, we have to look at all their terms, that is, those they first agree to together with those modifying or even discharging the old. Obviously it is for the parties to make their own promises, just as it is for them to have second thoughts, provided these too result in terms they freely consent to. Only thus do parties retain their

13 This, too may adequately enough explain two much debated decisions: *Jorden v Money* (1854), 5 H L C. 185, 10 E R. 868, and *Foakes v Beer* (1884), 9 App Cas. 605 The latter, often castigated as an antiquated relic of medieval logic, can now be seen as the case of a creditor having done nothing to indicate his willingness to forego the interest (still unpaid) on the principal sum, he could not be pushed into giving more than he had actually conceded *Jorden's* case, sometimes said to have been profoundly misunderstood, can be interpreted as an instance of a creditor never actually abandoning or releasing a debt, only making noises to this effect. A further suggestion that the creditor's statements amounted to a legal promise only unenforceable because not complying with the *Statute of Frauds* is a little strange. the statute was wholly inapplicable to this promise (see Lord Cranworth, L C., ibid at 217) If there was a promise, it anyhow lacked enforceability since not made by the proper methods of discharge Perhaps it was the attempt to circumvent these methods that encouraged talk of "representation", then a not unfamiliar stand-by in courts of chancery where the common law's contract rules appeared too narrow at times Treating this as a representation was however also inappropriate, because for one thing, this was at best a representation of a present intention which could always change, and because, for another, the obligor could hardly be said to have (detrimentally) relied on something (the discharge) as this was of special benefit to him

autonomy in making their own exchanges and so running their own risks.

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We turn to our second category of non-bargain promises whose breach can cause direct commercial loss. Unlike a bargain-promise which typically leads to loss, a non-bargain promise does so only exceptionally — in a somewhat special, and numerically small, group of situations, those having to do with promises which arise in the course of making a contract, before a contract is actually formed. We may describe them as "pre-contractual" promises, or as promises *in contrahendo*, to borrow Jhering's well-known phrase describing a party's legal liability though no proper contract as yet exists.[14]

Now pre-contractual promises raise an obvious difficulty as regards their validity. If orthodox doctrine calls for consideration to make a promise enforceable, orthodox consideration (i.e. consideration in a bargain sense) is precisely what pre-bargain promises lack. Even so, pre-contractual promises have in some instances been surprisingly readily upheld, always provided the promisee suffers loss. Material and measurable loss again emerges, as we shall now see, as the real, even if not the officially admitted, yardstick of promissory liability. A very simple example of this is the so called contract "on approval" or "sale or return". If A gives B an article on these terms which B, after reflection, decides not to take, but thereupon returns the article in a damaged state, or not at all, A has an action against B either for the partial damage or the total loss, though there is here no bargain, only what is known as a bailment between A and B.[15] Even if B made no express promise to take care of the article, a promise would still be implied, simply because it would be taken as entirely presumable that A would not hand over his property without at least an implied undertaking that B would look after it.

More interesting, as well as more difficult, are various other ex-

14. Jhering, "Culpa in Contrahendo" (1861), 4 Jher. Jahrb. 1; and see F Kessler and E. Fine, "Culpa in Contrahendo" (1964), 77 Harv L Rev 401.

15. This example is a combination of *Bainbridge v Firmstone* (1838), 8 A. & E 743, 112 E.R. 1019, and *Moss v Sweet* (1851), 16 Q B 493, 117 E.R. 968

amples, all in a way related, all of them what are sometimes known as options or option contracts, though each of varying legal effect. Take, first, an agreement also called a "tender" that consists of a promise by a subcontractor (or "sub") to a general contractor (or "general") to enable the latter to put in a bid for a (usually major) construction contract with a third party, the entrepreneur. The question is whether the sub is bound by his bid, at least to the extent that the general uses it in his own tender for the job. The general may of course pay a price (thereby furnish "consideration") for the sub's bid, thus "buying" its remaining open for a certain time, and, if so, the price will indicate what the bid is worth to both, since the value of the bid as a bid now is quantified. Our present example does not presume a bargain of this sort: the general does not want to pay a price, neither does the sub insist on one, eager as he is to get the major job. If the sub now withdraws, what are the general's rights?

