1880. June 16. „ 17. *In re* Petition of G. C. Rens.

The matter must be referred to the Master to decide upon a fit and proper person to be appointed as curator to the applicant's property.

DWYER and SMITH, JJ., concurred.

Application refused.

[Applicant's Attorney, I. HORAK DE VILLIERS.]

MALAN AND VAN DER MERWE *vs.* SECRETAN, BOON & CO.

Pactum de non petendo.—Consideration.

An agreement entered into subsequently to a contract, either varying the terms of the contract or dissolving it wholly or in part, can by our law be used as a defence to an action on the contract, even though the party bringing action have received no consideration for entering into the agreement

Perry *vs.* Alexander (*Buch. Rep.* 1874, p. 59) *commented upon and approved.*

1880. June 17. „ 18. Malan & v. d. Merwe *vs.* Secretan, Boon & Co.

In this case two actions were by consent of the parties and leave of the Court amalgamated. The action was brought by J. J. Malan and W. C. van der Merwe, both resident in the district of Wellington, against Secretan, Boon & Co., who traded in Cape Town, upon two promissory notes, one for £111 6*s.* 3*d.*, made in favour of Van der Merwe, and the other for £162 19*s.* 2*d.* in favour of J. J. Malan. The defence set up was that the plaintiffs as well as the other creditors of the defendants had agreed to accept a composition of five shillings in the pound on the debts due to them by the defendants, who tendered to the plaintiffs the sums of £27 16*s.* 7*d.* and £40 15*s.*, as being the amounts due to them under the composition. The plaintiffs denied having entered into the alleged composition. The point of law to be decided was whether this composition, for agreeing to which the plaintiffs had received no consideration, furnished a sufficient defence to the action.

Leonard (with him *Giddy*), for defendant. The compromise is in accordance with English and Roman-Dutch law. There is no doubt that a release by a creditor is an effectual defence to an action brought against the debtor. See *Voet* (2, 14, 3, and 2, 14, 28).

Jones (with him *Upington, A.G.*) *contrà*. It is clear that the compromise in question was invalid for want of consideration. That this is the law may be seen from *Stephen's Commentaries on the Laws of England* (Book II., page 59, 5th edition), and from *Van der Linden* (Book I., cap. 14, sect. 2, par 4). See also *Chitty on Contracts* (p. 44, 9th ed.).

Cur. adv. vult.

Postea (June 18th),—

DE VILLIERS, C.J.:—This is a consolidated action, in which the two plaintiffs, Malan and Van der Merwe, sue the defendants upon certain promissory notes made by them in favour of the plaintiffs. The defence is that a composition was entered into between the defendants and the plaintiffs, by which the plaintiffs agreed to accept from the defendants the sum of five shillings in the pound in full satisfaction of their demand.

No consideration was given to the plaintiffs for realising three-fourths of their claim, and the important question arises whether the agreement can be set up as a valid defence to the plaintiffs' claim for the whole of the debts.

This Court had occasion, in the case of *Alexander* vs. *Perry* (Buch. Rep. 1874, p. 59), to consider the question whether contracts entered into without consideration ought to be enforced. The defendant in that case had been sued in the Magistrate's Court for damages for breach of a contract of service, but there was no allegation that he was to receive any wages or other reward for his services, and the Court held that the absence of such an allegation was fatal to the summons. The contract between the parties, if any there was, must have been that of *locatio-conductio*, which is one of the so-called consensual contracts in which valuable consideration is clearly essential. Just as in the case of an alleged sale there is no valid contract unless a price has been agreed upon, so in the letting, whether of a house or of

1880.
June 17.
„ 18.

Malan & v. d. Merwe *vs.* Secretan, Boon & Co.

