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OF THE ACCEPTANCE OF GUARANTIES.[1]

The increasing attention paid in England and this country to the study of the Roman law, and its affiliated systems of jurisprudence, is a matter for sincere congratulation to those who desire the scientific development of the common law. The changes introduced into the latter by legislation on the one hand, and on the other, an original want or gradual loss of reproductive power in some of its branches, appear to have arrested its progress in several directions. The older sources of our law no longer furnish precedents to govern, or analogies to guide us in the decision of novel questions. We are obliged to seek our materials for reasoning, elsewhere, or at least we must require an induction of principles more comprehensive in its scope. What we lack in our own, must be borrowed from other codes. For aid in this respect, we can, of course, look nowhere with such advantage, as to the Roman jurisprudence. In breadth, logical coherence, elevation of moral standard, as well as minute applicability to the business of ordinary life, it is without a rival, and it stands now, after the lapse of centuries, an amazing monument of the power of human reason.

[1] See 1 American Leading Cases, 57, &c., note to Lent *vs.* Padelford, and Douglass *vs.* Reynolds. Our citations are from the fourth edition, with the sheets of which we have been obligingly furnished by the publishers.

But the very facility with which the deficiences of the common law can be supplied from this inexhaustible storehouse of human wisdom and justice, has its peculiar dangers, against which it behooves us to guard. It is so easy, in case of necessity, to find in, and borrow from that source, principles and doctrines made to our hand, that we do not always study with sufficient care the relations which they bear to the original structure, or fit them with much accuracy to their new position. Yet unless this duty is performed, our labor is worse than useless. Doctrines which, in their proper place, are the natural development of recognized principles, and have grown out in harmony with the other parts of a connected system of law, when transplanted into another system, whose maxims are different and tendencies diverse, will in general, however promising at first the process may appear, lead in the end to discord and confusion. The union between the graft and the original stock can never be perfect, its growth is artificial and unhealthy, and time, instead of blending the parts, only serves to bring into light their radical inconsistency and lack of coherence. The parable which teaches us not to put new wine into old bottles, is as applicable in jurisprudence as in theology.

The obvious truth of this proposition needs no illustration; if it did, it could find many in the history of English equity jurisprudence. The rules which the latter has adopted with respect to testamentary dispositions, have been taken in great part from the Roman law, and are, to some degree, consistent in themselves, yet so foreign are they to the principles of the common law, that the same language in the same will, may on quite a number of points have quite a different effect, according as its subject is real or personal estate. On the other hand the court of chancery has gradually, by a misapprehension or misapplication of the laws of Rome as to *fidei commissa*, elaborated the "doctrine of trusts," which, however convenient or beneficial in its operation, is an anomaly in jurisprudence.[1] Again, we have imported into our law, the head

[1] See this subject investigated in McDonogh's Ex'rs *vs.* Murdoch, 15 How. U. S. 367, 407, where the prohibition in the Louisiana code, against the creation of *fidei commissa* was held not to apply to trusts as understood in the English law.

of *donationes mortis causa*, which was out of place in our legatory system at the best, and by a blundering interpretation of the original texts have succeeded in producing a curious hybrid, with little resemblance to either parent.[1] To pass to the common law itself, some of the distinctions in the law of bailments, intelligible enough in their origin, but unmeaning or complicated when applied by us, we have retained, others, vital in their character, we have confused. And with respect to the doctrine of contracts in general, where error would seem less likely to occur, there appears to be, nevertheless, a series of chronic misunderstandings prevalent, which it requires constant care to guard against.

One of these latter has been recently exposed in a very clear and able manner, in the learned note to *Douglass* vs. *Reynolds*, in the second volume of "The American Leading Cases," and in so doing the inherent distinction between the theory of the Roman law, and that of common law, on the subject of contracts, has been explained in a very original and satisfactory manner. Judge Hare's views, indeed, are of so interesting and important a character, that we need not apologize for stating them at length, and in his own language. Before doing so, however, it is necessary to give a brief explanation of the origin and nature of the question in the solution of which they are employed.

The Supreme Court of the United States, in *Douglass* vs. *Reynolds*, and other cases, had laid down the proposition that in cases of future and contingent guaranties and letters of credit, the guarantor cannot be held bound until he has received notice of the acceptance of the guaranty by the party making or intending to make the advances stipulated. This, though followed in many of the State courts, is contrary to the English cases, and inconsistent with principles established on analagous subjects. Unable to agree to the doctrine in its broad statement, he demonstrates in an elaborate discussion, that the grounds upon which the decisions of the Supreme Court have been at various times supported, are insufficient and unsatisfactory.

