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# A Note on the Georgia Contracts Code

Julian B. McDonnell
*University of Georgia School of Law*

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## INTRODUCTION: THE ORIGINAL CODE

Today we cannot do without codes; judges, lawyers and law professors are immersed in them. Tax codes, corporate codes, procedural codes, commercial codes, criminal codes—even highway codes: the urge to reduce each area of our law to a systematic and comprehensive legislative form seems irresistible. In fact, many of the laws we call "Acts," such as the Bankruptcy Act and the Consumer Credit Protection Act, are at least minicodes. It seems a safe bet that a lawyer's advice or advocacy in our time is much more likely to be grounded on a code than a case.

Among all of these codes, the present Code of Georgia enjoys a distinguished pedigree. It traces its origins and many of its provisions to the original Georgia Code of 1860.[1] The story of that original Georgia Code has been largely lost to history, undoubtedly because it arrived simultaneously with the Civil War. For its time, the Georgia Code of 1860 was a remarkable legal document. Previous codifications in Anglo-American jurisdictions had been limited to reducing statutory materials to systematic written form or establishing new procedural systems.[2] The Georgia Code of 1860 was the first codification of the substantive areas of the common law.[3]

Today we generally think of codes as means of accomplishing modest law reforms and of making the law more accessible to

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* Associate Professor of Law, University of Georgia; B.S. 1963, Spring Hill College; LL.B. 1966, University of Virginia. I would like to thank Professor Ellen Jordan for her comments on an earlier draft of this article and for calling certain Georgia cases to my attention, and also to thank William Tinkler and Wesley Usher, students at the University of Georgia School of Law, for research assistance in the preparation of this piece.

[1] This original Code is variously referred to as the Code of 1860, 1861, or 1863. It was drafted between 1858 and 1860, and originally approved by the General Assembly on December 19, 1860, with an effective date of January 1, 1862. 1860 Ga. Laws 24. Georgia's secession from the Union, however, required a reworking of provisions dealing with its relationship to the federal government, and the war delayed the printing of the Code. It did not become effective until January 1863. *See* Clark, *The History of the First Georgia Code*, 7 GA. BAR A. REP. 144, 156-57 (1890). Since the contracts portion of the Code was approved in 1860 and not changed until after the Code's effectiveness, it is referred to here as the Code of 1860.

[2] C. WARREN, A HISTORY OF THE AMERICAN BAR, 531-39 (1966).

[3] For studies of the original Code, see Clark, *supra* note 1; Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178 (1929); Almand, *Preparation and Adoption of the Code of 1863*, 14 GA. B. J. 161, 167 (1951).

*lawyers.* No one pretends that the Internal Revenue Code is addressed to the general public. But the commissioners, led by Thomas R.R. Cobb,[4] who prepared the first Georgia Code, were directed "to prepare for the people of Georgia, a Code, which shall as near as practicable, embrace in condensed form, the Laws of Georgia, whether derived from the Common Law, the Constitution of the State, the Statutes of the State, the Decisions of the Supreme Court, or the Statutes of England of force in this state."[5] This directive suggests a code along the lines that Bentham, who coined the term "to codify," advocated. He envisioned legislation so clear and comprehensive as to eliminate or greatly reduce the need for lawyers as interpreters of state directives to the ordinary citizen.[6] This objective of codification is reflected in the report of the Committee of the General Assembly that reviewed the Code and recommended its approval. The report states:

> Your Committee intend to say, that it has not been before so extensively attempted, that the citizen should be referred to the whole embodiment of the Law in a single volume to be exactly informed what are his rights in any and every exigency, and what his remedies for their enforcement and protection. And it need hardly be added that to the large degree in which the offered Code accomplishes this great desideratum, it must and will commend itself to public approval and acceptance.[7]

In more cautious language the preface to the 1860 Code itself endorses an objective somewhere between the ambitions of Ben-

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[4] The original Commissioners elected by the legislature were Iverson L. Harris, David Irwin, and Herschel V. Johnson. Harris and Johnson, however, declined to serve, apparently on the grounds that the project was too ambitious to be completed in the allotted twenty months. In their stead, the Governor appointed Thomas R.R. Cobb and Richard H. Clark. Cobb had previously published the respected *Digest of the Statute Laws of the State of Georgia* in 1851, and a book in defense of slavery, and had served as Reporter to the Georgia Supreme Court. He was a indefatigable worker who claimed "he had never felt weariness from mental labor." Clark, *supra* note 1, at 153. Cobb was later to become a Brigadier General in the Confederate Army and die at the age of 39 in the Battle of Fredericksburg. Perhaps because he was a fallen hero, Cobb may have been given too much credit for the drafting of the Code to the exclusion of Irwin and Clark. Certainly, references to the legislation as "Cobb's Code" are unfair. But Cobb was assigned the task of drafting the substantive common law portions of the Code, while Clark was to deal with political organization and Irwin was to prepare the procedural portion. Moreover, Clark admits to Cobb's leadership of the drafting team. *See* Clark, *supra* note 1, at 152-54, 158; Smith, *supra* note 3, at 184.

[5] 1858 Ga. Laws 95.

[6] *See* J. BENTHAM, *Codification Proposal,* in 4 WORKS OF J. BENTHAM 537 (J. Bouring ed. 1962).

[7] *Preface* to GA. CODE at vi (1861).

tham and the technique of modern codification. The preface states:

> Looking alone to the words of the Act, the object contemplated by the Legislature swelled into a project, the magnitude of which would have deterred the boldest adventurer, if its accomplishment did not strike his mind as being utterly impossible. The commissioners, however, did not believe, that such a construction of the Act was a proper interpretation of the Legislative will, but construed it as requiring a Code, which should embody the great fundamental principles of our jurisprudence from whatsoever source derived, together with such Legislative enactments of the State, as the wants and circumstances of our people had from time to time shown to be necessary and proper.
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> Such a Code will furnish all the information, on the subject of Law, required either by the citizen, or the subordinate Magistrate.[8]

While the Code was to be addressed to the citizen, it was not to be an exhaustive declaration of the law along the model of civil law codes. Reading between the lines, it seems that those who conceived and drafted the Code, lawyers all,[9] did not plan to make their profession obsolete. Nor did they use the word "citizen" with the same democratic sweep that it connotes for us. They simply felt that they could produce a code that would be of use to "unprofessional readers."[10] Their product is a distinctive legislative genre. It states the general principles of the common law in a style untroubled by the need for technical nuance. Provisions of the contracts title that survive in our present Code illustrate the drafting technique:

> A contract is an agreement between two or more parties for the doing or not doing of a specified thing.[11]
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> . . . .

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[8] *Id.* at iii.

[9] The idea of codifying the substantive parts of the common law originated not with Cobb, but with George A. Gordon, a 28 year-old lawyer from Chatham County. *See* Clark, *supra* note 1, at 150-51.

[10] In Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888), Chief Justice Bleckly indicated that Cobb addressed a provision of the 1860 Code pertaining to property to "unprofessional readers." *Id.* at 380, 7 S.E. at 557. (I am indebted to John Larkins, Esq. of the Athens Bar for calling this case to my attention.)

[11] GA. CODE ANN. § 20-101 (1977).

> Impossible, immoral and illegal conditions are void, and are binding upon no one.[12]
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> . . . .
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> A consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise.[13]
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> . . . .
>
> If such a performance is impossible, and becomes so by act of God, such impossibility is itself a defense equivalent to performance; but if, by proper prudence, such impossibility might have been avoided by the promisor, it ceases to be an excuse for non-performance.[14]

These are but four of the 129 sections of our present contracts code. Of the total, ninety-nine appeared in whole or in part in the original Code of 1860, and most of those are worded today exactly as they were in 1860.

The potential impact of the original Code on contemporary Georgia contract disputes is not due solely to the style of its draftsmanship and the breadth of its coverage. The most significant aspect of the contracts portion of the Code of 1860 is that it was drafted so early. To place the Georgia codification in the stream of development of the law of contracts, consider that the Court of the Exchequer did not announce the foreseeability limitation on the recovery of contract damages until 1854 in *Hadley v. Baxendale*;[15] Holmes did not popularize the objective theory of contracts nor the bargain theory of consideration until 1881 when he published *The Common Law*;[16] and the preexisting duty rule did not receive its most celebrated application until the 1884 decision in *Foakes v. Beer.*[17]

In short, the 1860 Code was drafted before what we now sometimes disparagingly refer to as the "nineteenth-century theory of contracts"[18] was developed. It goes without saying that our contracts

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[12] *Id.* § 20-111.

