FORMAL PROVISIONS AND THE ELIMINATION OF THEIR DETRIMENTAL CONSEQUENCES

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I. INTRODUCTION

MUCH CONCERN HAS been expressed in recent legal writings over the increase in civil law of provisions concerning formalities.[1] French writers, among others observing this phenomenon, have spoken of the existence of a "renaissance of formalism".[2] It is evident that this trend cannot be considered purely local, nor can it correctly be evaluated as an exclusively legal phenomenon. Formalism is a cultural phenomenon, having its roots in the attitudes prevalent in our society.[3]

We cannot determine the correctness of the French writers' contention without resort to an independent study in comparative law. Such a study, however, is not essential for the purposes of this article. Whether formalism is experiencing a "renaissance" in civil law, or is rather in the gradual process of being extinguished, is not for us to determine. For in either event the problem of excessive formalism is with us now, and will remain with us for some time to come.

In the author's country, *Finland,* legislation shows an increase in formal provisions and an accompanying tightening of existing forms, while in legal practice certain signs of the opposite trend may be observed. It would not be an exaggeration to state that Finnish lawyers have cast their eyes upon the methods of their

[1] See e.g. Arnholm, *Alminnelig avtalerett,* Oslo 1949, p. 118; Fischer, *Der Begriff der Vertragsfreiheit,* Zürich 1952, p. 52, p. 73; Flour, *Quelques remarques sur l'évolution du formalisme,* Le droit privé français au milieu du XX[e] siècle, Etudes offertes à Georges Ripert, Vol. I, Paris 1950, pp. 93 ff.; Iuul, Ross & Trolle, *Inledning til retsstudiet,* Copenhagen 1956, p. 116; Scherrer, *Die geschichtliche Entwicklung des Prinzips der Vertragsfreiheit,* Basle 1948, p. 35; Vahlén, *Formkravet vid fastighetsköp, särskilt dess inverkan på regler om förutsättningar och fel,* Stockholm 1951, p. 8.

[2] See Colin & Capitant, *Cours élémentaire de droit civil français,* Vol. 3, 10th ed., Paris 1953, pp. 25 ff.; Flour, *op. cit.,* pp. 93 ff.

[3] The great classicist of formal provisions, von Ihering, sees a certain parallelism between freedom and formalism. Ihering, on the basis of the later development of Roman law, puts forward the idea that freedom and formalism are not in real conflict, because when freedom flourishes strict formalism prevails. — The idea scarcely holds good today. See von Ihering, *Geist des römischen Rechts auf verschiedenen Stufen seiner Entwicklung,* Vol. II: 1, 8th ed., Basle 1955, pp. 470 ff.; Vahlén, *op. cit.,* p. 50. The word "formalism" is used in what follows to mean only formal provisions in civil law.

western neighbour, Sweden, but remain uncertain whether or no to follow suit.

Formal provisions bear a strong impress of *nationality*. Thi feature is sometimes brought out in legal writings, but not ofter enough.[4] This special national flavour can be seen when examining the formal provisions of different countries along with their development. Thus, if we compare the legal systems of the different countries belonging to the juridical community which may be said to exist in Scandinavia, we see that there are slightly more formal regulations in Finland than in Sweden. In both of these systems, however, there are considerably more regulations than in Norway and Denmark. This is the chief reason why sec. 1 of the Norwegian and Danish Contracts Acts says nothing about formal contracts, whereas the corresponding clauses in the Swedish and Finnish Acts explicitly cover that subject.[5]

Since formal provisions are national norms, a study of them must be approached in this light. Generally speaking, a comparative legal study of the particular formal provisions of each of several countries is of little significance. Only where the legal transaction and its formal requirements are common to many countries, are "international", so to speak (e.g. the Bill of Exchange, where the decisions of one country may very well affect the decisions of another), does the comparative study assume importance. Otherwise with respect to questions concerning particular national formal provisions the most constructive approach would be a comparison on the internal level.[6]

However, many problems concerning the judicial treatment of formal requirements, having the same face in different countries, transcend national boundaries. This is the case as to the problem of eliminating the "detrimental"[7] consequences of formal provisions.

In the Scandinavian countries, as in several others, the principle of freedom from formalities (required forms) prevails. According to this principle, a person may bind himself to a promise and perform a legal transaction in the way he considers most suitable.