one's services, there must be a rent, wages, or other reward. But the majority of the Court went further, and laid down the far-reaching and important rule that contracts, unsupported by any consideration whatever, ought not to be enforced by the Court. Mr. Justice DENYSSEN expressed no opinion upon the question, which, he thought, had not been properly raised in the case. The judgments as reported are very brief, but, with some slight amendments, they substantially represent what fell from the Court. I have had occasion more than once to point out that the expression *nudum pactum* had a somewhat wider signification in the Roman law than in the law of England; but, on investigation, it will be found that there is a remarkable similarity in the original meaning of the expression in both systems of law, and even in the subsequent modification which the notion of *nudum pactum* underwent. In the law of England it was used in the latter part of the fifteenth century, according to *Pollock* in his excellent book on *Contracts* (2nd ed., p. 154), to denote an agreement not made by specialty so as to support an action of covenant, or falling within one of certain classes, so as to support an action of debt. It was only after a long series of decisions that the expression acquired its modern meaning of an agreement entered into without consideration. In the Roman law the same expression was used to denote an agreement not made by the form of *stipulatio* so as to support the action known as *condictio*, or falling within those classes of agreements for which the law provided the *bonae fidei actiones*. But occasional passages are to be found in the *Digest* which show that the notion of consideration was not always absent from the minds of the writers in connection with the *nudum pactum*. Thus *Ulpian* (Dig. 19, 5, 15) discusses the question whether an action can be brought against the owner of fugitive slaves to enforce an agreement by which he undertook upon their apprehension to remunerate a person who would inform him of their place of concealment. "Such a convention," he says, "is not naked (*nuda*), so that one would say that it does not give rise to an action, but it entails some degree of labour (*habet in se negotium aliquid*), and therefore it gives rise to a civil action, that is to say, *praescriptis verbis*." Now, even in regard to contracts entered into by means of *stipulatio*, it is by no means clear to

me that such contracts were ever practically enforced unless supported by a *causa*, which is the nearest equivalent for the English *consideration*. I know that *Savigny* (Obligations, § 78), differing in this respect from *Liebe*, held that a *stipulatio* without a cause "produces," as he expresses it, "a practical effect upon a man's patrimony," but his reasoning is not altogether conclusive. For instance, he passes over the evidence afforded by *Dig.* 22, 3, 25, § 4, with the remark that this text is not rightly attributed to *Paulus*, but is a rule of *Justinian's* own, which his compilers derived from a constitution of *Justinus*. But even if the rule were *Justinian's* own, it would be as binding as if it had been taken over from *Paulus*. That rule, as I understand it, throws upon the obligee under a written acknowledgment of debt, which does not distinguish the cause of debt, the burthen of proving that it was given for valuable consideration, unless the obligor had himself admitted the cause of debt. It is needless to add other passages which tend to disprove *Savigny's* view, but I would make this general remark, that I fully concur in the view expressed by *Mr. Pollock* (Contracts, 2nd ed., p. 153), that "if the Roman lawyers or the civilians in modern times had ever fairly asked themselves what were the common elements in the various sets of facts which under the name of *causa* made various kinds of contracts actionable, they could scarcely have failed to extract something equivalent to our consideration." But, next, how stands the Dutch law? *Vinnius*, *Groenewegen*, *Voet* and many other Dutch writers have laid it down as undoubted law that in their time the rule "*nuda pactio obligationem non parit*" no longer obtained in the Dutch law. I find, however, on a close investigation that what they really mean by "*nuda pactio*" or "*nudum pactum*" is the same as the original and strict signification of the expression in the Roman law. Thus *Voet*, in the passage I cited in *Alexander* vs. *Perry*, says in substance (2, 14, 9): "It is true that the cause of debt must be expressed or at least proved in order to entitle the creditor to recover, but this does not concern the question whether or not a *nudum pactum* gives rise to an action; nor is there any doubt that a person may by a *nudum pactum* promise to become surety for another, or to give a pledge, or lend money or other things; and although it is clear that such a promise did not

1880.
June 17.
„ 18.

Malan & v. d. Merwe *vs.* Secretan, Boon & Co.