[13] *Id.* § 20-302.

[14] *Id.* § 20-1102.

[15] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[16] O.W. HOLMES, THE COMMON LAW 227-30, 238-49 (1881).

[17] 9 App. Cas. 605 (1884).

[18] Two recent studies have emphasized that some principal doctrines of the American law of contracts as formulated in the *Restatements* did not come into existence until the 1800's. Professor Grant Gilmore argues that Holmes did, in fact, invent the bargain theory of contracts. G. GILMORE, THE DEATH OF CONTRACT 19-21 (1974). From a different perspective Professor Horwitz finds the objective theory of contract formation and the doctrine that the courts do not examine the adequacy of consideration to be nineteenth-century innovations. M.

code took shape before such twentieth-century developments as the recognition of promissory estoppel[19] and the elaboration of the doctrines of unjust enrichment,[20] unconscionability,[21] and impossibility.[22] Because so much has happened to contract law since 1860, and so much of our present Code traces to the 1860 codification, one might suspect that our present contracts code assures the obsolescence of contract doctrine in this state. The purpose of this Article is to show why our Code generally has not been a drag on the evolution of our law and to explore whether in the future it can be read to accommodate contemporary developments. In Part I, I propose to underscore how the present Title 20 of the Code of Georgia differs from contracts law as stated in sources such as the *Restatements of Contracts* by examining their respective treatments of the doctrine

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HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 173-85, 197-201 (1977). *See* text accompanying note 72 *infra*.

[19] RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973). The provision reads:

> Promise Reasonably Inducing Action or Forbearance.
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> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
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> (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Note that the *Restatement* itself does not use the term "promissory estoppel." Judicial opinions employed this usage to distinguish the doctrine from equitable estoppel. The established doctrine of equitable estoppel required a misrepresentation of existing fact; the new rule embodied in § 90 imposed liability upon promises producing reasonable reliance with the promisor "estopped" to assert the absence of bargain consideration. The term "promissory estoppel" has been criticized as obscuring the fact that the courts are enforcing certain promises purely on the basis of reliance, but continues to be employed in the absence of a more convenient label. *See* 1A A. CORBIN, CONTRACTS § 204 (1963). *See generally* Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L. J. 459 (1950).

[20] RESTATEMENT (SECOND) OF CONTRACTS § 89A (Tent. Drafts Nos. 1-7, 1973). The provision reads:

> (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
>
> (2) A promise is not binding under Subsection (1)
>
> (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
>
> (b) to the extent that its value is disproportionate to the benefit.

In contrast to § 90 which enforces certain promises on the basis of reliance by the promisee, § 89A recognizes that promises may be binding where the promisor has been enriched. *See generally* Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115 (1971).

[21] U.C.C. § 2-302. *See generally* Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Leff, *Unconscionability and the Code*, 115 U. PA. L. REV. 485 (1967).

[22] U.C.C. § 2-615. *See generally* Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COMM. L. J. 75 (1974).

of consideration. In Part II, I will explore the interpretative approach that the Georgia courts typically have taken in dealing with the contracts code; in Part III, I will speculate as to whether this approach can be extended to make room for the most recent developments or whether amendment of Title 20 may be required.

## I. CONSIDERATION IN GEORGIA

### A. *The Original Doctrine*

The antiquity of our contracts code is best dramatized by comparing the doctrine of consideration as it is formulated in the *Restatements of Contracts* and in Title 20 of the Georgia Code. The *Restatements* embrace the bargain theory of consideration. Section 75 of the first *Restatement* defines consideration as follows:

> (1) Consideration for a promise is
>
> (a) an act other than a promise, or
> (b) a forbearance, or
> (c) the creation, modification or destruction of a legal relation, or
> (d) a return promise
>
> *bargained for and given in exchange for the promise.*[23]

Nearly anything can be consideration provided it is the subject of a bargain. Holmes explained the nature of the required "bargain" in a famous passage from *The Common Law*:

> [I]t is the essense of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of the reciprocal conventional inducement, each for the other, between consideration and promise.[24]

The consequence of this formula is that neither benefit conferred on the promisor nor detriment incurred by the promisee will alone constitute consideration. Although detriment to the promisee might render a promise enforceable under the distinct doctrine of promissory estoppel, it does so only where justice demands. There is no

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[23] RESTATEMENT OF CONTRACTS § 75 (1932) (emphasis added).
[24] O. W. HOLMES, *supra* note 16, at 293-94.

similar equitable restriction on the doctrine of consideration. For consideration, however, the benefit or detriment must induce the promise. In fact, Holmes advanced his explanation in an attempt to show that the then-standard definition of consideration, expressed simply as benefit for the promisor or detriment to the promisee, was inadequate.[25] What Holmes rejected with his bargain theory stands today as section 20-302 of the Georgia Code: "A consideration is valid if any benefit accrues to him who makes the promise, *or* any injury to him who receives the promise."[26]

This definition of consideration accurately reflected Georgia case law at the time of the 1860 codification. In *Molyneux v. Collier,*[27] Cobb's father-in-law, Judge Lumpkin, upheld an agreement between a holder of an execution against three jointly liable judgment debtors and the debtors to take one-third of the judgment from each of the obligors. The execution holder also held a mortgage against one of the obligors, and pressing his obligor for the entire amount of the execution might have endangered the collection of the mortgage. The court sustained the arrangement because there was "a possibility of benefit to the creditor."[28] In *Tompkins v. Philips*[29] the Georgia Supreme Court upheld a promise by a holder of a priority execution to forego his claim to certain assets of the judgment debtor. The promisor received nothing for making the promise, but the promisee relied upon it by proceeding to levy on the assets himself. Both opinions emphasized that either benefit to a promisor or detriment to a promisee was sufficient to constitute consideration; both were decided while Thomas R.R. Cobb was reporter of the Georgia Supreme Court. It is hardly surprising that he included their message in the 1860 Code. These Georgia cases and section 20-302 of the present Code stand as evidence for Gilmore's thesis that Holmes invented the bargain theory of consideration.[30]

That Cobb and his fellow commissioners did not adhere to the bargain theory is confirmed by other provisions of their Code. They recognized in section 20-302 that good consideration could be "founded on natural duty and affection, or on a strong moral obligation,"[31] which are hardly the stuff of a bargain transaction. More-

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[25] *Id.* at 289-92.
[26] GA. CODE ANN. § 20-302 (1977) (emphasis added).
[27] 17 Ga. 46 (1854).
[28] *Id.* at 50.
[29] 12 Ga. 52 (1852).
[30] GA. CODE ANN. § 20-303 (1977).
[31] *Id.* § 20-304.

over, in section 20-304 they assured the enforceability of many charitable subscription pledges by providing: "In mutual subscriptions for a common object, the promise of the others is a good consideration for the promise of each."[32] Finally, in section 20-301 the codifiers provided that consideration is presumed in the case of contracts under seal.[33]

The Georgia codifiers also refused to follow two of the principal applications of the bargain theory. The Holmesian theory produced a very strict preexisting duty rule: An agreement to pay, or the actual payment of, a sum that was less than the amount that the payor was obligated to pay was not supported by consideration. Since the payor was already bound to do what he was doing or promising to do, his action could not be considered part of a bargain, and was not binding. The transaction was characterized as a coerced rather than an exchange relationship. When the Georgia codifers dealt with this doctrine in section 20-1204 of the Code, they stated it in a significantly different manner. The provision reads:

> An agreement by a creditor to receive less than the amount of his debt cannot be pleaded as an accord and satisfaction, *unless it be actually executed by the payment of the money,* or the giving of additional security, or the substitution of another debtor or some other new consideration.[34]

In Georgia the simple payment of the money without any additional element validates the arrangement, and to this extent consideration is found to be present even in the absence of a bargain.[35]

The 1860 codifiers also did not apply the bargain theory to option agreements. The bargain theory made an agreement to hold an offer open for a period of time unenforceable unless supported by consideration. Section 2689 of the 1860 Code, however, suggested that such consideration was not necessary. It read: "The consent of the parties being essential to a contract until each has assented to all the terms, the contract is incomplete; until assented to, each party may with-

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[32] G. GILMORE, *supra* note 18, at 19-21.