[1] See 1 Am. Law Reg. 9.

One of these grounds, that first assumed by the court, rested on the doctrine of notice at common law. This is shown to be clearly untenable, and in point of fact has been abandoned in later cases. Judge Hare establishes conclusively, indeed, upon a full examination of the authorities, that notice of a mere intention to act under a binding contract, can in no case be necessary. In fact, at common law nothing further was required, than that the party to be affected should have information in a reasonable time of the particular act when done, and in many cases the duty of obtaining this information was thrown upon himself.

On the abandonment of this ground, another of a more plausible nature was substituted. This consisted in the assumption that no binding contract is created by a guaranty or letter of credit, until notice of the acceptance thereof by the creditor is communicated by the guarantor. The question is thus brought within the general range of obligations, and placed on the ground of the necessity of mutual concurrent assent of the parties to execute a contract.

"The fair deduction," says Judge Hare,[1] "from the general course of decision on the subject in the United States, would seem to be, that no obligation can arise from acts done by one man on the faith of a promise given by another, unless the assent of the promisee, and his intention to act under the promise, is known to the promisor, although such knowledge will be as effectual when derived from facts and circumstances, as if it had been communicated by the most formal notice. The *Louisville Man. Co.* vs. *Welsh*, 10 Howard, 461. Some of the difficulties which have attended the inquiry, unquestionably vanish on attaining this point, because the question ceases to be a branch of the doctrine of notice, and falls within the dominion of the principles which determine when and under what circumstances assent must be communicated, in order to give force and validity to a contract, and render it binding on the contracting parties; and it becomes plain, that the numerous cases in which notice of acceptance has been held essential to the obligation of guarantees, really sustain and depend upon

[1] 2 Am. Leading Cases.

the single proposition, that assent cannot give rise to a contract, unless each party knows or is informed that the other has assented, which may be sufficiently true when the obligation of the contract is meant to be reciprocal and mutual, but not when its sole object is to induce the performance of an act which is subsequently performed; for if such were the law, there could be no recovery in the common case of a general undertaking to pay a reward to any one who shall find or restore a lost or missing article, or bestow his work or labor in some other specified manner, indicated by the terms of the undertaking. Under such circumstances, it has never been thought necessary, either as a matter of substantial good faith or technical principle, that those who mean to act under the terms of the promise should first signify their intention of doing so, or their assent to the contract, to the person by whom the reward has been offered, or the promise of payment given. On the contrary, the mere fact of pursuing the course requested by the promisor, and arriving at the result desired by him, has always been held sufficient evidence of assent to the terms of the promise; and there is no necessity for making any direct communication of what is done under it, until the whole is accomplished, and the fulfilment of the promise demanded, nor, as it would seem, even then, if the nature of the performance be such as to be ascertained by the promisor without notice, upon making proper inquiry. *Freeman* vs. *Boston*, 5 Metcalf, 46; *Wetson* vs. *Dodson*, 3 Carr. & Payne, 162; *Waterbury* vs. *Graham*, 4 Sandford, 215; *The Union Bank* vs. *Coster*, 3 Comstock, 203. This doctrine stands as well upon authority, as it does upon general principle, and the ordinary course of business. Thus, where the promise was, that in consideration that the plaintiff would marry a third person, the defendant would give him ten pounds, it was held, that no notice, either of the intention to marry, or of the fact of marriage, was necessary; *Beresford* vs. *Goodrouse*, 1 Rolle, 433. And where the defendant had promised, that if the plaintiff would make a set of sails he would pay for them, notice of the completion of the job was held unnecessary, because the debt became due and was a good cause of action as soon as the sails were completed; *Willis* vs. *Scott*, 1 Strange, 88. The point was