give rise to an action in the Roman law, it is equally clear that at the present day an action may as properly be brought upon such a promise as upon a stipulation." He does not, however, touch the question whether such a contract would be binding if there were no consideration to support it. Suppose, for instance, A promises B three months hence to lend him all his (A's) household furniture to use it gratuitously for five years, would B be entitled to enforce the promise or claim damages for its breach? Such a promise would, I apprehend, be treated as a mere *pollicitatio* unless there was some forbearance, detriment, loss or responsibility given, suffered or undertaken by B. But supposing A delivers the furniture to B but, before the expiration of the five years, takes them back, would B have an action against A? Under the Civil law B would, according to *Paulus* (Digest, 13, 6, 17, § 3), have an action against A. His reasoning is that, until delivery of the thing, it is competent for the intending lender to withdraw from his promise, but when once the loan has been effected by delivery mutual obligations arise which will be enforced by action. But, as pointed out by *Hunter* (Roman Law, p. 302), the *commodatum*, in its original scope, is a unilateral contract imposing duties and responsibilities only on the borrower. The duties and responsibilities thus undertaken by the borrower may, therefore, be fairly deemed to be a consideration for the lender's promise to lend the thing for a fixed period. The rule of the Dutch law is the same as that of the Roman law (*Voet*, 13, 6, 9). By the law of England, however, it would appear that the loan is revocable even after delivery to the lender, but this rule was established before the term Consideration had acquired its full modern meaning. Except in the case of donation I cannot conceive of a case in which the Dutch Courts would have enforced an agreement unsupported by any consideration whatever. It is clear that they would not have enforced such an agreement in any case in which the voluntary payment by the defendant would have given him the right to institute the *condictio indebiti* or the *condictio sine causâ*. If the promise were not treated as a mere *pollicitatio* it would still be rendered practically valueless by one of the equitable defences such as the *exceptio doli* or the *exceptio non numeratae pecuniae*. *Grotius*, in the passage

cited by *Voet* and *Vinnius* to support their opinion as to the binding force of a *nudum pactum* (Introd. 3, 1, 52), says that the Germans have since times of old respected good faith above all other virtues, and have adopted the principle and practice that all promises which are made for any reasonable cause, in whatever terms expressed, confer a right to claim or reject a claim. He adds that a reasonable cause is understood when the promise is made by way of donation, or is auxiliary to some other transaction, whether the promise is made at the time of the transaction or afterwards. *Groenewegen*, in his Notes to *Grotius*, cites the *Digest* (44, 4, 2, § 3). In that passage *Ulpian* says, "*Si quis sine causâ ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiatur, exceptio utique doli mali ei nocebit; licet enim eo tempore qui stipulabatur, nihil dolo malo admiserit, tamen dicendum est, eum, quum litem contestatur, dolo facere, qui perseveret ex ea stipulatione petere.*" I did not quote this passage when treating of the Roman law upon the subject because it has been differently interpreted by different commentators, some holding that it refers only to the case where a consideration was intended at the time of the contract but afterwards failed. It is clear, however, that *Groenewegen*, in citing the passage in support of *Grotius's* view, did not so understand it. And, in his comments on the passage in his work *De Legibus Abrogatis*, he merely refers to his comments on *Dig.* 22, 3, 25, § 4, where he says that if a written acknowledgment of debt does not mention the cause of debt the alleged creditor must prove the cause except where the relationship between the parties is that of a merchant to his customer, a sick person to his physician, or the like, in which case the existence of a cause of debt might be presumed. I need here only add that according to *Van Leeuwen* (Comm. 4, 1, 5) a promise without a cause confers no right of action, that according to *Van der Linden* (1, 14, 2, § 4) contracts are void when made without consideration, and that *Van der Keessel*, the latest authority, says (Thes. 484): "On a promise which is not founded on a just *causa debendi*, an action cannot be effectually maintained in Court; although in other respects an action is maintainable on a *nudum pactum*." I have incidentally referred to *donatio* as a contract which although voluntary might under certain circumstances be enforced. It is disputed by some, how-

