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THE WANT OF CONSIDERATION AS A DEFENSE TO NEGOTIABLE PAPER.

The learned editor of a valuable collection of cases on bills and notes declares: "Prior to the case of *Rann* v. *Hughes*, 7 T. R. 350, note *a*, no authority can be found for the view that absence of consideration is a defense to an action upon a bill or note."[1] And again, "It is frequently stated in the books that, as between the immediate parties to a bill or note, a consideration is necessary to the validity of the obligation. This notion, it is submitted, is erroneous upon principle and also upon the authorities; for although it must be conceded that the courts have sanctioned the defense of absence of consideration in certain cases, these decisions should be regarded as anomalous exceptions to the rule that a bill, being in the nature of a specialty, is obligatory without a consideration, rather than as illustrations of the opposite doctrine, that a bill, being a simple contract, requires a consideration to support it."[2]

The same view is entertained by the brilliant editor of a

[1] Ames's Cases on Bills and Notes, Vol. 2, p. 641, note.
[2] Ibid. Index and Summary, p. 876, § 14.

more recent collection of cases on negotiable instruments. His statement is as follows: "The doctrine that a bill or note requires *any* consideration is of comparatively recent origin. It was unknown in the time of Blackstone (2 Comm. 446), and early American cases are to be found in which it appears to be denied or doubted (*Bowers* v. *Hurd*, 10 Mass. 427; *Livingston* v. *Hastie*, 2 Cai. (N. Y.) 246). But the modern cases now uniformly hold that a bill or note executed and delivered as a gift is unenforceable for want of consideration." [1]

On the other hand, the Supreme Court of Pennsylvania has expressed the opinion that the necessity of a consideration for negotiable paper has been settled, in English law, for centuries.[2]

Let us examine the authorities upon this disputed point.

In support of the first proposition, quoted above, the distinguished editor cites extracts from Blackstone and from four judicial utterances. One of the latter is from a Scotch decision, and another from the reporter's note of a loose comment by Baron Parke, made during the argument of a case. Neither of these is of value on the question now before us. A third is an extract from the opinion of Parker, J., in *Bowers* v. *Hurd*, 10 Mass. 427 (1813), which is as follows: "Now, we do not admit that, when one voluntarily makes a written promise to another to pay a sum of money, the promise can be avoided by proving that there was no legal and valuable consideration subsisting at the time; any more than if he actually paid over the amount of such note, he can recover it back again because he repents of his generosity." Fifteen years later the same judge said: "A negotiable promissory note given for a debt is with us evidence of payment of the debt, but where there was no previous debt or demand, the note given is *nudum pactum*. In coming to this conclusion we undoubtedly overrule some of the expressions in the opinion, as reported in the case of *Bowers* v. *Hurd*, though the case itself was rightly decided upon other principles. . . . But further opportunity to examine the cases has convinced us that the opinion so expressed is untenable; there being cases in the English and other books, which are

[1] Huffcut's Negotiable Instruments, p. 327, note 1.

[2] In re Kern's Estate, 171 Pa. 55; 33 At. 129 (1895).

cases clearly of defense founded upon no consideration, rather than a failure of one once existing." [1]

Surely a judicial utterance, which has been retracted by its author because of his admitted ignorance of decisions when it was made, does not raise a very violent presumption that it ever contained an accurate statement of the law.

The fourth judicial deliverance is from Livingston, J., in *Livingston* v. *Hastie*, 2 Cai., 246, at p. 247 (1804). Its most significant statement is the following: "No case can be found where the want of consideration alone has been admitted as a good defense." The entire extract is a mere dictum, for the learned judge adds, at p. 248, "But it is not necessary at present to decide how far a total want of consideration will form a defense, because here there was a valuable one, and there is no pretence on that ground to avoid the note."

It did become necessary, however, for the same court to decide this question in *Pearson* v. *Pearson*, 7 Johns. 26 (1810). The trial judge "told the jury that a voluntary note, though without consideration, was valid in law; that it was a vested gift, and that the defendant was under a legal obligation to pay it; and the jury, under the direction of the judge, found a verdict for the plaintiff." A motion having been made to set aside the verdict, and for a new trial, the Supreme Court, consisting of Kent, Ch. J., Thompson, Spencer, Van Ness and Yates, JJ., delivered the following opinion: "*Per curiam.* The validity of the note cannot be supported upon the ground taken at the trial, of its being a gift; for a gift is not consummate and perfect until a delivery of the thing promised; and until then the party may revoke his promise. A parol promise to pay money, as a gift, is no more a ground of action, than a promise to deliver a chattel as a gift. It is the delivery