decided the same way, in *Lent* vs. *Padelford*, 10 Mass. 230, and *Duval* vs. *Trask*, 12 Mass. 154, and again in *Train* vs. *Gold*, 5 Pick. 380, where a promise that a third person should indemnify the plaintiff, if he went on with an execution which had been placed in his hands, was held to bind the promisor, on proof that the execution had been levied and returned, without notice of an intention to act under the promise, or anything to show that it had been accepted, except a subsequent compliance with its requisitions; although the whole evidence of the contract lay in a letter written by the defendant, who resided at a distance, to which no answer was returned by the promisee, so that the case was in all respects similar to a letter of credit or prospective guaranty. "If," said Wilde, J., in delivering the opinion of the court, "A promise B to pay him a sum of money, if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time, the obligation of the contract or promise is suspended; for until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum*; but on the performance of the condition by the promisee, it is clothed with a valid consideration, which relates back to the promise, and it then becomes obligatory. "So, if a reward be offered for the apprehension of a culprit, or for the doing of any other lawful act, the promise, when made, is *nudum pactum;* but when any one, relying upon the promised reward, performs the condition, this is a good consideration for the previous promise, and it thereupon becomes binding on the promisor." And in *Morse* vs. *Bellows*, 7 N. Hamp. 549, the defendant was held liable on a promise to repay the plaintiff the amount which he should expend in the purchase of certain bonds, although the latter had made the purchase in question without giving notice of his assent to the contract, or of his intention to act in accordance with its terms. It was held, in like manner, in *Barnes* vs. *Perrine*, 9 Barb. 202, that a promise in consideration of the future performance of an act specified by the terms of the promise, becomes binding as soon as the act is done, although the promisee may not have bound himself to do it. But it is hardly necessary to cite authori-

ties, to a point which is sufficiently implied by the tenor of every precedent of a declaration in assumpsit, where the consideration is executory, and the pleader does not rely upon an averment of mutual promises. The whole question is, in fact, reduced to that of determining what is the consideration upon which the promisor has intended to make himself liable. Where it is merely executory, no instance can be found in which there has been required, either the averment or proof of any other assent on the part of the promisee, than is necessarily implied from the execution of the task, or the performance of the act, which is the express or implied condition or consideration of the promise which he seeks to enforce.

"Mutual assent is unquestionably necessary to give birth to an agreement, which cannot exist unless the minds of the parties have concurred in one object, and in the choice of the means necessary to attain it. But, while the assent of both parties is thus indispensable, it is far from being universally, or even generally true, that it must be signified or made known by one to the other. There is no better proof of assent to a promise, than compliance with its terms, and, if this be shown, nothing more can be necessary. All that is needed to render an engagement binding, is the fulfilment of the condition or consideration on which it is made, and, unless this requires notice, none will be requisite. Those who seek to enforce an agreement, must prove that it received their concurrence; but they need not ordinarily prove that it was known to the opposite party, and still less that he received any express or formal notification of its existence. Every man has a right to dictate the terms on which he will be bound, and should neither be compelled to accept less, nor allowed to exact anything more. Hence the duties and responsibilities of the promisee must be sought in the terms or conditions imposed by the promisor, and great care should be taken not to import other matters into the contract foreign to the purpose of the parties, and, therefore, likely to defeat their just expectations. The right of either party to notice, will consequently depend on whether what he has expressly or impliedly asked from the other, is of a nature to give him notice. There can be no reason why he should go beyond his own requisitions. These must,

however, unquestionably be fulfilled, and may be of a nature to impart that knowledge incidentally, which need not be given formally, or merely for the sake of communicating it. For, when one party promises on condition, or in consideration that the other will promise also, the promise thus asked, which is indispensably necessary to the completion of the contract, necessarily operates as notice that it has been completed. Thus, what is commonly called a proposition or offer, is, in fact, a promise to be bound, if the person to whom it is made will enter into a reciprocal and binding engagement. No contract can arise until is it accepted; or, in other words, until the engagement for which it stipulates, has been actually given. But this is not because an agreement cannot grow out of mutual assent, unless each of the parties knows that the other has assented, but because the promise made by one party is conditioned for a reciprocal promise by the other, and no contract can arise until the condition is fulfilled. A concurrent promise is, therefore, under these circumstances, indispensably necessary to the birth of the agreement, and its place cannot be filled even by performance. When, however, the promise, instead of stipulating for a reciprocal promise, merely stipulates for performance; or, in other words, where one party agrees to be bound if the other will perform, without requiring him to engage beforehand that he will do so; the latter may withhold his assent until the time comes for action, and then signify it by complying with the terms of the promise, without giving notice of his intention to comply with them. This is nothing more than the well settled principle, that an act done in pursuance of a prior request, will give a right to compensation, proportionate to the intrinsic or stipulated value of the act itself. Under such circumstances, the plaintiff may choose between two different modes of pleading, and may declare on a promise to pay if the defendant will perform, or on a request to perform, followed by an implied promise of payment. These modes of declaring are ordinarily convertible, and may be supported by the same evidence; for while a prior request generally implies a promise, a prior promise always operates as a request; *King* vs. *Sears*, 1 C. M. & R. 48; *Lampleigh* vs. *Brathwait*, Hobart, 125; 1 Smith's Leading Cases, 222, 224, 424, 5 Am. ed.