[4] See von Tuhr, *Der allgemeine Teil des deutschen bürgerlichen Rechts*, Vol. II: 1, Munich and Leipzig 1914, p. 496; Vahlén, *op. cit.*, p. 32.

[5] As is well known, the Scandinavian countries have similar Contracts Acts (Sweden 1915, Denmark 1917, Finland 1929, Iceland 1936, Norway 1918).

[6] See Muukkonen, *Muotosäännökset*, Vammala 1958, pp. 242 ff.

[7] The adjective is placed between inverted commas because of its subjective nature.

Only in a few cases are exceptions made by regulations which provide for the *form* of the transaction. Where the liberal attitude towards formal requirements prevails, the principle of *pacta sunt servanda* is in the ascendant, and is even used as a slogan.[8] Indeed, the Contracts Acts of the Scandinavian countries are based on a theory which is more liberal than that. An offer is binding as such, without the support of an acceptance or a consideration. In this legal atmosphere the nullification of a legal transaction on the ground of a formal error often seems harsh. The incompatibility between formalism and liberal notions is difficult to resolve. Too often, a strict observation of the formal requirement would bring the court in a particular case to a decision opposite to what is considered just and decent.

The functions of formal provisions have not, so far as is known, been empirically studied in the field of legal sociology. However, statements concerning the "advantages" and "disadvantages" of formal provisions concur as regards major issues.

Typically, the following points are mentioned to indicate the disadvantages of formal provisions:

(a) The observing of formal provisions is inconvenient and burdensome, particularly as a delaying factor in business life;[9]

(b) Formal regulations are apt to give legislation a chill formality;[1]

(c) A formal regulation may create a fictional atmosphere of security, the idea that everything is all right. This may lead to considerable disappointment;[2]

(d) Formal regulations harbour the possibility of formal error. An allegation of formal error, again, often gives rise to a strong moral reaction.[3] Furthermore, in cases of formal error, an inexperienced party to an agreement can be swindled.[4]

While these objections do at times overlap, it is clear that the disadvantages of formal provisions appear in varying degrees in

[8] See Ahlman, *Oikeudenmukaisuus ja sen suhde moraaliin,* Helsinki 1943, pp. 41 ff.

[9] See Arnholm, *op. cit.,* p. 123; von Ihering, *op. cit.,* pp. 470 ff.

[1] See Knoph, *Norsk arverett,* 2nd ed., Oslo 1944, p. 119.

[2] See Arnholm, *op. cit.,* p. 122.

[3] Writings concerning formal regulations consider very generally the question of whether the allegation of formal error should be considered as contrary to the norms of morals (or custom). Opinions differ. On this question, see e.g. von Ihering, *op. cit.,* pp. 490 ff.; von Tuhr, *op. cit.,* p. 502; Undén, *Om solennitetsvittnen och deras funktion,* Förhandlingarna vid Sveriges Advokatsamfunds årsmöte i Stockholm 1931, pp. 18 ff.; Vahlén, *op. cit.,* pp. 49 ff.

[4] See Vahlén, *op. cit.,* p. 49.

ndividual cases. Certain variables affect the composition of the lisadvantages (and for that matter the advantages), viz. the nature of the legal transaction itself;[5] the quality of the formal regulation, i.e. its technical make-up;[6] the "conception of form" prevailing in the juridical community where the norm is to be applied;[7] etc.

Of all the disadvantages mentioned above, the possible occurrence of formal errors is probably the most serious. In the following section, where we examine the means of removing the detrimental effects of formal provisions, special attention will be devoted to this point.

II. REQUIREMENTS FOR THE CLARIFICATION OF FORMAL PROVISIONS

Formal regulations have a tendency to crystallize into certain *patterns of procedure*. Thus, it is stipulated in formal regulations that the legal transaction must be set down in writing, in the presence of witnesses, before the proper authorities, etc. Individual components or *forms* can be distinguished in these patterns of procedure. When a legal transaction is to be performed, e.g. in writing, it is often prescribed that it must be signed as well. The witnesses must fulfil certain requirements, such as competence and presence at the time when the act is performed, etc.

In several legal systems, certain general norms prescribe the forms for the patterns of procedure. This is true, for instance, in Germany and Switzerland.[8] It is not, however, the case in Finland. The situation there is the same as in the other Scandinavian countries, though with some exceptions.