[33] GA. CODE ANN. § 20-301 (1977). For a discussion of the cases construing this provision, see text accompanying notes 66-68 *infra.*

[34] GA. CODE ANN. § 20-1204 (1977) (emphasis added).

[35] The crucial case construing § 20-1204 is Rivers v. Cole Corp., 209 Ga. 406, 73 S.E.2d 196 (1952). The court there adopted the position expressed by Chief Justice Duckworth in his earlier dissent in Sylvania Elec. Prod. v. Electrical Wholesalers, 198 Ga. 870, 33 S.E.2d 5 (1945). Justice Duckworth emphasized the novelty of the Georgia provision in maintaining that no dispute is necessary for a binding satisfaction if the money is actually paid.

draw his bid or proposition, *unless a given time is agreed on in which the other party may assent."* [36]

This provision remained unchanged through the Georgia Code of 1910. Then in *Prior v. Hilton & Dodge Lumber Co.*,[37] the Georgia Supreme Court in dictum stated that a promise to hold an offer open was unenforceable unless supported by consideration. In response, those who prepared the Code of 1933 omitted from section 20-108 the language emphasized above. It is interesting that the 1933 codifiers did not modify the original language to specify that the agreement to hold a proposition open needs consideration. They instead eliminated the original thought entirely. That such a change could be effected on the strength of case law dictum suggests an attitude toward the authority of the original Code, which I will explore in Part III of this Article. First, however, we must assess the implications of the consideration doctrine embodied in the 1860 Code and (save for this one change in regard to options) carried forward to our present Title 20.

### B. *Consideration Without Bargain: The Case Law Results*

The development of the doctrine of promissory estoppel has overshadowed the elaboration of the bargain theory of consideration which continues apace in the proposed *Restatement (Second) of Contracts.* The *Second Restatement* seeks to purify the consideration doctrine by changing the rules on the issue of nominal consideration. It specifies that an agreement to pay a nominal sum such as one dollar is not sufficient consideration for a promise or performance of real value.[38] The reason is that the stipulation of the one dollar gives the transaction only the form, not the substance, of a bargain. Everyone knows that if Uncle Jack exacts a promise of one dollar from his nephew and "in return" promises the nephew a valuable horse, a gift rather than an exchange is involved. The Reporter for the new *Restatement* argued that cases allowing enforcement of a promise made for a one dollar stipulation are confined to option and guaranty agreements.[39] The new *Restatement* treats these separately, allowing their enforcement without consid-

[36] GA. CODE § 2689 (1861) (current version at GA. CODE ANN. § 20-108 (1977)) (emphasis added).

[37] 141 Ga. 117, 80 S.E. 559 (1913).

[38] RESTATEMENT (SECOND) OF CONTRACTS § 75, Illustrations 4, 5, 39 (Tent. Drafts Nos. 1-7, 1973).

[39] *See* Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L. J. 598, 606 (1969).

eration if the promise is embodied in a signed writing.[40]

Although Georgia cases describing the one dollar as valuable consideration include option agreements, they are not limited to the option and guaranty context.[41] They proceed on the theory that even if the buck was not forked over, the stipulation constitutes a promise to pay the dollar, and under section 20-302 any benefit to the promisor is sufficient consideration. This result has been criticized on the ground that it allows the parties to shape the transaction so that consideration is stipulated.[42] But once one recognizes that the Georgia Code does not embrace the bargain requirement, the path is cleared for promises to pay nominal sums to validate the agreement.

The one dollar stipulation cases are not, however, the most important result of Georgia's unique codification of the doctrine of consideration. Section 20-302 allows detriment to the promisee as well as benefit to the promisor to qualify as consideration. Thus, the Georgia courts have been able to find consideration in contexts where other tribunals have had to use promissory estoppel, thereby obviating the need for an express judicial embrace of this latter doctrine in Georgia.[43] *McCowen v. McCord,*[44] a suit on a promissory note made by a widow, exemplifies the capacity of the Georgia courts to stretch their doctrine of consideration beyond the limits of the *Restatement*. The note evidenced the widow's engagement to pay a debt of her deceased husband. Although the opinion does not indicate whether the widow herself extracted any return promise, the payee of the note changed his position in reliance upon it by withdrawing his claim against the husband's estate. The trial court charged that the note should be enforced if "by reason of the giving and receiving of the note a detriment was done" to the payee.[45] In

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[40] RESTATEMENT (SECOND) OF CONTRACTS §§ 89B, 89C (Tent. Drafts Nos. 1-7, 1973).

[41] *See, e.g.*, Jolles v. Wittenberg, ___ Ga. App. ___, ___ S.E.2d ___ (1979) (indemnity agreement); Smith v. Wheeler, 233 Ga. 166, 168, 210 S.E.2d 702, 704 (1974) (option contract); Morris v. Johnson, 219 Ga. 81, 85, 132 S.E.2d 45, 49 (1963) (conveyance of land); Southern Bell Tel. & Tel. Co. v. Harris, 117 Ga. 1001, 1002, 44 S.E. 885, 886 (1903) (right to construct telephone line); Nathans v. Arkwright, 66 Ga. 179, 180 (1880) (conveyance of land). *See also* Harry v. Griffin, 210 Ga. 133, 78 S.E.2d 37 (1953); Jones v. Smith, 206 Ga. 162, 163, 56 S.E.2d 462, 464 (1949); Whidby v. Willis, 151 Ga. 49, 105 S.E. 470 (1920); J. CALAMARI & J. PERILLO, CONTRACTS § 45 (citing Georgia cases as a minority view).

[42] 6 ENCY. OF GA. LAW *Contracts* § 35 (1978).

[43] Apart from the *McCowen* case (*see* text accompanying note 44 *infra*), the Georgia appellate courts apparently have cited neither § 90 of the *Restatement* nor § 75, which embraces the bargain requirement. *See* ALI THE RESTATEMENT IN THE COURTS (1932-34 & Supp. 1976). The doctrine of promissory estoppel was subject to cursory reference in Reuben v. First Nat'l Bank, 146 Ga. App. 729, 247 S.E.2d 507 (1978). *See* text accompanying note 107 *infra*.

[44] 49 Ga. App. 358, 175 S.E. 592 (1934).

[45] *Id.* at 363, 175 S.E. at 596.

upholding this charge the Georgia Court of Appeals cited section 20-302 (then section 4242)[46] of the contracts code, together with the pre-1860 decision of *Thompkins v. Philips,*[47] and section 90 of the *Restatement*, which contains the promissory estoppel doctrine. The court held that a charge allowing enforcement on the basis of detrimental reliance was correct because in such circumstances the promise was "supported by a valid consideration."[48]

When the drafters of the *Restatement* decided that some promises should be enforceable based on reliance, they could have returned to the pre-Holmesian, Georgia definition of consideration which does not require a bargain.[49] They decided instead to retain the bargain definition of consideration and make room for the enforcement of reliance cases under the separate doctrine of promissory estoppel, which they visualized as "a substitute for consideration." Thus, the drafters of the *Restatement* established two independent grounds for promissory liability: consideration and promissory estoppel. They may have chosen this approach because of a reluctance to say that reliance on a promise by a promisee automatically made the engagement binding. Reliance was to be sufficient, under the promissory estoppel rule, only when the circumstances were such that justice then demanded enforcement. This equitable approach to enforcement in cases of promissory estoppel stands, of course, in marked contrast to the traditional nineteenth-century notion that the presence of consideration, however minimal, automatically validates the arrangement.

The Georgia Code in section 20-302 does not *appear* to provide such flexibility; it states that any detriment to the promisee is consideration. In practice, however, the courts have not been constrained by the literal language of the Code. Their adaptability is illustrated in suits for commissions by real estate agents, a type of litigation handled under the unjust enrichment doctrine in other states.[50]

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[46] GA. CODE § 4242 (1910) (current version at GA. CODE ANN. § 20-302 (1977)).