1880.
June 17.
„ 18.

Malan & v. d. Merwe vs. Secretan, Boon & Co.

ever, whether it can be treated as a contract at all (see *Voet*, 39, 5, 2), or whether a promise to make a donation at a future time can be enforced. Upon the latter point *Vinnius*, in his Treatise on Pacts (c. 4, § 5), says, "*Quod si pactum donationis causa in futurum concepta sit, veluti si quis dixerit, donabo tibi centum aureos, manebit hic etiamnum jus vetus, neque ex nuda hac pollicitatione promittens magis nunc obligabitur quam ante.*" Without deciding between the disputants it is sufficient to say that the right of making a donation and its effects when made are subject to so many conditions and qualifications as to prove rather than disprove the general rule that an agreement will not be enforced unless supported by a just cause. The notion that this just cause is to all intents and purposes the same as the consideration of the English law is so firmly established in the law of the Colony that it is too late, even if it were wise, to eliminate it. A similar process seems to have gone on in Lower Canada, where the old French law prevails. According to *Pollock*, whose book on Contracts was published after the decision of this Court in *Alexander* vs. *Perry*: "In the Civil Code of Lower Canada we find the English *consideration* introduced, professedly as a synonym for *cause*; it would seem therefore that the English jurisprudence on this point has been there introduced by English lawyers, and has in effect supplanted the French by its greater convenience and simplicity."

But if an agreement unsupported by a consideration does not give rise to an action, it does not follow that it will not avail as a defence to an action upon a contract to modify which the agreement has been made. Under the Civil law the contract of *stipulatio* could not be subsequently dissolved wholly or in part except by an equally solemn form of contract; but, as Mr. Hunter remarks in his *Roman Law* (p. 375), before the time of Cicero the Praetor inserted a provision in his Edict, making a pact a good defence to an action or contract. "If," says *Justinian* in his *Institutes* (4, 13, 3), "a debtor has agreed with his creditor that he shall not be sued for payment, still none the less he remains under the obligation. For by a mere agreement obligations are not in every case dissolved. The action is therefore available against him in which the plaintiff uses as his *intentio* 'if it appears that he ought to give.' But it is unfair

that, despite his agreement, he should be condemned; and therefore he can defend himself by the *exceptio pacti conventi.*" That a similar defence would be available to the defendant under the Dutch law is clear from *Voet*, 2, 14, 3, and *Vinnius* (*On Pacts*), c. 21, § 9; and the latter adds, in the next paragraph (§ 10), that pacts which detract from or otherwise vary any contract whether of *stipulatio* or *bonæ fidei*, even if entered into at the same time as the contract, may be relied upon by a defendant as a defence of release. The practice of allowing a defendant under certain circumstances to avail himself of certain facts as a defence which if he were plaintiff he would not be allowed to prove or rely upon in support of his action is not wholly unknown in the law of England. For instance, a plaintiff cannot ordinarily claim specific performance of a parol variation of a written contract. Whereas the same person, if sued for specific performance of the written contract, might give in evidence and reply upon a parol variation of the same contract as a defence *pro tanto*. It is unnecessary to cite many cases in which the so-called liberatory pacts have been held to be good defences against previous contracts. I need only refer to the case of *Roux* vs. *Executors of Roos* (1 Menz. 89), in which it was clearly assumed that the *pactum de non petendo* would be a good defence to an action by a surety who has paid the principal debt against his co-surety. In the present case there is sufficient evidence that the plaintiffs have agreed with the defendant to accept five shillings in the pound in payment of their claims, and to release the defendant from the payment of the remaining fifteen shillings in the pound. Notwithstanding this agreement the plaintiffs sue the defendant for the full amount of the debts. The defendant tenders a sum at the rate of five shillings in the pound. Judgment must be given for this amount only, and the plaintiffs must pay the costs of suit.

DWYER and SMITH, JJ., concurred.

[Plaintiffs' Attorneys, DE VILLIERS & VAN DE WALL.
Defendants' Attorneys, TREDGOLD & HULL.]