The absence of general form-prescribing legislation and the random occurrence of individual norms in *Finnish* legislation have given rise to an abundance of procedural patterns and forms. The lack of unity and, at times, lack of clarity in the Finnish legal norms has produced some rather unfortunate results. For ex-

[5] See Arnholm, *op. cit.*, p. 124; Ussing, *Aftaler paa Formuerettens Omraade*, 3rd ed., Copenhagen 1950, p. 103.

[6] See Arnholm, *op. cit.*, p. 124; Vahlén, *op. cit.*, p. 49.

[7] See von Ihering, *op. cit.*, p. 503.

[8] See the German BGB, secs. 126–129, the Swiss OR, arts. 13–16. Note that a proposal for reforming the formal regulations of the German BGB exists; see Heldrich, "Die Form des Vertrages. Vorschläge zur Neugestaltung des Rechts auf Grund eines Referates", *Archiv für die civilistische Praxis* 1941, pp. 89 ff.

ample, the question whether a contract must always be signed by both parties, or whether the signature of one party (the one undertaking the obligation) is sufficient, has given rise to unnecessary and difficult questions of interpretation. The obscurity of formal regulations has, in very recent years, been the cause of numerous lawsuits, in connection with marriage settlements, sales of real property, the recognition of illegitimate children, etc.

It has been said that a very high standard should be required of the legislator in stipulating formal provisions.[9] At least one might demand that the contents of such provisions be made as clear and complete as possible. What is needed as an effective prophylactic measure is the enactment of a statute governing the *formalities* of legal transactions in general. Such legislation must, in a clear and comprehensive manner, prescribe the actual patterns of procedure. It is essential that these patterns be kept to a minimum. Also, those chosen should take into account the customs and practices of the public.

This question of merging the scattered formal provisions into a simple, clear-cut, legislative entity is not new to Finland.[1] General regulations exist in Finland, after the Swedish model, concerning the competence of witnesses to a legal transaction.[2] Thus, when some individual clause prescribes that a legal act is to be performed in the presence of competent witnesses, norms of competence can be "found" in one and the same statute. In this way certain provisions might be expanded to cover every formal legal transaction, and all that is current concerning the competence of witnesses could be transferred to this statute.[3]

There are two kinds of questions connected with the sphere of application of formal provisions. One kind concerns the different categories of contracts to which the requirement of form applies, such as sales of real estate, or gifts between spouses. Another kind concerns the extent to which individual parts of a contract come under the regulation of form. When, in this respect, the requirement is carried so far that all oral agreements concerning the

[9] Bo Palmgren, "Formkravens egna 'formkrav'", *F. J. F. T.* 1958, p. 63.

[1] In this connection I do not wish to deal with such "big questions" as whether civil law should be codified at all.

[2] In Finland the norms under discussion are, technically speaking, in the wrong place. They are found in a statute relating to legal procedure, viz. the Judicial Procedure Code. In Sweden they are embodied in a separate statute.

[3] The only and quite unnecessary exceptions are the norms in the Inheritance Code concerning the competence of witnesses to wills.

subject of the contract are invalid, the formal regulation may be said to be total.[4]

Finnish writers often put forward the "classical" idea that oral agreements even on matters of minor importance are not binding when they occur in connection with legal transactions in writing. Both in the practice of the courts and in legal writings certain significant deviations from this principle can be found.[5] Since this ground is comparatively unexplored, it is not surprising that there is a certain lack of unity in opinion.[6] Errors of form of this kind can be eliminated to some extent by inserting express provisions in the statute governing the form of legal transactions. However, this remedy has limits of its own. Unless the formal regulation is total in the sense mentioned above, it cannot be precisely determined, and even careful drafters may commit mistakes.

Scholars of the German *Pandektenrecht* formerly taught that the legal consequence of the failure to fulfil formal requirements was that the transaction was rendered null and void. While approval of this approach was not unanimous,[7] some indication of the spread of its authority is shown by its enactment into law in the German BGB (sec. 125).

It may only be a conjecture that early German doctrine or sec. 125 of the BGB have affected the laws of the Scandinavian countries. However, one may be certain at least that in the view of some earlier writers the neglect of a formal requirement *in the nature of things* leads to invalidity. By contrast, contemporary Finnish writings, along with those of the other Scandinavian countries, do not advance this view. The current Scandinavian legal writings stress the point that invalidity is not the only "natural" legal consequence of failing to observe a formal provision, but rather that invalidity is only one possibility among others.[8] There is in other words a modern trend in favour of diversifying the sanctions.