Curiously, our law of contract is still not very clear on this. On principle, existing law leaves little doubt that the sub does remain free to revoke his promise, unsupported by consideration as it manifestly is. American law similarly refuses legal redress, except where the general has somehow "accepted" the bid; though this is only by an acceptance, it is said, not simply consisting of the general saying "I accept," or using the sub's tender in his own bid; the acceptance has to take the form of an express counter-promise by him.[16] The question immediately is what purpose this counter-promise can serve. Since the general cannot promise to engage the sub's tendered services as the final contract may not be awarded to him, he can at most promise to take the latter's services should his own bid succeed, yet just this the sub must already know as soon as the general accepts to use his bid, as this is the bid on the basis of which the general calculates his own. A general's counter-promise, it thus turns out, cannot give the sub any greater assurance than he would anyhow have, once he knows that his bid is accepted since it is being used.

The idea that a counter-promise could here make a difference of course stems from the notion we earlier criticised, namely, that

16 *James Baird Co v Gimbel Bros* , 64 F. 2d 344 (2nd Cir 1933)

a counter-promise furnishes "consideration" by itself — the sub's promise being seen as supported by the general's reciprocal promise so as to create a bargain of mutual promises. However, to call any such agreement a bargain is to force the meaning of bargain well beyond its conventional sense, for the contemplated events in this agreement are as yet far too contingent to constitute anything like a real exchange. Indeed, if this were a bargain, there could be one even without a special counter-promise, as soon as the sub is made aware that his bid is accepted by the general; instead of a bilateral contract, it would be a unilateral one.

The true reason why a sub might wish to withdraw is in any case not the lack of an express counter-promise but an error or oversight in his own calculations, rendering his bid disadvantageous to himself. If, however, the sub's bid does not reveal any patent or palpable error but seems, on the contrary, eminently plausible on the face of it, the miscalculation cannot, or at least should not, affect the sub's promise as a promise on which the general is to rely as a promisee. It is broadly such reasoning American law now adopts. The sub's bid is now seen as a promise that induces the general's injurious reliance, a reliance the sub can surely foresee; hence his promise becomes irrevocable, at least until it is clear whether the general wins the major contract or not.[17] This result, it is true, is based on the doctrine of promissory estoppel, according to which (under s.90 of the Contracts Restatement, its *locus classicus*) a promise which the promisor should reasonably expect to induce, and which does induce, action or forbearance by the promisee is binding if injustice can be avoided only by enforcing it.

Undoubtedly useful as a quick reformatory device, promissory estoppel yet carries with it considerable theoretical flaws. For one thing, it presupposes as it perpetuates the view that the orthodox learning of consideration is so firmly entrenched as to be quite incapable of change by way of its own internal reform; consequently only an *ab extra* doctrine such as estoppel can give us at all, or give us more quickly, more satisfactory results. For another, overstress-

17 *Drennan v Star Paving Co* , 51 Cal 2d 409, 333 P 2d 757 (1958); and see also Restatement (Second) of Contracts, s 87(2), Illustration 6 *Aliter* if the revocation comes before the general relies on it see *Belle River Community Arena v Kaufman Co Ltd* (1978), 87 D L R (3d) 761

ing as estoppel does the element of reliance, as though the party estopped is some sort of misrepresentor, the doctrine rather deflects attention from the fact that the two parties are in reality in an entirely consensual relationship, with one side (sub) promising to do or supply certain things at a certain price (this is after all what his bid is), and the other side (general) accepting this promise by acting on it in his effort to get the major job. Obviously the two cannot but agree that the sub's bid is to be used by the general; for what other purpose could it have? Hence the general suffers commercial or economic damage if the bid is prematurely withdrawn. The Restatement, too, speaks (in section 90) of the promisor "reasonably expecting" the promisee to rely on the promise made, the point of this being that the promisor knows that his breach or withdrawal of the promise will lead to loss, or some detrimental change of position, by the promisee. But if so, we hardly need a special doctrine of estoppel, for the latter thus merely repeats what we already know, namely, that a promise can be binding or enforceable if it is a loss-creative one. It follows that material and remediable loss transpires again as the immediate test of promissory liability, the same test, we have seen, which the primary (as distinct from the secondary) doctrine of consideration long ago held out as the crucial one.

