BOOK REVIEW

CONSIDERATION RECONSIDERED, by K. C. T. Sutton, B.A., LL.B., LL.M.(N.Z.), Ph.D.(Melb.). St Lucia, Queensland. University of Queensland Press, 1974. xxxvii and 282 pp. including select bibliography and index. New Zealand price $15.

"A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other," said Lush J. in *Currie* v. *Misa* (1875) L.R. 10 Ex. 153, 162. Who can be much the wiser for reading and reflecting upon his Lordship's definition? The statement is so arid as to border on the meaningless, given—as Professor Sutton says in chapter 8 of his book—that "[t]he fundamental principle of any law of contract should be that men must be able to assume that those with whom they deal will act in good faith, and hence will make good reasonable expectations created by their promises or other conduct". The common law has, however, since the sixteenth century almost invariably required that a party furnish consideration before he may reasonably expect the other party to make good his promise. It is not surprising therefore that "the doctrine of consideration has always exercised a peculiar fascination for scholars of the common law", as is suggested in the attractive dust jacket of Professor Sutton's book.

The author defines his aims as being to survey recent developments in the doctrine of consideration throughout the common law world, to outline the criticisms levelled at the doctrine in its present form, and to suggest appropriate measures for reform. The magnitude of the task Professor Sutton has set himself will be appreciated when one recalls that "the common law world" embraces all and several the jurisdictions of the English speaking world. The book is divided into four parts, entitled respectively "Derivation and Definition", "Promissory Estoppel in the Law of England and the British Commonwealth—Departure from Dogma", "Promissory Estoppel in the United States", and "The Reform of the Doctrine of Consideration".

The treatment in Part I of the derivation and definition of consideration is, in the reviewer's humble opinion, at once too short and too long. Professor Sutton attempts in 33 pages to outline all the major views on the genesis, subsequent development, and definitional problems of consideration and to make his own comments and evaluation in each area. The result is that the uninitiated are left perplexed (reading the book under review is the writer's chief claim to initiation), for the arguments surveyed are pared to the barest bones, while the reader versed in the arguments traversed might wish to cavil with the author's treatment of a particular line of argument but find himself stymied by the very brevity of the treatment. Perhaps it would have

been preferable for the author to have eschewed any serious attempt to survey the various theories and arguments, and simply to have essayed his own exposition of the subject. For all that, readers trained in England and the British Commonwealth, benumbed by *Currie* v. *Misa,* will welcome reference to the analysis of Holmes in *The Common Law.* According to Professor Sutton, Holmes concluded that the same thing might be consideration or not according as it was dealt with by the parties: while consideration must not be confounded with motive, a *consideration* must still be given and accepted as the motive or inducement of the promise, and the *promise* must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the conception is the relation of reciprocal conventional inducement, each for the other, between consideration and promise. It has always struck the writer that the English textbooks too quickly pass over the idea that consideration is part of a whole—that it is but one element of a consensual or, to use Holmes' word, "conventional" transaction. The idea of consideration's possessing this characteristic is present in Pollock's description of consideration as "the price for which the promise of the other is bought". But too often English texts neglect the essential reciprocity of contractual obligations, in which each party's burden is the other's benefit. It is, perhaps, misleading to speak of "the Doctrine of Consideration", for this suggests that the doctrine can be studied as something in itself, and that the idea of consideration can be examined in the singular. This wholly ignores the fact that within a single contract, as commonly understood, there are necessarily plural burdens ("detriments" is the word history sanctions) and benefits—one man's poison *is* the other man's meat, and vice versa. Professor Sutton himself concludes that the traditional definition of consideration as given in *Currie* v. *Misa* is inaccurate, and that the proper approach to consideration is to regard it in terms of sale or the price paid for the promise—within the concept of a bargain. But, he says, although consideration may be described in terms of price, "it must be realised that there are exceptions to the rule, and the question remains whether the function of the courts is not to apply the rule mechanically and dogmatically, but to determine if a sound and sufficient reason exists for the refusal to enforce a particular promise". Now one would not quarrel with this conclusion, save that Professor Sutton implies that the need to admit exceptions to the rule has something to do with the idea of the law of contract as the law of bargain and sale, and the idea of consideration as the price for the reciprocal promise. The law may well wish to enforce promises other than those bought and sold. But in enforcing such promises, is the law to be thought of as enforcing rules of contract or rules of gift, unjust enrichment, or restitution? It is, perhaps, because hitherto the courts have focused on contract, and not on other areas of the law—the rules of which might suggest better grounds in policy and logic for enforcing a promise—that the extrapolation of the doctrine of consideration has become such a tortuous and discredited thing. Professor Sutton offers no new analysis of the enforcement of legal obligations voluntarily assumed. Rather he wrestles with the law as it is, and the reader of this book must struggle with the author through the nuances of a host of judges and writers to reach the author's final conclusion—that the doctrine of consideration should be retained, with modifications.