Elsewhere I have shown that the legal consequences of not observing formal provisions in Finland are quite varied.[9] On this

[4] See Vahlén, *op. cit.*, pp. 95 ff.
[5] See Muukkonen, *op. cit.*, pp. 59 ff.
[6] See Dehn, *Die Bedeutung mündlicher Nebenabreden bei formellen Verträgen nach bürgerlichem Rechte,* Leipzig 1908, pp. 1 ff.
[7] See, e.g., Stobbe, *Handbuch des deutschen Privatrechts,* Vol. 3, 2nd ed., Berlin 1885, p. 129; Regelsberger, *Zivilrechtliche Erörterungen I, Die Vorverhandlungen bei Verträgen,* Weimar 1868, pp. 138 ff.
[8] See Arnholm, *op. cit.*, p. 118; Ussing, *op. cit.*, p. 105; Vahlén, *op. cit.*, p. 14.
[9] Muukkonen, *op. cit.*, pp. 76 ff., pp. 176 ff.

basis we may divide formal provisions into three groups: ordinary, extraordinary and guiding. *Ordinary* formal provisions imply norms the non-observance of which can destroy the binding character of the legal transaction.[1] The non-observance of *extraordinary* formal provisions leads to a legal consequence other than one concerned with the binding effect of the transaction. Or to put it in another way: the observation of formal provisions which are extraordinary is not a prerequisite for the enforceability of the transaction. The legal consequences are, rather, directed towards other factors in the transaction.[2] *Guiding* formal provisions imply norms the non-observance of which is not of direct legal significance. These norms represent only the hopes of the legislator (*leges imperfectæ*).

As regards Finnish law, no set rule can be given as to the consequences of the failure to observe a formal regulation. The question must be viewed in the light of each individual formal provision.[3] This is not always by any means an easy matter. Hence legal practice shows a certain lack of clarity in many important questions. This state of affairs is hardly satisfactory. But successful adjustment can be made by analysis of the legal consequences of not observing a given formal provision.

Swedish and Finnish legal practice employ the device of "interpretation" of the statutory provision concerned in an attempt to remedy the unfavourable situation which occurs when an ordinary formal provision has not been observed. Where "small" errors are concerned, the view is often taken that no ordinary formal provision pertains. Thus it has been possible to preserve the binding effect of the legal transaction. Understandable as this tendency to "mild sentences" is, it gives rise to considerable disunity and uncertainty. Different persons have, in fact, very different ideas as to when the "moderate decision" frontier has been crossed. If, on the other hand, the existence of a formal error is admitted honestly, a remedy may, as will be shown later, be offered by a general clause prohibiting pleas of formal error in certain situations.

But this is not enough. *De lege ferenda* it is still desirable that the legislators remember the fact that the "nature" of a formal

[1] "Not binding" generally means in Scandinavian writings that no party can require either specific performance or substantial damages.

[2] For example, formal regulation regarding real estate business in English law is extraordinary, since the contract is not "void" or "voidable" but only "unenforceable by action".

[3] See Muukkonen, *op. cit.*, pp. 197 ff.

provision does not by any means imply that its non-observance must lead to invalidity. Formal provisions should as far as possible be enforced by sanctions other than invalidity. And when it is necessary to have access to so rigid a measure as invalidity, certain legal facts should have the beneficial consequence of removing the right to plead invalidity (Germ. *heilende Wirkung*). Examples of such legal facts are: the elapsing of a certain fixed time, the possession of an object, some registration measure connected with a legal transaction, etc.

III. FORBIDDING PLEAS ON THE GROUND OF FORMAL ERROR

German legal practice has prohibited to a very considerable degree the possibility of pleading formal error. *Exceptio doli generalis* has frequently been used as a means of preventing fraud.[4] The norm in question is, as is well-known, inherited from Roman law. Its contents, as they appear in practice, are chiefly to be found in the German BGB, secs. 242 and 826. Explanations of the content of this norm at different times need not now be given. It should be emphasized here that there has been good reason for German legal practice to make use of it. The rule forbidding pleas based on formal error helps to mitigate the harsh effects of the rule that invalidity of one part of a legal transaction causes the invalidity of the whole transaction.