"It is, indeed, said in 1 Williams Saunders, 264, Note 1, and held in *De Zeng* vs. *Bailey*, 9 Wend. 233, that a declaration which avers that in consideration that the plaintiff would perform, the defendant promised to pay, must state the performance to have been on request; but it would seem plain, both in reason and on the authority of *King* vs. *Sears*, that a promise which unquestionably implies and constitutes a request in evidence, will have the same effect when alleged in pleading.

"Whichever, therefore, of these modes of declaring is adopted, proof of a promise on one side, and of compliance with its terms on the other, will be all sufficient; and no proof or allegation that notice was given of the intention to perform, will be necessary either to give birth to the obligation of the contract, or confer a right of action for its violation. The acts done, or the engagements made on the faith of the promise, may, indeed, be of such a nature as to operate as notice; but this result will not follow in every instance, and cannot happen in any until the contract is performed.

"To allege that notice of the intention to act under a guaranty, is necessary to render it binding, is, in fact, to allege that no executory contract can be valid unless founded upon mutual promises, and not upon an antecedent request on one side, followed by performance on the other; for, to make such a notice effectual as a means of information, it must bind the party by whom it is given, and preclude a subsequent change of purpose; or in other words, have the effect of a promise. It has always been held that a request, followed by performance, is sufficient to constitute a contract both in pleading and evidence, and the allegation of an antecedent promise necessarily implies an antecedent request. The law was so held in *Lent* vs. *Padelford*, 10 Mass. 230, where the objection taken to the declaration for want of mutuality, was overruled by the court, on the ground that where the consideration for the promise of the defendant is a future performance by the plaintiff, it is unnecessary to allege that the plaintiff promised to perform it.

"It is necessary to remember that the common law differs from the civil, and perhaps from every other system of jurisprudence, in requiring that every promise shall be accompanied by some express

or implied condition, without which it cannot be binding; and, in holding that a promise, thus conditioned on one side, and a fulfilment of its requisitions on the other, are the essential elements of a contract, and all-sufficient to give it validity. Thus, while the English cases, under the 4th section of the statute of frauds, decide that the whole agreement must appear in writing, and that when it does not, parol evidence is inadmissible to supply the deficiency, they also decide that the writing may be limited to the promise and the consideration; or in other words to what the promisor binds himself to do, and to the terms on which he is willing to be bound; and, that the assent, or the acceptance of the other party may be proved aliunde, which would seem to show that it forms no part of the contract. *Stadt* vs. *Lill*, 9 East. 348; *Powers* vs. *Fowler*, 4 Ellis & Blackburn, 511; *Moon* vs. *Campbell*, 10 Exchequer, 323. Hence, after the promise, and the condition or consideration on which it is based, have been proved by writing, all the rest may be left to unwritten evidence, which must follow the terms of the promise, and need not go beyond what those terms require. Thus, a recovery may be had on a written promise to guaranty the good conduct of a servant, if the plaintiff will employ him, or will promise to employ him, on proof in the one case of a promise to employ followed by employment, and in the other, of employment only, although neither promise nor employment appear in the writing, or are proved by written evidence. A written promise, said Crompton, J., in *Powers* vs. *Fowler*, that, "if you furnish goods hereafter to A. B., I will see you paid," does not contain anything binding the promisor to furnish the goods to A. B.; but if he does furnish them, there are cases to show that the guaranty is good." And he went went on afterwards to say, that even when the writing is a mere offer,—that is, a promise on condition of a promise,—there is no reason why "the acceptance of the offer," or, in other words, the reciprocal promise for which the offer is conditioned, "should be in writing."

After a careful examination of certain of the cases which appear at first sight to establish a different conclusion, Judge Hare proceeds:[1]

[1] p. 104.