[1] Hill *v.* Buckminster, 5 Pick. 391 (1828). In Whittemore *v.* Waters (1804), cited and approved in Gates *v.* Winslow, 1 Mass. 65, the payee of a note was defeated on the ground that "when a promise is made without consideration, the law will not enforce a performance." The same doctrine is announced in Thacher *v.* Dinsmore, 5 Mass. 300, 302 (1809); Baker *v.* Prentiss, 6 Mass. 430, 434 (1810); and in Boutell *v.* Codwin, 9 Mass. 254 (1812).

which makes the gift valid. *Donatio perficitur possessione accipientis: Noble* v. *Smith*, 2 Johns. 52. The question then was upon the delivery and consideration of the note; for if there was no consideration for the note, it was a *nude pact*, and void as between the original parties to it. This is the true point in issue, and without giving any opinion upon it to the prejudice of a future inquiry, a new trial is awarded, with costs to abide the event of the suit." [1]

Counsel on behalf of the plaintiff cited as the leading authority, in support of his contention, "that the maker of a promissory note was not allowed to aver a want of consideration:" 2 Bl. Comm. 445—the passage which has been referred to as cited by the learned editor of the cases on bills and notes. It is as follows: "And as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases, where such promise is authentically proved by written documents. For, if a man enters into a voluntary bond or gives a promissory note, he shall not be allowed to aver a want of a consideration in order to evade the payment; for every bond from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will, therefore, support them both as against the contractor himself; but not to the prejudice of creditors or strangers to the contract." This sweeping proposition of the commentator is based solely on *Meredith* v. *Chute*, Ld. Raymond, 759, 760 (1702), a decision which furnishes no warrant for the statement.

In that case, the defendant was sued upon his promise to pay the plaintiff one hundred guineas in consideration of the plaintiff's surrendering to the defendant a note for like amount made by one Hurst to the plaintiff's order. After

[1] The note in this case was not intended as a gift. Its maker, the defendant, intended to bind himself by it to pay $530 to plaintiff in settlement of a claim made by plaintiff against him. "The true point in issue" was whether there was any consideration for this written, negotiable promise of defendant.

verdict for the plaintiff, it was "moved in arrest of judgment that the consideration of this promise was not good, since it did not appear that Hurst gave this note to plaintiff upon any good consideration, and consequently the said note would be void, and then the delivery of the said note by the plaintiff to the defendant would be no prejudice to the plaintiff nor advantage to defendant. But it was resolved (*per totam curiam*) that this was a good consideration; for though no consideration was expressed in Hurst's note, yet the note being subscribed by Hurst was good evidence of a debt due from Hurst to plaintiff; and, therefore, the delivery of the evidence of his debt to the defendant, at his request, was a good consideration of the assumpsit of the defendant upon which this action is brought. *Note.* Holt, Ch. J., said he was of opinion, on the trial, that it was not necessary for the plaintiff to prove upon what consideration Hurst's note was given, the defendant having admitted it to have been upon good consideration by his promise." The case does not contain an intimation that, in an action by the plaintiff against Hurst on his note, the latter would not have been allowed to show a want of consideration. Indeed no court, of which Lord Holt was a member, would have permitted a recovery on the note, at that time, without proof by the plaintiff of the consideration for which it was given. Such a note was, in his opinion, "but evidence of a parol contract."[1] *Meredith* v. *Chute* falls as far short of establishing the doctrine that the maker of a note shall not be allowed to aver a want of consideration, as does *Haigh* v. *Brook*, 10 Ad. & E. 309 (1839), of supporting the proposition that a guarantor cannot set up the statute of frauds as a defense.

Blackstone's "inaccuracy," in the passage quoted above, was pointed out as early as 1794 by Mr. Fonblanque.[2] Even earlier than this, writers on bills and notes had declared that absence of consideration was a defense in actions on such instruments as between immediate parties and those in privity with them.

[1] Buller *v.* Crips, 6 Mod. 29 (1704).

[2] Fonblanque's Eq., Vol. 1, 342, note.

Kyd on Bills (1790), p. 274, says: "The want of consideration, it is evident, will be a sufficient defense to an action by one party against another from whom he has immediately received the instrument; for, according to general principles of law, no contract can be supported without a consideration and, accordingly, it frequently occurs that the defendant rests his case on the circumstance of the bill or note having been given merely for accommodation. But when the plaintiff has in fact given a consideration to the person from whom he immediately received the instrument, any preceding party being sued on it cannot protect himself by saying that he himself had no value of the party to whom he gave it; for by making himself a party to the instrument he contributed to its currency, and that circumstance was, perhaps, one reason that prevailed on the plaintiff to part with his money."