The other types of non-bargain promises raise similar problems about the promisee's commercial loss. Suppose, in what is known as a requirement contract, that A promises to supply B with specified goods, usually at a specified price, should B require and request these at some future date. B, it will be noted, does not promise to buy, only to inform A of his requirements. If B does place an order, A is bound to fulfil it, on the ground that A's promise is a "continuing" offer or an offer for a "unilateral contract", so an offer that is accepted by virtue of B's placing his order with A. Nonetheless until A has such an offer, he can revoke his promise to B just as B can revoke his promise to buy.[18] To avoid such premature revocation, it has been suggested that a requirement contract does con-

18 See *Great Northern Railway Co v Witham* (1873), L R 9 C P 16 at 19 and 20, *Percival v L C C Asylums etc Committee* (1918), 87 L J K B 677, and see generally J N Adams, "Consideration for Requirement Contracts" (1978), 94 L Q Rev 73 at 81 *et seq*

tain some consideration, sometimes called "contingent consideration", in that A's promise to supply is supported by B's counter-promise to buy what he may later consider he may need. This however is a promise so contingent and (as lawyers sometimes say) "potestative" as to make it illusory, since B, as promisor, does not really commit himself to anything definite.[19] An alternative suggestion is to use promissory estoppel, though this too will only work if B's promise to buy his requirements from A induces the latter to change his position (as where B not only promises to buy from a certain supplier, but also gives A every encouragement to lay in stocks for B's future demands); in which case, however, we are back into promissory liability, along the lines here advanced. For B's promise, if prematurely revoked, can lead to considerable loss to A, since B's promise created an expectation in A that he would sell to B perhaps not everything he stocked, but still a great deal, given B's normal requirements; A's loss consists in thereupon being left with goods for which he has no ready customer.

Our final situation deals with seemingly simpler facts, though no less difficult. If A, offering to sell a house to B, promises to keep this offer open for a time, (say) a relatively short time; and if B accepts that offer (e.g., telling A: "I'm certainly going to think it over."), what sort of promise does A make? There is no doubt that A's offer is freely retractable until B makes his acceptance of the offer to sell "till both parties have agreed, either has a right to be off".[20] Even if A had made a so-called "firm" offer, the result would, in our law, be the same, unless (and this is the other side of the orthodox coin) B "pays" or promises to pay a price for this option, or obtains it (what in terms of consideration amounts to the same thing) by a covenant under seal. This outcome is often criticized. The promisee, it is said, now needs to have a firm as well as irrevocable offer if he is to be able seriously to reflect upon whether or not to accept it.[21] In German law such an offer is binding, as in fact is any offer save where a right of revocation is ex-

19 See 1 *Williston on Contracts*, s 104A; 1 *Corbin on Contracts*, s 156.

20 *Routledge v Grant* (1828), 4 Bing 653 at 661, 130 E.R. 920 (the option here was for six weeks), similarly *Cooke v Oxley* (1790), 3 T.R. 653, 100 E.R 785 (an option till four o'clock of the same day)

21 See Restatement (Second) of Contracts, s 25 Comment *b*

pressly reserved. French law does permit the withdrawal of an ordinary offer but not one coupled with a promise to keep it open for a time.

Still, the common law rule is far from indefensible — not, to be sure, on the grounds of "consideration" traditionally given for it, but on the ground that it would be extraordinarily difficult to identify material loss even if B, as offeree, did rely on A's firm offer. Though A's revocation would deprive B of an opportunity to buy, even of a chance of thinking it over, can such a deprivation constitute a true loss, and even it does, how would it be measured in money terms? What, more particularly, could be the financial value to the seller of the (high? low?) probability of the other's buying the property? The position would be different if the buyer incurs at least some expense: where he spends money on having the title of a house examined by a solicitor, or its soundness by a building inspector. But short of this, it is very difficult to quantify the offeree's detriment. Indeed the loss might well be with the seller, not the buyer at all; for bound as the former now would be to wait for the full period specified in the offer, he might easily lose a sale to another buyer, the latter perhaps prepared to complete the sale immediately, unlike the first offeree who takes his time, delaying until the last moment only to decline in the end. If it be said that the buyer is deprived of an opportunity to consider a possible purchase, the answer is that if the opportunity really matters to him, he can buy an option from the seller. And if he does, we not only know what the opportunity is worth to both, but what the loss is too.

Our emphasis on the promisee's loss offers a neat illustration of how a common law conception of contract would still differ from the civilian.[22] Whereas in the latter what essentially matters is the parties' mutual consent crystallizing as this historically did, and even today still does, into a rule of *pacta sunt servanda*, the common law, while similarly respecting the parties' agreement or consent as evidenced by their mutual promises, yet adds to this a requirement of material loss. Unless, in short, there is some sort of injury or loss, the common law sees itself as having nothing to intervene for as it has nothing to remedy.

22. For this civilian law, see the text accompanying n 5 above