In Finland and, as is well-known, elsewhere in the Scandinavian countries, there is no general agreement upon the adoption of a doctrine similar to the German one.[5] From my own point of view I have, quite conscious that the favouring of norms is subjective,[6] put forward the idea that pleading formal error can sometimes be

[4] See on this question Arndt, "Zur *exceptio doli* bei Schwarzkäufen", *Deutsche Juristen Zeitung* 1926, pp. 805 ff.; Boehmer, *Grundlagen der bürgerlichen Rechtsordnung*, Vol. II: 2, Tübingen 1952, pp. 80 ff.; Hildebrandt, *Erklärungshaftung, ein Beitrag zum System des bürgerlichen Rechtes*, Berlin 1931, pp. 117 ff.; Jacoby, *Der Einwand der allgemeinen Arglist gegenüber der Berufung auf Formmängel von Rechtsgeschäften*, Königsberg i. Pr. 1928.

[5] See especially on this question Karlgren, *Avtalsrättsliga spörsmål*, 2nd ed., Stockholm 1954, pp. 66 ff.

[6] See, e.g., Ekelöf, *Är den juridiska doktrinen en teknik eller en vetenskap*, Lund 1951, pp. 5 ff.; Ross, "Videnskap og politik i juridisk doktrin", *T. f. R.* 1952, pp. 252 ff.

contrary to common honesty and the general sense og justice.[7] If someone has committed a formal error with the intention of later making use of the error *to his advantage,* this must be considered contrary to honesty and justice from the point of view of the law as well. For example, in drawing up a contract of sale of real estate, the seller might ask some close relative to be a witness to the contract, fully aware of the fact that he is incompetent for the purpose. The seller does this for the reason that he can, with the money so obtained, conclude a new, profitable deal. With the profit he then "buys" back the real estate he has sold. In other words, he says that the sale in question is, owing to formal error, null and void. While he has to return the sale price he has received—the real value of which may have diminished as a result of inflation—he gets back his real estate and in addition he receives a considerable profit on the other sale. In such cases it would be best to deprive him of the plea of formal error. Here is a second example where the norm suggested by the author might well be adopted. According to Finnish law, an oral agreement concerning a black-market price in real estate is void.[8] Suppose a buyer with legal knowledge, having convinced some farmer to accept his word as binding, subsequently argues he has acquired the real estate but that he has no obligation to pay more than the official price. It should then be possible to forbid his plea on the ground of invalidity of the oral agreement.

If someone has committed a formal error *intentionally in some way other than those indicated above* or *through negligence,* the adoption of the suggested principle is not generally to be recommended. There are, however, exceptions. The plea of formal error might be forbidden for reasons such as: that the error was insignificant, that a considerable time has elapsed since the performing of the legal transaction, that the contract has been performed by the other party, or that he acted in good faith.

It may be granted that a general clause forbidding the pleading of formal error is an instrument which should be handled with care. It should seldom be resorted to and then only after deep consideration.

In defence of the strict application of norms there are, however, certain weighty factors. Finnish legal practice, evidently following

[7] Muukkonen, *op. cit.,* pp. 219 ff. See also Hakulinen, *Velvoiteoikeus,* Vol. I, Helsinki 1958, p. 249; Ylöstalo, *Lakimies* 1958, p. 378.

[8] See on this question Hakulinen, *op. cit.,* pp. 117 ff.; Muukkonen, "Kiinteistön ns. mustasta kauppahinnasta", *Lakimies* 1959, pp. 814 ff.

Sweden's example, has admitted the idea of moderation among its formal regulations. As mentioned before, this has been done, rather haphazardly, by way of "interpretation". It is said, for example, that formal regulations do not include a requirement of competence for the witnesses, though in fact they quite clearly do include this. This procedure results in the blurring of the contents of a formal regulation, thus endangering legal security. And the situation will worsen. For it is very difficult, once having started on the path of interpretation, to turn off in the direction of strictness. This is well shown by the fact that in Sweden, where legal practice is in a situation of the same kind, the courts have no power to tighten up a formal requirement.[9] Thus, if some legal point has for some time been interpreted in such a way that incompetent witnesses are allowed, who can then defend the change that incompetent witnesses are no longer to be admitted? Such a change of direction can be effected only by the legislator. For this reason modification by means of statutory interpretation is not to be recommended as a method of eliminating the detrimental consequences of formal regulations. Rather would one favour a close adherence to the formal requirements laid down, frankly admitting the existence of accidental formal error. This would be only in rare cases. Then, when it is absolutely necessary from the point of view of justice, the right to plead on the ground of formal error should be forbidden.