Part II of the book is the largest and perhaps the most valuable section. It contains a detailed treatment of the development of promissory estoppel in English law, a survey of the application of the principle in New Zealand, Canada, India and Pakistan, and Australia, and concludes with an assessment of the current position of the *High Trees* principle. Professor Sutton begins this section by remarking that if the test of enforceability of a promise is the existence of a bargain, of a price paid for the promise, a distinction has to be drawn between a bargain and both a conditional gift promise and also a promise intended to be made gratuitously in that no price is sought for it in return. The distinction, the author says, is between an act (or, one might say, the promise thereof) which induces the promise and by which the act (or promise) has been bought, and an act done in reliance on the performance of a promise which results in injury to the promisee when the promise is broken. It may be added that the essence of the doctrine of promissory estoppel is that the promisee has acted in reliance on the performance of a promise gratuitously made to him: it may be disputed whether the promisee must suffer injury or detriment through his action, and if so then in what that injury or detriment must consist. The *sine qua non* of promissory estoppel is action in reliance on a gratuitous promise. The distinction between the three situations—bargain, conditional gift promise (e.g. a promise to pay X $200 if X breaks his leg playing football), and promissory estoppel—is not, as the author observes, always easy to make, and in the last analysis the test must be the intention of the parties, objectively considered. Easy or not, judges and most writers have consistently attempted to make the distinction, and Part II is largely concerned with the extent to which there is enforcement of promises which have not been bargained for, but on which the promisee has justifiably relied to his detriment.

Professor Sutton begins his treatment of promissory estoppel with a review of the distinction between a representation of fact and a representation of intention. He treats *Jorden* v. *Money* (1854) 5 H.L.C. 185 as establishing the rule that the doctrine of estoppel (which would preclude the representor from resiling from the situation he has represented) did not apply to a case where the representation was not one of fact but a statement of something which the party intended or did not intend to do. The author makes no reference to the interesting analysis of *Jorden* v. *Money* (supra) by Atiyah in *Consideration in Contracts: a Fundamental Restatement* (1971) 53-59, where the thesis is advanced that the real explanation for the decision in *Jorden* v. *Money* lies in the fact that the plaintiff deliberately avoided arguing *in contract* his case for enforcement of the promise to release the debt, in reliance on which he had married. Atiyah points out that in 1854 the Statute of Frauds required a promise made in consideration of marriage to be in writing, and that the plaintiff was attempting to outflank the Statute by deliberately refraining from arguing his case on contract, and relying instead on estoppel. The conclusion Atiyah draws is that the House of Lords could not have countenanced so serious an evasion of the Statute, and that but for the want of writing the plaintiff would have succeeded in his action, and could today on the same facts successfully plead promissory estoppel as a defence. Be all this as it may, Professor Sutton puts the fact/intention contrast well as "distinguishing between a statement

of future intention not to insist upon a right and an immediate renunciation of that right". Nor would one argue with the author's assertion that "the distinction is a subtle one, and one cannot resist the suspicion that it has frequently been made in order to circumvent the decision in *Jorden* v. *Money,* while paying lip service to the doctrine established in that case".

With this background, Professor Sutton outlines the now familiar principle propounded by Denning J. in *Central London Property Trust Ltd.* v. *High Tree House Ltd.* [1947] K.B. 130 that a promise intended to be binding, intended to be acted on, and in fact acted on, is binding on the promisor notwithstanding that the promisee furnishes no consideration for the promise. Professor Sutton then points to a number of lines of authority on which Denning J. could have relied, but did not, in support of his proposition. These authorities the author collects under the heading "The Equitable Doctrine of Making Good". They include acquiescence or "standing by" as exemplied by *Dillwyn* v. *Llewelyn* (1862) De G. F. and J. 517. This line of authority dates from 1740 and embraces the principle that where an owner of land has allowed another, either by unchecked mistake or under a promised gift, to expend money on the land on the faith of the owner's express or implied representation, the owner will be compelled either to allow the other to enjoy possession of the land or to make compensation for the money expended. A further line in which a similar principle has many times been applied is the line of cases in which a promisor has been held bound by a promise made to one of the parties to an intended marriage in contemplation of the marriage. Professor Sutton also argues that the cases on breach of warranty of authority, the cases where one party has been held bound by his gratuitous waiver of strict performance of his contractual rights (as in *Panoutsos* v. *Raymond Hadley Corporation* [1917] 2 K.B. 473), and the documentary letter of credit cases all have some affinity with the principle of promissory estoppel. In each of these cases a representation is made or inferred by the courts, there is action in reliance on the express or implied representation or promise, and in many instances the courts have held the representor or promisor bound where there was no consideration furnished, or where the courts find consideration by an artificial process of construction. It is, for example, artificial to say that a party is induced to enter a contract with a principal on the faith of the agent's independent warranty of authority to act. The conclusion Professor Sutton draws from his survey is that the courts have frequently departed from the orthodoxy of enforcing only promises for which a price has been paid, and have enforced promises "where the promisee, in the absence of a bargain, has acted to his detriment in reliance on the undertaking being kept—in other words, promissory estoppel". The author draws particular attention to the fact that in many instances the courts have allowed the promisee to *bring* an action on the promise. Professsor Sutton then submits that the notion of promissory estoppel, as a basis for the enforcement of a promise and not merely as a weapon of defence, is widely established in English law and is of respectable antiquity. From this he argues that the orthodox insistence on the existence of bargain as the test of a promise's enforceability is erroneous, that promissory estoppel is well established as a basis for enforcement of promises, and that it is there-