[47] 12 Ga. 52 (1852). *See* text accompanying note 29 *supra.*

[48] 49 Ga. App. at 359, 175 S.E. at 594. *McCowen* may not constitute an actual embrace of promissory estoppel since an agent of the widow sought to induce the payee to withdraw a claim against the estate to get the note. Judge Jenkins emphasized this bargain aspect of the situation. *Id.* at 364, 175 S.E. at 597.

[49] This was Corbin's preference, but he was overruled by Williston, who insisted on the bargain requirement. Corbin, however, was able to slip in § 90. The history is accounted in G. GILMORE, THE DEATH OF CONTRACTS 62-65 (1974).

[50] *See* Lee v. St. Jo Paper Co., 371 F.2d 797 (2d Cir. 1967); Miniche v. Royal Bus. Funds, 18 N.Y.2d 521, 527, 223 N.E.2d 793, 796, 277 N.Y.S.2d 268, 271 (1966). *See generally* Annot.,

In *Hill v. Horsley*[51] the owner of a tract of land gave the plaintiff real estate agent a power of attorney to sell the land, promising to pay a commission of five per cent of the gross purchase price. He also promised not to cancel the power of attorney unless he paid the same commission. After the real estate agent incurred expenses and performed services in an effort to sell the property, the owner cancelled his authority. Citing section 20-302 (then section 4242)[52] the Georgia Supreme Court allowed the agent's action against the owner for breach of the promise not to revoke the authority.

In later cases, however, where the owner did not appear to have made an express engagement to refrain from selling the property himself, enforcement was denied apparently on the ground that such a contract was not supported by consideration.[53] It has now been recognized, however, that the real estate sales agent contract in Georgia cannot be described as a "nudum pactum" after the agent incurs expenses or expends effort seeking to sell the property.[54] When relief is denied in such cases, it is often because the agent has assumed the risk that the owner will make the sale. He has relied, but in circumstances where his reliance does not demand enforcement. Without mentioning the doctrine of promissory estoppel, the Georgia courts have dealt with the sales agent exactly as a court would in a jurisdiction that has explicitly embraced promissory estoppel.

The Georgia courts apparently have employed a similar analysis in cases where insurance agents have orally promised to provide certain coverage or to effect endorsements on policies. For example, *Corporation of the Royal Exchange Assurance v. London*[55] involved an automobile insurance policy which specified that it would be void if the insured enjoyed less than clear and unconditional ownership of the car, and barred waiver of the policy terms except by written endorsement on the policy. The insured desired to mortgage

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41 A.L.R.2d 905 (1955). In situations where the agent has not assumed the risk of having his reliance go for naught, relief could be granted to him under the theory of promissory estoppel. *Cf.* J. CALAMARI & J. PERILLO, CONTRACTS §§ 6-10 (1977) (franchisees recover under promissory estoppel).

[51] 142 Ga. 12, 82 S.E. 225 (1914).

[52] GA. CODE § 4242 (1910) (current version at GA. CODE ANN. § 20-302 (1977)).

[53] *See* Ocean Lake & River Fish Co. v. Dotson, 70 Ga. App. 268, 28 S.E.2d 319 (1943); Barrington v. Dunwoody, 35 Ga. App. 517, 134 S.E. 130 (1926).

[54] *See* Stone v. Reinhard, 124 Ga. App. 355, 356, 183 S.E.2d 601, 602 (1971). *See also* Contract Management Consultants, Inc. v. Huddle House, Inc., 134 Ga. App. 566, 570, 215 S.E.2d 326, 329 (1975).

[55] 158 Ga. 644, 124 S.E. 172 (1924).

the car and left the policy with the company agent who promised that an endorsement permitting the mortgage would be made. In these circumstances, the company was held to be equitably estopped from denying the continuation of coverage. Of course there had been no misrepresentations of existing fact which would be required for any "equitable estoppel" in the traditional sense. On the other hand, where insureds have relied on oral engagements of agents to effect indorsements but the agents lacked possession of the policies and thus were physically unable to meet their promises, the reliance of the insureds has been deemed unreasonable and no estoppel has been recognized.[56] Beneath the surface of such opinions, the courts appear to be imposing liability based on ad hoc judgments as to the reasonableness of the insureds' reliance, again without mention of the doctrine of promissory estoppel.

## II. The Interpretative Approach

### A. *Examples of Adaptive Construction*

The decisions elaborating on the Code's definition of consideration are not isolated instances of judicial creativity. In cases involving a variety of sections, the Georgia courts have treated the provisions of the contracts code as common law materials rather than statutory proscriptions.

1. *Contracts of Minors.*—The 1860 Code contained the following provisions (section 2693) dealing with the contracts of infants:

> The contracts of an infant under twenty-one years of age are void, except for necessaries, and for necessaries, they are not valid, unless the party furnishing them proves that the parent

[56] Fire & Cas. Ins. Co. v. Fields, 212 Ga. 814, 96 S.E.2d 502 (1957); Aronoff v. United States Fire Ins. Co., 178 Ga. 97, 172 S.E. 59 (1933). In Fields v. Continental Ins. Co., 170 Ga. 28, 152 S.E. 60 (1929), a purchaser of properties sought reformation of fire policies that had been obtained by her vendor and sold to the plaintiff along with real estate. The policies had been pledged to a bank by the vendor and remained in its hands. The insurer's agent orally agreed to endorse and change the ownership of the policies to the plaintiff. The court may have deemed the insured's reliance on this promise unreasonable because the agent did not have the policy or because the Georgia Code required insurance policies to be in writing. But in denying relief, it stated: "The doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to promises concerning the future which, if binding at all, must be binding as contracts." *Id.* at 28, 152 S.E. at 60 (citations omitted). Thus, the courts did not appear to realize that reliance alone could be the basis for a contractual enforcement. *Fields* was not followed on similar facts in New York Underwriters Ins. Co. v. Anderson, 52 Ga. App. 112, 182 S.E. 529 (1935). Its reasoning seems also to have been undermined by Georgia Farm Bureau Mutual Ins. Co. v. Wall, 242 Ga. 176, 249 S.E.2d 588 (1978).

> or guardian fails or refuses to supply sufficient necessaries for the infant. If however, the infant receives property or other valuable consideration, and after arrival at age retains possession of such property or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him.[57]

It should be noted that section 2693 declared as a general rule that the contracts of minors are not voidable but void, and then recognized only two exceptions to this rule: contracts for necessities that a parent or guardian fails to provide and situations where the infant retains the fruits of the contract after reaching his majority. In declaring the minor's contract void, section 2693 followed not the pre-Code Georgia case law but legislation adopted in 1858.[58]

One apparent implication of the section is that a minor can make a perfectly valid contract just as though he were an adult, provided necessities are involved. Such an implication would, however, be contrary to the normal Anglo-American doctrine that the minor's responsibility in such cases is quasi-contractual, that is, that the minor cannot be sued on the contract at all but can be forced to disgorge the fair value of the necessities in order to avoid unjust enrichment.[59] *Mauldin v. South Shorthand & Business University*[60] illustrates the practical consequences of the theoretical foundation of such liability. "Dora Mauldin, of Tunnell Hill, Georgia, a seventeen-year old girl, an orphan, whose whole estate consisted of about $75 came to Atlanta and, over the objection of her guardian, made a contract with the defendant to take a five-months course in stenography for $35 . . . ."[61] Ms. Mauldin prepaid the $35 fee, but she lasted only five days in Atlanta. She requested a return of the fee but was refused on the ground that a necessity was involved. The Georgia Court of Appeals held that regardless of whether the course was a necessity, Ms. Mauldin was entitled to the return of the $35. Relying on authority from Wisconsin, Connecticut, and Vermont, the court reasoned that since the liability of a minor for necessities is quasi-contractual, an executory contract for necessities is unenforceable. A literal reading of the contracts code provision (now section 20-201) strongly suggests the contrary conclusion that Ms.

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[57] GA. CODE § 2693 (1861) (current version at GA. CODE ANN. § 20-201 (1977)).