When employing the method described, the legal facts on which the decision is based must be revealed without fail. If this is not done, in the very process of trying to benefit legal security only harm will result. Not to disclose the basis of the decision is always as dangerous as, and indeed, often more dangerous than, to follow the path of statutory interpretation.

IV. ON COMPENSATORY DAMAGES, LIQUIDATED DAMAGES, AND ADVANCE PAYMENT

If a legal transaction is invalid owing to formal error, specific performance is not required. Nor, in this event, are compensatory damages involved.[1] Yet, according to the current conception of the

[9] See, e.g., Vahlén, *op. cit.*, p. 53.

[1] The term "compensatory damages" implies the same as the German *positives Vertragsinteresse* and the Swedish concept of *positivt kontraktsintresse*. The term "quasi-delictual damages" later employed corresponds to the German *negatives Vertragsinteresse* and the Swedish concept of *negativt kontraktsintresse*.

Scandinavian countries,[2] invalidity does not mean absence of other legal consequences. Thus invalidity does not *in principle* rule out a decision whereby the injured party is given an award the amount of which is determined by quasi-delictual considerations. Invalidity does not imply non-existence. Invalidity does not justify the idea of *ex nihilo nihil fit*. No "voidness" exists. The problem is in fact whether an invalid legal transaction justifies in certain cases a compensation up to the amount which is awarded in quasi-delictual situations or whether it carries with it other legal consequences.

Legal writings often put forward the general question: Does a contract that is invalid owing to formal error justify damages based on quasi-delict? Answers vary and contain an abundance of rules and reservations. An affirmative trend is perhaps more common than a negative one.[3] I personally believe that the question is too general to be accurately answered. It is only by resort to individual instances that any satisfactory answers can be given. For this reason I offer an examination of an instance which often appears in the Finnish legal field of real property, namely when a formal error is found in an instrument of sale. What is said in this connection applies *mutatis mutandis* to many other instances of formal error.

The granting of quasi-delictual damages has been recommended in Finnish writings.[4] From the point of view of legal practice opinion has fluctuated so that it is hard to draw any conclusions. As the latest decisions have been negative, this may be taken as the Supreme Court's present opinion. The plea for compensation in quasi-delictual damages has been rejected on the grounds that "no basis has been put forward" for the payment of the costs in question. This line of argument is particularly open to criticism as it clearly expresses the idea that when a contract is invalid it is non-existent, and that therefore compensation in quasi-delictual damages cannot be prescribed.

[2] See Arnholm, *op. cit.*, pp. 79 ff.; Karlgren, *op. cit.*, pp. 10 ff.; Ussing, *op. cit.*, p. 117; Vahlén, *op. cit.*, p. 167.

[3] See, e.g., Karlgren, *op. cit.*, pp. 66 ff.; Keller, *Das negative Interesse im Verhältnis zum positiven*, Aaurau 1948, pp. 142 ff.

[4] E.g. Chydenius, *Lärobok i finsk kontraktsrätt*, Vol. I, 3rd ed., Helsinki 1923, p. 30; af Hällström, "Formkravet vid fastighetsöverlåtelse", *F. J. F. T.* 1932, p. 398. See also Kivimäki & Ylöstalo, *Suomen siviilioikeuden oppikirja*, Porvoo 1959, p. 200.

In deciding this question, certain pros and cons should be considered. In support of the Supreme Court's present approach we may first refer to the fact that the granting of quasi-delictual damages diminishes the importance of an exact and strict formal regulation for real estate business.[5] It is thus a compromising of the strict formal requirement. The granting of quasi-delictual damages emphasizes the necessity of keeping to what has been promised, and thus means, at least indirectly, compulsion to stick to the deal that has been made. In this way, the intention of this provision, which includes among other things the encouraging of mature and weighty consideration, is violated. When we add further that an invalid contract cannot have a legal consequence, the argument seems to have been carried much too far.

Certain realistic factors argue in favour of an affirmative decision. Thus, trust in another's word should be protected by the granting of quasi-delictual damages, for morality in general condemns one who breaks his word.[6] Yet this need not be limited solely to the moral point of view. The detrimental side of formal provisions is, as has been mentioned above, that the invalidity they cause often seems harsh and unreasonable. This unreasonableness can be "offset" by granting damages in quasi-delict.