Similar statements are found in Bayley on Bills (1789), at pp. 121 and 123: "The only species of defense to an action in respect of a bill or note necessary to be mentioned is that which is founded upon the want of a consideration for giving or transferring it, or an illegal consideration on which it is given or transferred." "No person can insist upon a want of consideration who has himself received one, nor can it ever be insisted on if the plaintiff or any intermediate party between him or defendant took the bill or note *bona fide* and upon a good consideration."

The same doctrine is laid down by Ashhurst, J., in *Lickbarrow* v. *Mason*, 2 D. & E. 63, 71 (1787). In his discussion of the nature of a bill of lading, he says, "So it is like a bill of exchange; in which case, as between the drawer and the payee, the consideration may be gone into, yet it cannot between the drawer and indorser; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law, which is that, as between the original parties, the consideration may be inquired into; though when third persons are concerned

it cannot." It is true this is but a dictum, but its accuracy does not appear to have been questioned by judge or counsel in that much litigated case.

Moreover, it is in accord with the rule laid down in Buller's Nisi Prius, in these words: "And it seems a reasonable distinction which has been taken between an action between the parties themselves, in which case evidence may be given to impeach the promise, and an action by or against a third person, viz., an indorser or an acceptor."[1]

Although the authorities, save the last, cited thus far in opposition to Blackstone's statement are subsequent to the decision in *Rann* v. *Hughes*,[2] not one of them intimates that the defense of a want of consideration is a modern innovation; while some of them cite cases as far back as 1726 in support of this defense. Nor is *Rann* v. *Hughes* referred to as establishing any new doctrine.

Let us now push our investigations back of *Rann* v. *Hughes*, and back even of Blackstone's Commentaries.

In *Simmonds* v. *Parminter and Barrow*,[3] the drawer of a bill sued the acceptor, who had failed to pay it at maturity, for the face of the bill, and £36, 15 s. paid by the plaintiff to the holder for interest, exchange, re-exchange, costs of protest and damages. The sixth count of plaintiff's declaration recited the drawing, the negotiation, the acceptance, the non-payment and the protest of the bill, the payment of the face of the bill, and of £36, 15 s. interest, etc., to the holder, and concluded: "By reason of the premises, and by force of the usage and custom of merchants, the defendants became liable to pay the plaintiff the contents of the said bill and the said sum of £36, 15 s., and being so liable, promised payment when so requested." Defendant's counsel argued that the acceptor of a bill is not liable to the drawer, but only to the payee, and that there was no such custom of merchants as

[1] Buller's Nisi Prius, 274 (1st Ed. was published in 1772), citing the unreported case of Snelling *v.* Briggs (1741).

[2] While this case was decided in 1778, the first report of the opinion was published in 1798.

[3] 1 Wils. 185 (1747). Reported also, but not fully, in 2 Ames's Bills and Notes, 527. The italics are those of the reporter.

was set out in the count. To this the counsel for plaintiff replied: "The principal matter in this case, and upon which the whole must turn, is whether here is not a good consideration for the promise laid in this count; and I agree, if there is not, the plaintiff cannot have judgment." Lee, C. J., having expressed his view in the following terms: "The count says that the defendant accepted the bill, and became liable by the custom, and being so liable, neglected payment, and thereby the plaintiff was obliged to pay it, and did pay it; by reason of which premises and the custom, the defendant became liable, and so promised to pay the plaintiff. This seems to me, as at present advised, to be a good consideration to raise the promise;" defendant's counsel said, "If this matter be taken in the manner your lordship seems to say it must, it must be upon *contract*, but all actions upon bills are founded on *custom*. Indeed, if the defendant had said to the *drawer* I have not money by me at present, so you pay it to the *payee*, and I will pay you again; this would have been an express *contract*, and a strong *consideration* being at the defendant's request; but what I rely upon is that the *count* and *promise* laid therein are founded upon *custom* and not *contract*, and there being no such custom among merchants, it is bad." But "the whole court seemed to be of opinion for the plaintiff; and, after time taken to consider, overruled all the exceptions taken by the defendants. They said the *acceptor* had made himself liable to the *drawer*, as well as to the *payee*, and to every indorsee to whom the *payee* should transfer the bill."