[58] 1858 Ga. Laws 58.

[59] RESTATEMENT (SECOND) OF CONTRACTS § 18B, Comment c (Tent. Drafts Nos. 1-7, 1973).

[60] 3 Ga. App. 800, 60 S.E. 358 (1908).

[61] *Id.* at 800-01, 60 S.E. at 358.

Mauldin had responsibility on the contract if the course was a necessity. But the *Mauldin* court did not mention this provision or the contracts code at all. *Mauldin* seems, nevertheless, to have settled the question: a minor's responsibility for necessities is quasi-contractual in Georgia as in other parts of the Anglo-American world.

A second apparent implication of the original section 2693 of the 1860 Code is that ratification of a contract by a minor would not be possible if the property received by him was consumed during his minority. The contract was declared to be void with the one exception (apart from necessities) in the case of enjoyment of the property after majority. What would happen if the minor consumed the property and then after reaching his majority expressly declared himself to be bound by the contract? This was the situation in *Bell v. Swainsboro Fertilizer Co.*[62] There the Georgia Court of Appeals cited section 2693 for the proposition that retention of the fruits of a contract may amount to a ratification, but ignored its declaration of voidness. Instead the court invoked pre-Code Georgia case law for the rule that the contract was not void, but merely voidable, and it had in fact been ratified by express declaration. Apparently embarrassed by the wording of Cobb's Code, the *Swainsboro* court simply suppressed the offensive language.

The court of appeals was not so intimidated when it completed its restructuring of section 2693 in *Hood v. Duren.*[63] In *Hood* the minor had not only consumed the property conveyed to him but had also allegedly fraudulently misrepresented his age in order to obtain the contract. Following authority in other jurisdictions, the court indicated that the minor would be estopped from asserting infancy in such a case. It disposed of section 2693 by stating: "While the contract of an infant is declared by the Code to be 'void except for necessaries', it is the well-settled rule that such a contract is 'not void, but voidable, at the election of the infant, when arriving at full age.' "[64] This was the well settled rule because it was the rule of the pre-Code case law and the post-Code cases such as *Swainsboro.* In short, the judicial exposition of the law of minors' contracts both before and after the 1860 Code rather than the wording of the 1860 Code itself controlled the decision. The Georgia Court of Appeals did not consider the Code language to articluate the theory of the

[62] 12 Ga. App. 81, 76 S.E. 784 (1912).
[63] 33 Ga. App. 203, 125 S.E. 787 (1924).
[64] *Id.* at 203, 125 S.E. at 787 (citations omitted).

law of minors' contracts but to alert the "unprofessional reader" to the general unenforceability of the minors' engagements. A lawyer immediately perceives significance in the choice of the word "void" as opposed to "voidable," but the educated layperson would not necessarily appreciate the distinction. And it appears that the layperson was the addressee of the message. Indeed, it is doubtful that Thomas R.R. Cobb intended a provision which would have produced different results than did the cases reshaping section 2693. Following the *Hood* case the drafters of the 1933 Code of Georgia (in order to make sure that lawyers were notified) changed the word "void" in what was section 2693 to "voidable," carrying forward that provision in the present section 20-201.[65] Again the statutory Code was modified to conform to judicial decision.

2. *Contracts Under Seal.*—In 1854, while Thomas R.R. Cobb was its reporter, the Georgia Supreme Court had occasion to fully expound the role of seals in Georgia law. The case was *Albertson v. Halloway,*[66] a suit on a note reciting that it was sealed and containing the indication "L.S." after the signature of one of the makers. The issue was whether that maker could defend on grounds of partial failure of consideration. Judge Starnes ruled that the defense was available. He held that the rule barring such a plea in case of a sealed instrument applied only to such documents qualifying as "specialties" at common law. His opinion indicated that specialties consisted of bonds or similar instruments that were sealed and delivered with formal ceremony. A simple note did not qualify; the parties in such a case did not intend by the recital of the seal and the use of "L.S." to render the promise enforceable in the absence of consideration.

This decision established that the seal was an independent way of fixing promissory liability distinct from the doctrine of consideration only in exceptional cases. Although it was the type of opinion that one would have expected Thomas R.R. Cobb to latch on to in drafting the original Georgia Code, he did not. Instead, he provided us with section 20-301, which reads in part: "In some cases a consideration is presumed, and averment to the contrary will not be received. Such are generally contracts under seal, and negotiable instruments alleging a consideration upon their face, in the hands of holders in due course, who have received the same before dishonor."[67]

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[65] GA. CODE ANN. § 20-201 (1977).

[66] 16 Ga. 377 (1854).

[67] 189 Ga. 807, 7 S.E.2d 737 (1940).

The language seems to say that there is an irrebuttable presumption of consideration with respect to all "contracts under seal." The *Albertson* court had squarely addressed the issue, and Cobb was almost certainly familiar with it. He, however, did not confine the presumption to speciailities; instead he used the generic term "contracts under seal," precisely the type of phrase *Albertson* condemned as misleading. Whether Cobb actually intended to depart from the *Albertson* ruling is unclear; but if he did, Georgia courts were not prepared to allow for such tampering. Section 20-301 was authoritatively construed in *Trustees of Jesse Parker Williams Hospital v. Nisbet*[68] to be a mere restatement of the common law doctrine that only in the case of specialities is the presumption of consideration irrebuttable. Again the language of the Code was less important than the common law tradition out of which it emerged. The judges were unwilling to have *their law* changed by codification.

3. *Moral Obligation.*— If Cobb's objectives in regard to the seal are cloudy, his purpose with respect to moral obligation supporting a promise is not subject to serious question. In 1852 Cobb represented an illegitimate child seeking to enforce a promissory note made by her father. The note was delivered before the father died and Cobb sought to enforce it against the father's estate, relying on Lord Mansfield's position that a promise motivated by a feeling of moral obligation ought to be enforceable even if not supported by consideration.[69] Most Anglo-American jurisdictions have rejected Mansfield's view. The courts generally have confined enforcement on the ground of moral obligation to cases where a bargain promise has been rendered unenforceable by legal impediments such as the Statute of Limitations, and where the promisor thereafter has renewed his engagement. In his opinion in this case, Judge Lumpkin discussed Mansfield's position sympathetically, but refused to hold for his son-in-law's client on the basis of Mansfield's view. Instead, he strained to characterize the arrangement as an exchange in which the father gave the note to free himself from bastardy proceedings.[70] Cobb, it seems, saw the opportunity to establish his position on moral obligation in the 1860 Code.[71] He fashioned section 20-303 to

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[68] GA. CODE ANN. § 20-301 (1977).

[69] *See* Pillans v. VanMierop, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765).

[70] Hargroves v. Freeman, 12 Ga. 342, 350 (1852).

[71] Thomas R.R. Cobb was known in his time as a very scrupulous man. *See generally* W. McCash, Thomas R.R. Cobb (1968) (unpublished dissertation in University of Georgia Law School Library).

extend the validating impact of moral obligation beyond its common law role. The provision states:

> Considerations are distinguished into good and valuable. A good consideration is such as is founded on natural duty and affection, or on strong moral obligation. A valuable consideration is founded on money, or something convertible into money, or having a value in money, except marriage, which is a valuable consideration.[72]

Early decisions under section 20-303 seemed to confirm that the provision moved towards, if it did not adopt, Mansfield's view. In *Parrott v. Johnson*[73] a promise by a farmer to refund to his tenants money that they had paid him for allegedly worthless fertilizer if the farmer was successful in resisting an action for the price was held to be enforceable. The court stated that if the farmer "had collected from his tenants what he ought in equity and good conscience to refund, his promise to refund would not be without the consideration, at least, of a strong moral duty."[74] Later in *Gray v. Hamil*[75] a trader who disabled himself by the use of stimulants promised his partner a sum to reflect that the working partner had borne more than his share of the partnership labor. The court stated:

> The ultimate question, therefore, is, whether there was such consideration for the agreement in the present case. That the circumstances proved raised a strong moral obligation upon the disabled partner, his disability being voluntarily contracted, to pay for services which he ought to have rendered but which his co-partner rendered for him, admits of scarcely any doubt. According to the common law as now generally understood and administered, such an obligation would not suffice as consideration for an executory promise. Our code, however, [section 20-303] expressly recognizes a strong moral obligation as a consideration for a contract; and we see no reason for confining this to executed contracts, especially in a case of such strong natural equity as the present.[76]