fore historically unsound to say that promissory estoppel gives no cause of action for breach.

The review of the development of the *High Trees* doctrine in England since the case was decided is a faithful treatment of the considerable judicial and academic reaction. Predictably, Professor Sutton is critical of the decision in *Combe* v. *Combe* [1951] 2 K.B. 215 that ". . . the principle never stands alone as giving a cause of action in itself [and] can never do away with the necessity of consideration when that is an essential part of the cause of action" (ibid., 220 per Denning L. J.). The survey of promissory estoppel in Commonwealth countries is also useful. The New Zealand courts appear to have been the most receptive of the principle, and to have made some useful contributions to its refinement. In the final chapter of Part II, Professor Sutton examines the current position of the *High Trees* principle. He examines the meaning of "acting on the promise", and the vexed question whether the promisee must show that he has suffered personal detriment. Professor Sutton submits that the test to be applied in deciding whether the principle can be invoked is whether it would be inequitable in the circumstances to allow the promisor to go back on his promise, not whether the promisee has suffered loss as a result. It may be, the author says, that there will seldom be injustice sufficient to merit the application of the principle where the promisee has suffered no detriment, but it does not follow that detriment and "inequity" are co-terminous. The author cites the *High Trees* case itself as a situation where there was no detriment to the promisee, but where it would have been inequitable to allow the promisor to resile from its promise not to claim the full contract rent while conditions remained abnormal. Professor Sutton is critical of the confinement of the *High Trees* principle to the modification or release of existing contractual rights, pointing out that earlier authority tends to support the wider view that a promise will, in appropriate circumstances, be binding when the promisee has acted on it to his detriment, regardless of the pre-existence of contractual relations. Apparently the author has in mind, inter alia, the acquiescence cases. Professor Sutton is equally critical of the confinement of promissory estoppel to a defensive role. There is, he says, no valid reason why a person's rights should depend on his ability to manoeuvre the other party into bringing an action so that he can raise promissory estoppel as a defence to that suit. Furthermore, history and precedent afford many examples of the enforcement of gratuitous promises at the suit of the promisee who has acted to his detriment. Professor Sutton has performed a valuable service in drawing attention to these lines of authority. To the reviewer's knowledge, the only text dealing with estoppel in which explicit mention is made of estoppel as a cause of action is *Snell's Principles of Equity* (27th ed. 1973) where the authors discuss, at pp. 565-568, what they term "Proprietory Estoppel". Rather curiously, Professor Sutton's very compendious select bibliography does not refer to *Snell.*

In Part III of his book, Professor Sutton provides a good review of the development of promissory estoppel in the United States. The lines of authority in England and the Commonwealth on promissory estoppel all had their counterparts in the United States, though it would seem that the American experience covered a wider range, including charitable subscriptions, parol promises to give land, gratuitous

bailment, gratuitous agency, and what one writer calls "a miscellany including such diversities as bonus and pension plans, waiver, and rent reductions". According to Professor Sutton, by 1932 when the *Restatement of Contracts* was published, the American courts showed "a tendency to ignore the ' bargain ' view of consideration and to hold a promise binding when there had been action by the promisee to his detriment in reliance on the promise". Section 90 of the *Restatement* provided that "a promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise". The *Second Restatement* published in 1965, alters these provisions so that the action or forebearance induced need not be definite and substantial, and might be the action or forbearance of a third party as well as the promisee. The *Second Restatement* also introduces the interesting notion of partial enforcement by providing that "the remedy granted for breach may be limited as justice requires". The *Restatement,* both in its original and its modified form, seems to have provided considerable stimulus to the development of promissory estoppel which, Professor Sutton says, has been developed in the United States much further than in England or the other common law jurisdictions, though even in the United States it is still in the process of evolution. This part of the book contains a useful review of the English and Commonwealth decisions in such areas as charitable subscriptions, and an interesting excursus by the author on "the irrevocability of a ' firm ' offer". This passage might with profit have been considered in the recent New Zealand case *Cook Islands Shipping Co. Ltd.* v. *Colson Builders Ltd.* [1975] 1 N.Z.L.R. 422, where the court ruled that a tender by a sub-contractor acted upon by the contractor in obtaining its own contract does not bind the sub-contractor in the absence of a prior contract with him. But for other findings in his favour in the case, the contractor would have been compelled to pay the sub-contractor four times the amount of the sub-contractor's original tender.