"The true rule on a question which has been needlessly complicated, was stated and followed in *Jackson* vs. *Yendes*, 7 Blackford, 526, where it was held that a proposition for a guaranty, must, like every other offer, be accepted; but, that an absolute promise to pay for such advances as another shall make, needs no acceptance, and will be binding on proof that the advances were made in pursuance of the promise. The same principle was laid down in *Williams* vs. *Collins*, 2 Law Repos. 580, and *Shewell* vs. *Knox*, 1 Devereux, 404; although the majority of the court would seem to have held, in *Shewell* vs. *Knox*, that a general letter of credit addressed to all who may choose to act upon it, must necessarily be construed as a mere offer or proposition, and consequently cannot be valid without acceptance.

"In deciding between the discordant cases which elucidate or perplex this branch of the subject, care must be taken not to lose sight of the distinctive features of the common law, and to preserve the judgment from influences drawn from other systems of jurisprudence, which differ from it in many essential particulars. The civil law agrees with the moral or natural law, in basing the obligation of contracts on the expectation created in the minds of those with whom they are made, and consequently requires that this should be made known to the promisor, unless he has waived or dispensed with such a communication. The engagement made by one party, and the assent of the other, constitute the contract, and give it legal as well as moral validity. Pardessus, Droit Commercial, Part 2, Tit. 1, Chap. 1, sect. 1, 141, 143; Pothier, Part 1, Chap. 1, sect. 1, art. 1, §§ 1, 2. The only deviation from this rule is in those cases, where the nature of the promise, or the circumstances under which it is given, render assent useless or superfluous, as when a promise is made for the purpose of inducing future resolve or action, and without any view to an immediate response or determination; Pothier, Part 1, § 2, art. 1. Thus, a promise to pay another, a sum of money, if he will cut down a tree, will be binding as soon as the tree is felled, without the aid of a promise to fell it, or any other proof or expression of assent, than the performance of the act for which the promise is conditioned. Here what is asked is not assent,

but compliance; the promisee is not required to bind himself by an obligation, and might refuse to do so if he were; and cannot assent until the time comes for action, otherwise than by saying that he will take the matter into consideration, which, if said, would be simply immaterial, and have no legal force or significance. We may, consequently, believe that where such promises are in question, which are placed by Pothier in a separate class or division, and described as "*obligations conditionelles, potestatives,*" the civil law agrees with the law of England, and holds the contract perfected by the performance of the condition. But, aside from this exception, acceptance is essential to the obligation, which is complete as soon as the promise is accepted, and derives no additional force from the acts or stipulations of the promisee. No consideration is necessary to constitute an agreement, although it may be defeated by a failure of the cause on or by which it is induced or founded, or by any error or mistake, which destroys the identity of its subject-matter, and thus prevents the minds of the parties from meeting on the same object.

"On the other hand, all engagements, however solemnly or formally made or accepted, are referred by the common law to the forum of conscience, unless they are sustained by a sufficient consideration, to bring them within the scope of a system which refuses compensation where there has been no actual loss, and makes the validity of promises depend, not on whether they have received the assent of the promisee, but on whether he has parted with value, or made stipulations on the faith of the expectations created by the promisor. The consent or concurrence of the parties in a common purpose is essential; mere assent not equally so; and the main question is, whether the terms or conditions of the promise have been fulfilled, and are sufficient to render it legally binding. Hence that which the civil law makes the exception, here becomes the rule: every promise is conditional, and derives its validity from the fulfilment of the condition, either at the time, or at a subsequent period. The promise may be what is commonly called an offer, that is an engagement to be bound if the other party will be bound also, or it may be in the form of a positive engagement to be bound absolutely,

upon and in case of performance, without exacting a reciprocal promise to perform. In either case, it is substantially the same, and depends for its force on the acts or stipulations of the promisee, without which it would be a *nudum pactum*, and want the legal obligation of a contract. The distinction between those promises, which are generally known as offers, and those which are commonly viewed as absolute, is consequently nominal rather than real; the only difference being, that the latter undertake for performance, if the promisee will perform, while the former exact an absolute promise of performance. It is indeed plain, that all contracts, however absolute, consist either in two conditional propositions or offers, which together constitute an unconditional agreement, or in a conditional promise, which has become absolute by the performance of the condition. Thus, a contract of sale grows out of an offer to buy, if the vendor will sell, and an offer to sell, if the vendee will buy; the condition on one side being payment, or a promise to pay, and on the other a transfer of the right of property, or a promise to transfer it, each of these engagements satisfying the requisitions of the other, and both together forming an absolute agreement. And on recurring to the classification adopted by the earlier pleaders, by whom declarations in assumpsit were reduced to form and method, we shall find all express contracts arranged under the two heads of promises, in consideration of promises, and promises in consideration of acts,—the one stipulating for performance, the other for an engagement to perform,—but both conditional, and depending for validity on the fulfilment of the condition. The action of assumpsit is, in fact, the earliest application of the wise and salutary principle, which, under the name of equitable estoppel, binds men, not by what they say or declare, but by what others do or promise on the faith of their declarations; and hence the right of suit devolved at common law, not on him to whom the promise was made, but on him who acted on the faith of the promise. *Edmondston* vs. *Penny*, 1 Barr, 394; *Crow* vs. *Rogers*, 1 Strange, 592; *Stewart* vs. *The Trustees of Hamilton College*, 1 Denio, 403; *Warren* vs. *Blatchelder*, 15 N. Hamp. 127; to *Depeau* vs. *Waddington*, 2 Am. Lead. Cas. Hence, while the pre-