These earlier cases, however, did not control when section 20-303

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[72] GA. CODE ANN. § 20-303 (1977).
[73] 61 Ga. 475 (1878).
[74] *Id.* at 478.
[75] 82 Ga. 375 (1888).
[76] *Id.* at 385 (citations omitted).

received its decisive construction in *Davis & Co. v. Morgan.*[77] Morgan had been employed by Davis & Co. for one year at forty dollars per month. He alleged that after he had received an offer from another employer, Davis & Co. had agreed to pay him an additional $120 when his year was completed. Instead, Morgan claimed, Davis & Co. wrongfully had discharged him several weeks before the end of the term. The jury returned a verdict for Morgan for breach of the promise, but the Georgia Supreme Court reversed. The court held that even if the promise occurred, it could not be enforced, because the language "strong moral obligation" in section 20-303 refers to an obligation "supported either by some antecedent legal obligation, though unenforceable at the time, or by some present equitable duty."[78] According to Professor Henderson, the effect of the *Morgan* decision is to bring Georgia law into line with that of other jurisdictions: "The statute merely returns the concept of moral obligation to a role of rationalizing the mechanics of revival of discharged obligations."[79] At the same time the courts have confined the language in section 20-303 concerning "natural duty and affection" to cases involving relatives by either blood or marriage.[80] Section 20-303 leads to the enforcement of family promises that would not be enforceable in other jurisdictions, but leaves the law of the marketplace undisturbed. In that crucial arena the pull of the common law was too strong for Mr. Cobb's attempted reform.

4. *Inadequacy of Consideration.*—The centerpiece of the nineteenth-century theory of contracts was the maxim that the courts do not inquire into the adequacy of consideration: the parties have made their bargain and must now live with it. Professor Horwitz recently traced the history of this doctrine in *The Transformation of American Law.* He finds that until the nineteenth century courts were still under the influence of the scholastic notion that contracts were enforceable because of the fairness of the exchanges they embodied. Under this theory the courts could decline to enforce bad bargains. Horwitz says that the judges in the nineteenth century rejected inquiry into the fairness of exchanges because they found the scholastic doctrine inadequate for the needs of a developing market economy.[81] The kind of opinion which Horwitz has in

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[77] 117 Ga. 504, 43 S.E. 732 (1903).

[78] *Id.* at 507, 43 S.E. at 733.

[79] Henderson, *supra* note 20, at 1133.

[80] *See* Cannon v. Williams, 194 Ga. 808, 813, 22 S.E.2d 838, 844 (1942), and cases cited therein.

[81] M. HORWITZ, *supra* note 18, at 180-85.

mind is that of Judge Lumpkin in *Robinson v. Schly.*[82] At question there was whether a transfer of properties to Schly was effective where the consideration given to his transferors was apparently worth much less than the properties conveyed. The trial court charged that the transfer was void if the consideration was grossly inadequate and that a consideration of not more than one-fourth the value of the property would be grossly inadequate. Judge Lumpkin found this charge to be in error. He wrote:

> We believe it to be well settled, that mere inadequacy of price, or any other inequality in the bargain, is not, *per se,* a distinct principle of relief in Equity. Much less does the Common Law know or recognize any such principle. The value of any commodity is its marketable price, which is, and always must be, forever changing; and it was well remarked by Lord Ch. Baron Eyre, in Griffin vs. Spratley, (1 Cox's Rep. 383) for the purpose of demonstrating the inconvenience and impracticability, if not the injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief—"that if Courts were to unravel all such transactions, they would throw everything into confusion, and set afloat the contracts of mankind."[83]

It appears that Thomas R.R. Cobb had received Lumpkin's message on the subjectivity of values in a market economy, but had been only partially converted. Section 20-307 of the Code was drafted by Cobb to read: "Mere inadequacy of consideration alone will not void a contract. If the inadequacy be great, it is a strong circumstance to evidence fraud; *and in a suit for damages for breach of the contract, the inadequacy of consideration will always enter as an element in estimating the damages.*[84] The emphasized language reflects a continued adherence to the "medieval" theory of fair exchange. Its anachronism—even in 1860—was confirmed when the provision was construed in *Yaryan Rosin & Turpentine Co. v. Haskins.*[85] There the court stated that the emphasized statement allowing adjustment of damages to reflect disparities in consideration

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[82] 6 Ga. 515 (1849).
[83] *Id.* at 524.
[84] GA. CODE ANN. § 20-307 (1977) (emphasis added).
[85] 29 Ga. App. 753, 116 S.E. 913 (1923).

> was introduced in the Code of 1861, apparently as a codification from the common law or from some of the older cases, which are . . . "anomalous cases of unconscionable bargains, in which promisors have been excused from performance according to the terms of the bargains, and in which the promisee recovered only what was fairly due to him."[85]

The court reviewed the "modern" authorities on inadequacy of consideration such as *Robinson v. Schly.* It then struggled with the dated language Cobb had added to the Code. Its analysis of the section, though lengthy, merits examination in full because it says so much about how the Georgia courts have approached the contracts code.

> To permit the measure of damages to be determined in the light of the consideration alone would be allowing by indirection what the practical unanimity of decisions declares cannot be done directly, namely the effectual destruction or setting aside of the contract on account of the mere inadequacy. The result would mean the impairing of contracts, interference with the freedom of men to exercise their own judgment, attend to their own affairs, and bargain as they please; to spread anarchy in commerce and chaos in the important business relations of life. It would run counter to many of the other code sections and collide with hundreds of decisions laying out the reasonable, definite, and reliable standards for the ascertainment of damages from breaches of contractual duty, and leave every such controversy wide open to the varying judgments and peculiar notions of whatever jury might be called to sit upon the particular case. The section in question must be examined in the light of the others and of the many decisions in reference to rules for the measurement of damages to be awared in cases of breaches of the various classes of contracts. The part of the section which is invoked, that "on a suit for damages for breach of the contract, the inadequacy of consideration will always enter as an element in estimating the damages," can mean only that the inadequacy *with other circumstances* sufficient for the law's notice may combine to reduce the damages, by scaling or mollifying the usual rule; but the smallness of consideration by itself, if there be any at all, can not have such effect.

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[85] *Id.* at 762, 116 S.E. at 917-18 (quoting T. METCALF, PRINCIPLES OF THE LAW OF CONTRACTS 215 (1880)).

> From the foregoing authorities and others besides, we believe that the word "element" as employed in the section must have been used in place of or as the equivalent of "circumstance," and that the clause as stated has the meaning of this: "And on a suit for damages for breach of the contract, the inadequacy of consideration will always enter as a *circumstance* in estimating the damages;" and that, when construed in connection with other sections and well-known principles, it provides only that where other circumstances are present as a cause for relief, the inadequacy may be considered along and in connection therewith. "Element" is defined by Webster as "A component or essential part; especially, a simple part of anything complex; a constitutent; ingredient." Thus, inadequacy is only one of other constitutents or ingredients of a general cause for reducing the damages. If this construction seems strained, we think it is not worse so than one which would set at naught other principles which are thoroughly established, and in harmony with which this section must be regarded.[87]

Since the consequences of Cobb's language as perceived by the judges are unacceptable, the language must be rendered inoperative, no matter how "strained" the resulting translation of the legislation.

### B. *Purpose of Adaptive Construction*

There are cases construing Title 20 which emphasize a literal reading of the language of the Code and which could be offered as counterexamples to those discussed above. For example, *Gray v. Aiken*[88] focuses on the language of the definition of a contract in section 20-101. That definition reads: "A contract is an agreement between two or more parties for the doing or not doing of some specified thing."[89] The issue in *Gray* was whether an agreement to pay the plaintiff a salary of $7,500 per year plus a share of the profits to be determined and distributed equitably by the defendant gave the plaintiff an enforceable claim to a share of the profits. The court stressed the use of the word "specified." Turning to *Webster's*, the

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[87] *Id.* at 765-66, 116 S.E. at 919-20.