That the liability of the acceptor to the drawer is upon contract requiring a consideration, as stated by plaintiff's counsel and held by the court, and is not "*ex quasi contractu*" as argued by defendants' counsel in the foregoing case, is now well settled. In *Cowley* v. *Dunlop*, 7 D. & E. 565, 572 (1798), Lawrene, J., said: "In short the question comes to this, whether the drawer of a bill of exchange, who is obliged to take it up after having negotiated it, is not confined to his action on the bill to recover against the acceptor. And it seems to me that he is, for I see no reason to raise an implied assumpsit as for money paid by the drawer for the acceptor

when the contract arising out of the bill and the custom was fully sufficient to enable him to recover what he may be obliged to pay on the acceptor's refusal."

Likewise the liability of the drawer to the payee, as well as that of the indorser to the indorsee, rests upon a true contract; it is not an obligation imposed by law.

In *Starke* v. *Cheeseman*,[1] it was argued for the plaintiff (the payee of a bill who sued the drawer, upon refusal of acceptance by the drawee,) that "the custom raises a promise in law, that the drawer will pay the money if the person upon whom it is drawn refuses to pay it." But, according to Lord Raymond's report, "Holt, Ch. J., said that the notion of promises in law was a metaphysical notion, for the law makes no promise but when there is a promise of the party. Afterwards, in this term, judgment was given for the plaintiff because the drawing of the bill was an actual promise." According to Salkeld's report, "Holt, Ch. J., held the drawing of the bill was an actual promise; and judgment was given *pro quer.*"

The nature of an indorser's liability to an indorsee is stated by the counsel for plaintiff in *Hodges* v. *Nicholas*, 2 Shower, 493, 497 (1687), as follows: "Now the law doth suppose (and that's the supposition which first grounded this sort of contract or engagement in the civil law and amongst merchants here) that if at the time of the making this indorsement my client should have asked the defendant, 'but what if this bill be not paid?' He would have answered, 'The drawer is a good man': 'But what if the drawer should fail?' He would have answered, 'Then I will pay you.' All this is as strongly implied as if it had been written in express words."

Another case, which is much older than *Rann* v. *Hughes* and a valuable authority upon the topic of this paper, is *Brown* v. *Marsh*, Gilb. 154 (1722). The report of the case and the editor's note are as follows:

"This was a motion for an injunction, and the case was: A note was given by the defendant as trustee for the executrix of Fowler for some shares in the Assiento Brass and Copper

[1] Lord Ray. 538 (1700), s. c. Salk. 128.

Mines to the plaintiff Brown, who was an original undertaker in setting on foot that bubble. And here it was very much disputed whether the plaintiff should be left to law upon this note; for that these mines were a mere bubble and had no existence in *rerum natura;* and Fowler was an innocent person that only sold the shares he had bought, and the plaintiff was an original undertaker of the project. In this case it was very much disputed whether the defendant could give anything in evidence to show that the note wanted a consideration. The court was equally divided, and two judges were of opinion that, upon promissory notes, the want of a consideration could not be given in evidence, for the words of the Statute of 3 & 4 Anne Cap. 9, touching promissory notes are, 'That all notes in writing, &c., &c., &c., shall be taken and construed to be by virtue thereof due and payable to any such person or persons, bodies politick or corporate, to whom the same is payable.' The two puisne judges were, therefore, of opinion that since the statute made it payable by virtue of the note, then the consideration of the note was not enquirable, no more than the consideration of a bond; and on a bond the defendant can only plead *non est factum* in a court of law; and if it were sealed and delivered, which were the only solemnities of contracting appointed by the law, nothing could be given in evidence touching the consideration. The other two judges thought there was a great difference between a note and a bond notwithstanding the statute; for in the case of a bond where there were solemnities of contracting, viz., the sealing and delivery if there was no consideration, yet if there was no fraud in obtaining the bond, the money was a gift in law to the obligee; but the note was no more than a simple contract, and notwithstanding the statute says that the money shall be due and payable by virtue of the note, that only makes the note itself evidence of the consideration, which it was not before the statute, as appears by the cases of *Clark* v. *Martin* and *Potter* v. *Pearson*, 1 Salk. 129. But though the note itself be evidence of consideration, yet it is not conclusive evidence but turns the proof upon the defendant to show that there was no consideration given for such a note;

and so he can show that it was still but a simple contract, and therefore but *nudum pactum unde non oritur actio*, and of this opinion was my Lord Chancellor King who moved to rule it so at Nisi Prius.