cedents in which the science of pleading is embodied, require that all that the promisor has exacted, and all that the promisee has done in compliance with the exaction, should be set forth with the utmost precision, they contain nothing to justify the inference, that the assent of the one, or the communication of such assent to the other, is in any way material to the obligation of the promise, except in so far as both may result or be implied from what is stipulated or done in compliance with the terms of the promise. Pleading has always been regarded as the best test and criterion of legal principles, and that which finds no place in its forms and maxims can hardly be an integral part of the system of which it is the exponent.

"It is therefore plain, that the civil and common law differ in some important particulars, which must be kept in view in reasoning from one to the other. Mutual assent is the one and all-sufficient requisite under the civil law, which will in itself convert a promise into a contract; while all engagements derive their force at common law, not from the assent or acceptance of those with whom they are made, but from the injustice of allowing those who make them to violate stipulations on which others have acted; and hence no promise can be valid, unless it induces some act or forbearance, or some engagement to do or forbear, which must, moreover, be an exact fulfilment of the terms or conditions expressed by the promisor. The former system holds every promise binding which has been expressly or impliedly accepted by the promisee, but the latter requires first, a promise, next, that something shall be required in return, by the promisor, and finally, fulfilment or compliance on the part of the promisee. And while a condition is a mere accident, under the civil law, which may defeat the contract if broken, but gives no additional force when performed, it is essentially necessary, under the common law, as the connecting link between the engagement of the promisor and the acts or stipulations of the promisee, without which, the one could not serve as a consideration for the support of the other. Hence, while conditional promises form but one subdivision in the civil law, they are the only engagements known to the common law, under which every promise unaccompanied with a condition, must necessarily be destitute of a considera-

tion, and fail of effect unless sustained by a seal. Thus, the English decisions, under the fourth section of the Statute of Frauds, treat the promise and the consideration, as the essential elements of the agreement, and hold that both must appear in writing to give it validity, while the assent of the promisee may be proved by extrinsic evidence, when such proof is necessary. *Colgin* vs. *Henly*, 6 Leigh, *Moore* vs. *Campbell*, 10 Excheq. 323; *Stadt* vs. *Lill*, 9 East, 248; 1 Smith's Leading Cases, 373, 5th Am. Ed.

"This course of decisions results necessarily from the rules of the common law, which make a consideration necessary to give force to a contract; for, as the consideration can only arise from the exact fulfilment of the terms or conditions imposed by the promisor, these form an essential part of the promise itself; without which it would be impossible to trace the connection between the consideration and the promise, or to know that what the promisee has done, is that which the promisor required. In other words, that must appear in the promise as its condition, which will, when fulfilled, enure as its consideration, and thus give it force and validity as a contract."

We do not know that this view of the conditional character of promises at common law has been elsewhere advanced. It certainly furnishes a satisfactory clue to the explanation of many discrepancies between the doctrines of our own and the Roman law, on the subject of contracts. That in the one, a promise, when deliberately made upon a sufficient motive, is binding, while in the other, something further, in the shape of a consideration, is required, cannot be doubted. It is true, that promissory notes and the obligation of the acceptor of a bill of exchange, are absolute and not conditional engagements, but they are innovations in the common law, and exceptions to its rules. No other instance, we believe, can be put, of a parol promise enforceable at common law, *proprio vigore*, and independent of any act on the part of the promisee in fulfilment of some precedent condition, express or implied.

It may be proper to state in conclusion, by way of explanation of the term *obligation conditionelle potestative*, that conditions, whether annexed to contracts or testamentary dispositions, are among other divisions, distinguished by the writers on the Roman law,