[88] 205 Ga. 649, 54 S.E.2d 587 (1949).

[89] GA. CODE ANN. § 20-101 (1977). This definition appears to be drawn from Blackstone, who defined a contract as "an agreement, upon sufficient consideration, to do or not to do a particular thing." 2 W. BLACKSTONE, COMMENTARIES 442 (Lewis ed. 1902). Note, however, that Thomas R.R. Cobb did change "particular" to "specified."

court found that "to specify" means "to mention or name in a specific manner, to tell or state precisely or in detail."[90] Under this definition, there was, of course, no enforceable claim to a share of the profits. On its facts the ruling in *Gray* is not unusual; in fact one would expect that most common law courts particularly at the time of the *Gray* decision would have come to the same conclusion in the absence of any objective way of setting the plaintiff's share of the profits.[91] If, whenever the indefiniteness issue was raised, the Georgia courts returned to the definition of "to specify" given in the *Gray* opinion, then a serious and undeniable rigidity would be introduced. But the courts have not done this. For example, in *Ideal Realty Co. v. Reese*[92] the court of appeals upheld a real estate sales contract setting the price at $52,000 or $7,000 per acre, whichever was greater. It did not even cite the Code but relied instead on the maxim: "That is definite which can be made definite."[93] Or consider *Hale v. Higginbothan,*[94] where the court enforced an oral contract for the sale of a portion of the milk base of a dairy farmer on the ground that the quantity of product involved was determinable under federal government standards. The *Gray* opinion gave a very wooden interpretation to section 20-101 because there was no felt need to update the provision to conform to contemporary common law standards.

The doctrine of impossibility is another area where the Code could lead to obsolete results. Section 20-1102 reads: "If such a performance is impossible, and becomes so by act of God, such impossibility is itself a defense equivalent to performance, but if, by proper prudence, such impossibility might have been avoided by the promisor, it ceases to be an excuse for nonperformance."[95] This provision was involved in *Felder v. Oldham,*[96] where a contractor who had promised to remove timber by a specified time claimed the right to more time because labor shortages caused by World War II had delayed his work. The court stated that section 20-1102 would provide the contractor with at least an excuse for nonperformance

[90] 205 Ga. at 652, 54 S.E.2d at 589 (quoting WEBSTER'S INTERNATIONAL DICTIONARY 2415 (2d ed. 1934)).

[91] *See, e.g.,* Varney v. Ditmars, 217 N.Y. 223, 111 N.E. 822 (1916) (employment agreement calling for fair share of profits too vague).

[92] 122 Ga. App. 707, 178 S.E.2d 564 (1970).

[93] *Id.* at 708, 178 S.E.2d at 566.

[94] 228 Ga. 823, 188 S.E.2d 515 (1972).

[95] GA. CODE ANN. § 20-1102 (1977).

[96] 199 Ga. 820, 35 S.E.2d 497 (1945).

if an act of God were involved, but quickly concluded that the war could not be attributed to divine origins. A careful reading of the opinion, however, shows that the court did not draw from section 20-1102 the negative implication that would limit the impossibility defense to situations where acts of God were present.[97] The court indicated that other unforeseen casualties or misfortunes over which the contractor had no control would suffice, but concluded that the war was not such an unforeseen event. Formulated in this manner the Georgia law of impossibility would not seem to vary significantly from that prevailing in other jurisdictions. Although the *Felder* court gave a literal reading to the phrase "act of God" in section 20-1102, it does not appear that such a construction precludes the development of the impossibility doctrine in Georgia.

The Georgia courts seem to resort to literal readings of the contracts code when the doctrine they find there meshes with the court's view of what the law of contracts should be. In contrast, the adaptive readings noted earlier occur when the Code language seems out of step with contemporary needs. Georgia's early codification of contract doctrine neither insulates its judges from the changes in contract law that have occurred in this country, nor from the shifting national perceptions of utility or fairness. Further, Georgia judges have appreciated the legislative genre with which they are confronted. They have assumed with some justification that the contracts code is not independent of the common law from which it was derived. The adaptive approach provides them a means of assuring that Georgia contracts law keeps pace with the times.

### C. *Problems With Adaptive Interpretation*

To praise adaptive interpretation as a means of avoiding statutory obsolescence does not mean that the approach is free from difficulties. If the statute is not more dignified than the case law, the jurist may be tempted to opine without checking the legislation, secure in the belief that he knows the common law. One suspects that the dictum in *Prior v. Hilton & Dodge Lumber Co.*,[98] asserting that an option must be supported by consideration, was of this variety. Obviously, it is poor judicial technique simply to suppress legislative language when it is embarrassing, as was done in

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[97] *Id.* at 824-25, 35 S.E.2d at 500.

[98] 141 Ga. 117, 80 S.E. 559 (1913). *See* text accompanying note 37 *supra*.

*Mauldin v. South Shorthand & Business University*[99] and *Bell v. Swainsboro Fertilizer Co.*[100] It is only a slight improvement to disclose the legislative text but to reject it summarily as inconsistent with the common law formula as the court of appeals did in *Hood v. Duren.*[101] It is better, after admitting the legislative word, to struggle with the text in an effort to show that the legislature could not possibly have meant what it said, or that the collective purpose of the legislators in relation to the litigated situation was at least uncertain. There are values other than avoidance of statutory obsolescence. Legislation may be used to reform the common law, in which case adaptive interpretation may defeat the purpose of its authors and frustrate accomplishment of the reform.

It appears that this result is less likely to be a problem with legislation of the genre of the 1860 Code than with modern legislation such as the Uniform Commercial Code. The U.C.C. was consciously prepared with reform in mind—albeit reform of a decidedly unrevolutionary sort. Moreover, the specific improvements sought were for the most part objectively declared in advance in commentary accompanying the presentation of the U.C.C. to state legislatures.[102] A court may legitimately disregard the subjective desires of a Cobb or a Llewellyn if those desires are not manifested in the language of the legislation, the drafter's comments, or other legislative history.[103] In contrast to the U.C.C., the Code of 1860 was not presented to the legislature as a reform measure but as a restatement of the common law. Whatever reform the commissioners sought, they did so furtively.[104] The type of code which the commissioners sought to produce does not seem calculated to prevent most of the adaptive readings to which it has been subjected. Where the courts seem to have preferred their own policy, as in the case of seals

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[99] 3 Ga. App. 800, 60 S.E. 358 (1908). *See* text accompanying note 60 *supra.*

[100] 12 Ga. App. 81, 76 S.E. 784 (1912). *See* text accompanying note 62 *supra.*

[101] 33 Ga. App. 203, 125 S.E. 787 (1924). *See* text accompanying note 63 *supra.*

[102] *See* Skilton, *Some Comments on the Comments to the Uniform Commercial Code,* 1966 WIS. L. REV. 597.

[103] It is for this reason that Justices Frankfurter and Holmes objected to talk of legislative "intent." *See* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 538 (1947); Holmes, *The Theory of Legal Interpretation,* 12 HARV. L. REV. 417 (1899).

[104] In recently construing provisions of the suretyship code that also had their origins in the Code of 1860, the Georgia Supreme Court stated that "making new law would have been inconsistent with the intent to merely codify the common law." Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460, 461, 246 S.E.2d 316, 317 (1978). The commissioners did not annotate the original Code, perhaps for fear that annotations would expose how many provisions were new. *See* Smith, *supra* note 3, at 186.

and moral obligation, the authors of the 1860 Code may be posthumously estopped from complaining.

## III. PROSPECTS FOR THE FUTURE

Given the adaptive interpretations of the contracts code noted in the previous section, the question remains as to whether this codification—derived in large part from the original 1860 Code—will be able to accommodate the future. The doctrinal areas which from a national perspective appear to have the greatest potential for growth are promissory estoppel, unconscionability, and impossibility. As noted above, section 20-1102 does not preclude the courts from excusing performance on the ground of impossibility when they feel such relief is appropriate. Title 20 does not deal with unconscionability; thus, it erects no barriers to relief under that doctrine. The one area which may pose the most difficulty is the doctrine of promissory estoppel. As shown in Part II, the Georgia courts, armed with section 20-302, have not narrowed their definition of consideration to require that a bargain be present, but have in some circumstances allowed detriment to a promisee to support enforcement of engagements. They have done so, however, on the basis that the reliance constitutes consideration, not by embracing the distinct doctrine of promissory estoppel. But precisely because enforcement on grounds of reliance has been submerged in Georgia law, neither the courts nor the bar seem aware of the potentialities involved in this policy. Georgia lawyers seem to overlook the modern doctrine of promissory estoppel in cases where it should be argued. And when it is invoked, Georgia courts have difficulty fitting it within their received categories.