But in this case an injunction was granted on terms, the defendant agreeing to give judgment with a release of errors subject to order on hearing.

Note. This matter was very much disputed in the Hall, and this case was put: That if A forged a bank note, and gave it as a consideration to B for B's note, or if A should have given brass money for his note, could not this want of consideration be given in evidence? If not, A might recover against B when there was no debt; and certainly the statute did not design that a man should recover when there was no debt at all; for the statute only makes promissory notes as bills of exchange; and though the acceptor and indorser were bound to pay those bills, whether they had received any consideration or not, because the acceptor accepts it for the honor of the drawer and the indorser negotiates it; yet the drawer of the bill was not obliged to pay it to the person in whose behalf the bill was drawn unless he had paid him a consideration; but the owning a value received was evidence *prima facie* that a consideration was paid to the drawer of the bill: Vid. 1 Salk. 125; 4 Mod. 242, 244."

It will be observed that the two judges, who were of the opinion that a want of consideration was not a legal defer e to a promissory note, based that opinion on the language of the then recent Statute of Anne, and did not intimate that such a defense could not be interposed in an action on a bill of exchange; while the view of the other two judges and of the Lord Chancellor was that the statute, which declared that "such notes shall have the same effect as inland bills of exchange," and that the holders thereof "may maintain an action for the same in such manner as he, she or they might do upon any inland bill of exchange, made or drawn according to the custom of merchants," made the note evidence of consideration, yet not conclusive evidence, but only turned the proof upon the defendant to show that there was no con-

sideration given therefor. Moreover, the language of the reporter leaves no room for doubt that a bill of exchange was regarded by the bench and bar at that time as *prima facie* evidence only of a consideration, which could be overcome as against immediate parties and those not having the rights of *bona fide* holders for value, by proof of a want of consideration. The view, expressed by this reporter, of the rule of law then prevailing, is entitled to the highest consideration. He was Chief Baron of the Irish Court of Exchequer from July 5, 1715, to May 18, 1722, a member of the English Exchequer Chamber from May 24, 1722, until his death in October, 1725, and Chief Baron from June 3, 1725. His view is in accordance with the statements of Ashurst, J., of Bayley, of Kyd, and of modern authorities and, it is submitted, fully warrants the proposition that, as between the immediate parties to a bill or note, a consideration is and has always been necessary in English law to the validity of the obligation.

It may be said that the question raised in *Brown* v. *Marsh*, was whether a failure of consideration, not a want of consideration, is a defense to a note. Several replies can be made to such an observation. First, a failure of consideration was not a legal defense to a bond, any more than a want of consideration was a defense. Second, the judges and the learned reporter did not intimate that there was any distinction between the availability of the two defenses. Third, ample judicial authority exists for the proposition that there is no such distinction.[1]

Undoubtedly a bill or note differs from most written contracts, not under seal, in importing a consideration for the promise therein contained—it being treated by the courts as affording *prima facie* evidence of a consideration. The reason for this judicial presumption has been pointed out repeatedly.

[1] Le Blanc *v.* Sangler, 12 Mart. (La.) 402, (1822). "There is no difference between a want and a failure of consideration. Each may be set up as a defense, not only against the original payee, but also against an indorsee" who is not a *bona fide* holder for value. Hill *v.* Buckminster, 5 Pick. 391, *supra*; Ridout *v.* Bristow, 1 C. & J., 231 (1830); Bayley, B., "You may prove failure, or want, or illegality of consideration."

"A bill of exchange in its origin was an instrument by which a trade debt due in one place was transferred in another. It merely avoided the necessity of transmitting cash from place to place.[1] "Bills of exchange can only be used for one given purpose, namely, to extend credit by a speedy transfer of the debt, which one person owes another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered."[2] "In their nature they (bills of lading and bills of exchange) are different. A bill of exchange always imports to be for value received; but the very reverse is the case with the bill of lading. For in few, if any instances, is the consignor paid for the goods till delivery; and bills of exchange were first invented for the purpose of remitting money from one country to another, which is not the case with bills of lading."[3] In short, courts took judicial notice of the customs of merchants in accordance with which bills of exchange were employed as instruments for the transmission of trade debts.[4] When such an instrument was made the basis of an action, the courts presumed that it represented, as almost every bill at the time actually did represent, a trade transaction, and placed on the defendant the burden of showing that the bill in suit was exceptional in its character, in having been issued without a consideration.