We may also refer for guidance to an analogous situation. In former Finnish law a mere offer was not binding. The so-called contract theory prevailed. The transaction was not valid until offer and acceptance fused into a contract. The present idea that an offer alone is binding was introduced by the Finnish Contracts Act of 1929. Earlier attempts had been made, however, to "resolve" the conflict between an invalid offer and the trust inspired by an offer by granting quasi-delictual damages.[7] Examined from the historical point of view this granting of quasi-delictual damages might almost be said to be natural. An invalid business contract involves at least as much need for protection of trust as an offer. What has been said above also supports the goal of consistency. According to Finnish law, there is good ground for the idea that, in connection with formal error in business, only that part of the advances made (*arrha pacto imperfecto data*) need be

[5] According to Finnish law a sale of real estate must be in writing. The certification of the deed is effected by a notary public, who summons the witness and the parties to the contract to be present at the same time.

[6] Many proverbs, for example, express this idea.

[7] See Kivimäki & Ylöstalo, *op. cit.*, pp. 187 ff.

returned which is not needed for quasi-delictual damages.[8] The quasi-delictual damages can thus be deducted from the deposit and only the balance be returned. In Finnish law it is also possible to consider "correct" a decision whereby the contractual penalty (*pœna conventionalis*) connected with sale of real estate is binding as liquidated damages to the extent that it covers the quasi-delictual damages.[9] If the contractual penalty is higher, it can be reduced according to sec. 36 of the Contracts Act to cover only the amount of quasi-delictual damages.

If we adopt the ideas just mentioned concerning the advance payment and the liquidated damages, we achieve consistency between our three separate problems. This is necessary because all three are of equal importance. In all of them the point is the elimination of the detrimental consequences of formal error by similar means; i.e. the paying of a certain "credit" measured in money.

In weighing these incommensurable standpoints together, I conclude that the affirmative arguments are more convincing than the negative ones. Thus the invalidity of a sale of real estate owing to formal error does not prevent the granting of damages in quasi-delict. It may be noted that this decision is not based merely on "theoretical argument". The decision has not been arrived at from the "general principles" of quasi-delictual situations. No attempt has been made to make room in the decision for the idea of *culpa in contrahendo,* or to base it on *naturalis obligatio,* etc. The solution suggested is solely a pragmatic compromise,[1] arrived at by carefully considering the pros and cons.

Under the Finnish law now in force it is possible to eliminate the detrimental consequences of formal error by granting quasi-delictual damages. Liquidated damages and advance payments, which in Finnish law are binding to the amount of the quasi-delictual damages, offer similar opportunities. These means should be given proper consideration. They modify to a satis-

[8] This standpoint is most common in the latest Finnish writings and the administration of law by the Supreme Court. See, on this question generally, Godenhielm, "Om rättsverkan av föravtalet", *F. J. F. T.* 1958, pp. 226 ff.; Muukkonen, *Esisopimus,* Vammala 1960, pp. 113 ff. See also Karlgren, "Om handpenningsavtal i samband med köp av fast egendom", *Festskrift tillägnad Birger Ekeberg,* Stockholm 1950, pp. 302 ff.

[9] Finnish writings are not unanimous on this question, and judicial practice varies also. The latest decisions, which date from 1951 and 1955, are negative. See on this question Muukkonen, *op. cit.,* pp. 110 ff.

[1] See Arnholm, *op. cit.,* p. 83.

factory extent the unreasonable rule of invalidity owing to formal error. It is true that legal administration has not been logical and consistent in these three areas. However, there remains the possibility that legal practice can assist in moderating the law. If this be the case, there will be no need for legislative correction.

V. CONCLUSIONS

We have dealt with the question of the elimination of the detrimental consequences of formal provisions and purposely avoided discussion of such value judgments as how much can be demanded and what is a sufficient quantity in order that the formal regulation may fulfil its purpose in legal life. In the same way we have not tried to take up any kind of position on the question—which is also a value judgment—of whether or not formal regulations are necessary. We have only established that Finland has a good number of formal provisions and that most likely there will continue to be such provisions in the future.

In one article published in Finland the following opinion has been expressed: "Nowadays eyes are often turned to Sweden—indeed too often, as regards fixed forms."[2] The present author is quite willing to look to Swedish methods, but this should be for other solutions to the problem of removing the detrimental consequences of formal regulations than the "path of interpretation".

[2] Caselius, "Mietteitä oikeustoimen määrämuotoisuudesta", *Lakimies* 1958, p. 451.