These problems are compounded now that nationwide promissory estoppel has evolved into something more than a "substitute for consideration." It now appears as an entirely different type of promissory liability with attributes different from those of bargain contract. This new writ has been used where traditional contractual liability would be barred by the Statute of Frauds, the parol evidence rule, or indefiniteness of terms.[105]

*Wheeler v. White,*[106] a 1966 Texas decision, illustrates how far this evolution has come. Wheeler alleged that White had breached a promise either to secure a loan or to furnish the money to finance the construction of a commercial building or shopping center on

[105] The cases are collected in J. CALAMARI & J. PERILLO, CONTRACTS §§ 6-8 (2d ed. 1977).
[106] 398 S.W.2d 93 (Tex. 1965).

Wheeler's property. In reliance on the promise, indeed at White's specific urging, Wheeler had razed existing buildings on the site which were worth approximately $58,000. The Texas Court of Civil Appeals found the promise to provide the financing to be too indefinite for enforcement as a bargain contract. The contract failed to specify details of the financing such as the amount of the monthly repayments. Nevertheless, the court concluded that Wheeler's complaint stated a cause of action based on the doctrine of promissory estoppel, with Wheeler's recovery limited to the detriment that he had sustained. Contemporary mores dictated that White could not induce the reliance that occurred and then escape responsibility for it. Here a court used promissory estoppel not as a substitute for consideration but as a means of recognizing liability even though the terms of the arrangement were too indefinite to qualify as a contract. The liability, however, did not carry with it a normal contract measure of damages which would have protected Wheeler's expectations; instead, his reliance interest was the measure of his recovery.

How would a case like *Wheeler v. White* be dealt with if it arose in Georgia? We now have a good indication in light of the court of appeals decision in *Reuben v. First National Bank.*[107] There a contractor alleged that the defendant orally promised to extend one hundred percent financing for the acquisition of certain land. Later the contractor was allegedly induced to accept eighty percent financing of the land acquisition (and to enter a written agreement that the acquisition financing would be on that basis) by oral engagements that the defendant would also provide five construction loans. Failure to provide these loans was said to have caused the contractor's default and the loss of his equity in the project. His complaint alleged a fraudulent scheme by the financer including allegations that the financer had no intent to extend the financing at the times it was promising to do so. The court of appeals upheld a summary judgment for the defendant financer. It recognized that fraud could sometimes be predicated on promissory statements if the promissor had no intent to keep his engagement when he made it, but stated that such a claim could not be made when the promise was unenforceable due to indefiniteness. The alleged loan promises of the defendant were subject to that objection because neither interest rates nor due dates had been specified. It is apparent, therefore, that the court of appeals would agree with *Wheeler v. White*

[107] 146 Ga. App. 864, 247 S.E.2d 504 (1978).

to the extent that the promise to provide financing there was found to be too indefinite for a bargain contract.

But what of promissory estoppel? Rather than dealing seriously with the plaintiff's contentions based on that doctrine,[108] the court only stated:

> Finally, appellants argue that doctrines of promissory and equitable estoppel bar the grant of summary judgment to appellees. These doctrines are inapplicable for the reason that estoppel applies to representations of past or present facts and not to promises concerning the future, especially where those promises concern unenforceably vague future acts.[109]

A more basic misunderstanding of promissory estoppel would be hard to imagine since the term is employed to indicate that promises as to the future rather than factual statements that might give rise to equitable estoppel are the basis of the liability.[110] A serious analysis of the new doctrine in the context of this Georgia case could lead to the conclusion that section 20-302, and the cases under it recognizing that detriment to the promisee is consideration, preclude the recognition of promissory estoppel as a distinct type of liability. On the other hand, the courts could recognize that section 20-302 was not intended as a mathematical type of formula to fix in concrete the dimensions of promissory liability. It was, in fact, the codification of a common law slogan suggesting the types of promises that should be enforced. Indeed, the real estate commission cases illustrate that section 20-302 has not been employed on a literal basis. Thus, a court could say that section 20-302 covers what we now recognize as more than one form of liability with a bargain contract standing on a different footing from a case of pure reliance. This latter reading is in this context an adaptive interpretation that would allow Georgia to reflect contemporary mores, and at the same time promote the purposes which underlie section 20-302 of the Code.

A similar problem arises with respect to the relationship between the doctrine of promissory estoppel and the Statute of Frauds. Consider *McIntosh v. Murphy*,[111] a 1970 decision in Hawaii. McIntosh was induced to move from California to Hawaii by an oral agree-

[108] It is possible that the plaintiff below failed to raise the possibility of promissory estoppel, which would explain the court's mere cursory consideration of the doctrine.

[109] 146 Ga. App. at 866, 247 S.E.2d at 507.

[110] *See* note 19 *supra*.

[111] 52 Haw. 29, 469 P.2d 177 (1970).

ment with Murphy to employ McIntosh as sales manager for a car dealership. The agreement could not be performed within one year, and was thus subject to the Statute of Frauds. Although the agreement was unenforceable as a bargain contract, the court nevertheless allowed McIntosh to recover his reliance expenses under promissory estoppel. This result is in accord with section 217A of the new *Restatement of Contracts* which permits an oral engagement that would be barred as a bargain contract by the Statute of Frauds to be enforced under promissory estoppel if the claimant has a particularly compelling case for relief. In assessing whether to enforce such engagements, the *Restatement* directs the courts to consider

> (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
> (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
> (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
> (d) the reasonableness of the action or forbearance;
> (e) the extent to which the action or forbearance was foreseeable by the promisor.[112]

Could a Georgia court follow the approach of the *McIntosh* court and section 217A?[113] If so, would it be free to limit recovery to reliance expenses where awarding compensation for frustrated expectations seems excessive? These questions are unanswered. Conceivably, Georgia judges might find it more difficult to embrace promissory estoppel as a way around the Statute of Frauds since that statute could be read as applying to both bargain and nonbargain contracts.[114] It might be appropriate, therefore, to repeal section 20-302 of the present Code and enact in its place section 90 of the

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[112] RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Drafts Nos. 1-7, 1973).

[113] In recent Georgia cases strikingly similar to *McIntosh* counsel have not argued promissory estoppel. Instead the discussion in cases such as Hudson v. Venture Indus., 147 Ga. App. 31, 248 S.E.2d 9 (1978), and Utica Tool Co. v. Mitchell, 135 Ga. App. 635, 218 S.E.2d 650 (1975), has centered on whether the employee has partly performed the contract so as to avoid the Statute of Frauds under § 20-402 of the contracts code. The dissenting opinion of Judge McMurray in the *Hudson* case, however, also suggests that the Georgia courts have sometimes avoided the Statute of Frauds on grounds equivalent to those of § 217A of the *Restatement*. *See* 147 Ga. App. at 34, 248 S.E.2d at 12.

[114] The Supreme Court of Florida took this attitude in Tenebaum v. Biscayne Osteopathic Hosp., 190 So.2d 777 (Fla. 1966).

*Restatement* with the proviso that in applying that doctrine the courts would not be bound by the restrictions on bargain contracts. This approach would not be revolutionary, since the promissory estoppel doctrine exists below the surface in Georgia law already. It would simply bring it to the attention of the bar and free the courts to decide how far to carry this doctrine in Georgia. Reducing common law principles to code form exacts a price of both judges and legislators. Judges must within the limits of their powers adapt the legislation to new circumstances. Legislators must stand ready to make appropriate statutory changes. Neither can afford the illusion that any portion of our commercial law has reached a final, frozen form.[115]

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[115] *See* Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L. J. 1012, 1055 (1978); Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461 (1967).