It is not surprising that the want of consideration as a defense to bills and notes was rarely interposed until the present century. So long as merchants used them almost wholly for the single purpose of transferring trade debts, the question of consideration could rarely arise. As soon, however, as the currency theory of negotiable paper became prominent, and bills and notes ceased to be veritable representatives of trade transactions, and were employed more and more as instruments of credit, the want of consideration was

[1] Chalmer's Bills of Exchange, Introduction (4th Ed.) LIV.

[2] Loughborough, L., in Lickbarrow *v.* Mason, 1 H. Bl. 357, 361 (1790).

[3] Shepherd, in support of demurrer, Lickbarrow *v.* Mason, 2 D. & E. 63, 67 (1787),

[4] See the Declarations in Peter Vanheath *v.* Turner, Winch, 24 (1622), and Martin *v.* Bouse, 2 Croke Jac. 6 (1603), where the custom of merchants, as set out, includes the payment of money for the bill.

often set up as a defense to such instruments, with the result that, both in England and in this country, they were judicially recognized as forming no real exception to the rule that a consideration is necessary to the validity of every simple contract.

The soundness of this generally accepted doctrine has been attacked by counsel, frequently, of late. Whether or not these assaults are due to the positive statements and persuasive arguments which have emanated from distinguished teachers of the law in recent years, the writer does not know. This is certain, however, that a large body of judicial decisions has been evoked by these attacks within the last decade, and that they uniformly support the doctrine that a bill or note is not a specialty but a simple written contract, to the validity of which a consideration is necessary.[1]

A careful comparison of these decisions, with Chief Baron Gilbert's report of *Brown* v. *Marsh*, will show that the rule of law, stated by him nearly two hundred years ago, is the rule of law to-day on this topic. It will show, too, that the dictum of Lord Mansfield in *Pillans* v. *Van Mierop*, 3 Burr. 1664 (1765), that "in commercial cases amongst merchants the want of consideration is not an objection," has been properly characterized as "a solitary dictum barren of results;" "that

[1] A few of the recent cases in which the decisions have been based on this doctrine are the following: McCollum *v.* Edmunds, 109 Ala. 322, 19 So. 501 (1896); Leverone *v.* Hildreth, 80 Cal. 139, 22 Pac. 72 (1889); Tracy *v.* Alvord, 118 Cal. 654, 50 Pac. 757 (1897); Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608 (1896): First Nat. Bank *v.* Felt, 100 Ia. 680, 69 N. W. 1057 (1897); Marsh *v.* Chown, 73 N. W (Ia.) 1046 (1898); Dunkham *v.* Morse, 158 Mass. 132 (1893); Germania Bank *v.* Michand, 62 Minn. 459, 65 N. W. 70 (1895); Trevoli *v.* Sargent, 63 Minn. 211, 65 N. W. 349 (1895); Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180 (1894); In re Kern's Estate, 171 Pa. 55, 33 At. 129 (1895); Redding *v.* Redding's Estate, 69 Vt. 500, 38 At. 230 (1897); Price Co. Bank *v.* McKenzie, 91 Wis. 658, 65 N. W. 507 (1895).

The same doctrine has been recognized in numerous cases, of which the following are some of the most recent: Pauly *v.* Murray, 110 Cal. 13, 42 Pac. 313 (1895); Pauly *v.* O'Brien, 69 Fed. 460 (1895); Israel *v.* Gale, 77 Fed. 532 (1896); Whitehouse *v.* Whitehouse, 90 Me. 468, 38 At. 374 (1897); Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. 32 (1897); Johnson *v.* Rodger, 119 N. C. 446, 25 S. E. 1021 (1896); Fink *v.* Farmer's Bank, 178 Pa. 154, 35 At. 636. Compare the last case with Meredith *v.* Chute, Ld. Ray. 759, cited by Blackstone, and stated above.

its anomalous character was rightly seen at the time and it has never been followed;" that it came too late by a century or two to have any practical influence upon English law.[1]

If a judge of Lord Mansfield's commanding authority could not win acceptance for the anomalous doctrine that the contract of a party to negotiable paper is binding without a consideration, any attempt at this day to rehabilitate the doctrine must be doomed to failure. However ingenious and learned may be the arguments of counsel who make the attempt, these efforts will be apt to elicit from the courts only such responses as that of Mr. Justice Mitchell: "The necessity of a consideration having been settled more than four hundred years ago, is scarcely open to discussion now."[2]

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[1] Pollock's Principles of Contracts (Wald's new edition), 169.
[2] In re Kern's Estate, 171 Pa. 55 (1895).