Part IV of this book, dealing with the reform of the doctrine of consideration, should have been the most stimulating and satisfying. To a point it is, but the author's presentation of his subject does not make for easy and receptive reading. Professor Sutton appears to have an aversion for the full citation of source materials, be they cases or proposed or actual reforms. Throughout this part of the book, the author works back and forth over much the same ground, the reforms advocated or adopted in various jurisdictions, but gives only tantalizing extracts of the reforms. There is frequent mention of something "referred to earlier". The reader's memory must serve to inform him that indeed this is so, for the references are seldom footnoted. If this book is ever revised and reprinted, then in the writer's opinion an appendix containing, in the original language and in full, the recommendations for reform or reformative statutory provisions would make a very welcome addition. It would also greatly simplify the author's organisation of his subject, for he could then deal at one time with all the proposals for a particular reform in the sure knowledge that his readers would know where to find what a particular proponent has said. As the book is, the reader finds repeated variations of the same theme scattered throughout some 70 pages, with

consequentially scattered and repetitive comments—both of the author and the various writers whose comments and arguments are reviewed.

There is clearly insufficient space to recite here the reforms proposed or made in various jurisdictions to the doctrine of consideration. Professor Sutton certainly covers the ground, from New York to Ghana, and generally provides a worthwhile exposition of the operation and merits of each reform. He also provides a rather brief survey of determinants for the enforceability of promises in the civil law jurisdictions. Professor Sutton does not, perhaps, provide as much information as one might wish on the place of consideration in international trade. We are told that "the doctrine of consideration . . . plays no part in the formation of contracts for the sale of goods". The uninformed reader would appreciate an indication of how, in international trade transactions, binding contractual obligations are created. The author's treatment of the 1937 proposals of the English Law Revision Committee is rather misleading, for it is suggested in one passage that the Committee's recommendation requires both consideration and writing as proof of a binding contractual intent. In fact, as the author says both in earlier and later passages, the Committee treated consideration (past or present) and writing as alternative means for proving the requisite intent.

There are a number of minor criticisms to be made of this book. The author quite often places words within inverted commas—the quotations sometimes running to several lines—without indicating his source. This can be quite irritating, for this ill-tutored reviewer can only guess who suggested that the whole trend of the law of contract in the twentieth century has been "to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness" (p. 239). The author's style in the citation of articles is rather haphazard, and the dates of publication of books are not always given. The book also, perhaps, makes insufficient use of headings to break up the text, and sometimes seems to misplace matters under headings. Thus the author sets out the approach he is to adopt in Chapter 8 ("Proposals for Reform, Statutory Modifications, and the Possible Solutions"—p. 191) on p. 199, a page below the heading "Proposals for Reform—the New York Experiment".

These are, however, minor matters. Professor Sutton has certainly presented a very comprehensive survey of the means employed in many jurisdictions to distinguish binding promises from the rest. Few would dispute the author's conclusion that the doctrine of consideration should not be jettisoned. One shrinks from the very woolliness of one of the alternatives to the retention of consideration, namely the test of the intention of the parties to be legally bound. Describing this test, the author says on p. 196 "intention would be ascertained objectively by looking at all the relevant circumstances, including the assertions of the parties and their conduct, and gauging the sense which ought fairly to be attached to the promise. Each case would depend on its own particular facts . . . but difficulty would arise only where the parties had not clearly indicated their intention . . . and where the facts of the case left a doubt as to what the intention of the parties must reasonably be considered to be". One is left with the distinct impression that contractual intent would prove to be, as indeed it is, an infinitely variable quality. We may take com-

fort that Professor Sutton rejects this as a test, for he has obviously given the enforceability of promises wide and serious study and thought. There will never be universal agreement on which promises *should* be enforced. That is a question of policy, and the answer should and has changed over the generations. However the answer has not changed, as Professor Sutton shows, as much as is frequently thought. The reader will find that perseverance with Professor Sutton's studies of consideration justifies the effort, and if the reader must return to the development of a particular argument, that may be no bad thing in itself.

I. H. Williams