GIFTS AND PROMISES

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Continental and American Law Compared

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Preface

The invitation of the Yale Law School faculty to give the Storrs lectures in 1978 was an unexpected honor for which I was unprepared. The Storrs lecture series has been admired for many years and many reasons, mostly for the contribution it has made to the widening of horizons and the opening of new directions, often viewed from high vantage points. Being sure that I am not endowed with the scanning equipment or range-finders needed for such an overview, I concluded that I should take off nearer to ground level. So I have chosen a narrowly defined and familiar theme and propose to follow it closely over a considerable distance in space and time.

As with most comparative legal studies, the main purpose will be to discover whether we have something to learn from the experience of certain foreign systems of law. In order to start on the present inquiry one must first clear away much misinformation that is widely circulated in this country as to the treatment of gratuitous transactions in European countries. To understand why the solutions in those countries are so different from our own, much history will be needed. For me this was an additional reason for choosing the subject. To understand why France and Germany in their treatment of such transactions have come to differ from each other more than they do from us, one must examine some central questions of legal method under codes. My hope is that the dif-

ferences between the two countries will emerge more clearly because the issues that produce them are mostly drawn from common experience and are relatively simple and familiar.

I am indebted for aid and criticism to my son, Professor Philip Dawson of the history department of Brooklyn College, to Professor W. Burnett Harvey of the Boston University Law School, and to Professor James R. Gordley of the Law School of the University of California at Berkeley. To the Yale Law School faculty and the highly valued friends I have there I want to express again my respect and gratitude.

J. P. D.

Abbreviations

B.G.B.	Bürgerliches Gesetzbuch
B.G.H.Z.	*Entscheidungen des Bundesgerichtshofs in Zivilsachen*
C.	Code (part of Corpus Juris)
D.	Digest (part of Corpus Juris)
D.H.	Recueil hebdomadaire Dalloz
D.P.	Dalloz périodique
J.C.P.	Juris-Classeur périodique (La Semaine juridique)
J.W.	*Juristische Wochenschrift*
J.Z.	*Juristenzeitung*
M.D.R.	*Monatschrift für deutsches Recht*
N.J.W.	*Neue juristische Wochenschrift*
N.R.H.	*Nouvelle Revue historique de droit français et étranger*
O.G.H.Z.	*Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Zivilsachen*
R.G.Z.	*Entscheidungen des Reichsgerichts in Zivilsachen*
S.	Receuil Sirey
Seuff. Arch.	Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten
Warneyer	Warneyers Jahrbuch der Entscheidungen
Z.S.S.	*Zeitschrift der Savigny-Stiftung*

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Introduction

The landscape to be examined in this survey has been reported by many observers to include as one of its features a great gap, a chasm, that divides all legal systems derived from the English common law from those of the European continent. The gap is revealed by asking a short question: Can a fully capable person make a binding promise to another to give or do something for nothing? For countries within the sphere of influence of the English common law the standard answer would be no, almost never. For the more civilized countries of western Europe the standard answer would be yes, since they have never suffered from the blight that afflicts countries adhering to the English common law—the requirement of bargain consideration.

In order to discover whether the gap is in truth so wide, attention will be directed toward two European legal systems—those of France and Germany. One reason for choosing them is the considerable influence both have had on the law in force elsewhere in western Europe, so that they can serve in some degree as prototypes. But there are differences between these two "civil law" systems themselves, not so much in the provisions of their codes, which on these themes are much alike, as in the results reached by courts in applying them. These differences will invite comparisons of

another kind—as to the degrees of respect that France and Germany show toward their codes.

Main emphasis will be placed in this account on the law now in force, but the inheritance from the past, especially from Roman law, will have to be described in greater detail than is usually needed in modern comparative studies. There was a contribution also from medieval and early modern, precode experience that gave a new direction but in a strange way confirmed the Roman solutions. This means that attention will not be confined to promises, which historically have been the principal target of the consideration test. The Romans and their followers seldom marked off promises of gift from completed gifts in order to subject them to different treatment. In our own law the starting point is that most promises of gift are wasted words, and it is only their performance that counts, so that the gift is conceived as a one-sided act—a transfer in which the transferor holds all the controls. In western Europe a different way of thinking has come to be a habit. In what might be called the Romanesque tradition, a gift is conceived as a two-sided transaction, a contract which, like any other contract, requires mutual assent and is discussed, if trouble comes, with the vocabulary of the law of contract. At times this has made a difference. One effect has been, in any event, to blur the distinction, which is elementary for us, between promises of gift and completed gifts.

The main target, nevertheless, will continue to be the differences in both past and present in the treatment of gratuitous promises—promises for which, as we would say, there has been and will be no consideration. The effects of the requirement of consideration on contract formation in our law will be for the most part taken for granted and no attempt will be made to assemble all the complaints that have been made against it. Dissatisfaction with the doctrine of consid-

eration has been expressed, in English, in so many ways and for so many reasons that a glossary of quotations is hardly needed. The expressions range from attempts to explain it as an obsolete relic of late medieval English procedure to the charge that it is a sign of cultural retardation. Some of the critics, of course, condemn it altogether and demand that it be abolished. One of the most ardent of the abolitionists, however, was able recently to report some good news: that bargain consideration, produced only a century ago by that odd couple, Christopher Columbus Langdell and Oliver Wendell Holmes, has recently and quietly expired. No active surgery was needed, it seems, merely a denial of life support. For this coincided with the Death of Contract when Contract was consumed by the law of Tort, an event that was celebrated at a festive funeral not quite ten years ago.[1]

To me it has seemed that the account of both deaths was exaggerated. In these essays the premise will be that bargain consideration has been and will remain for a long time to come a central feature of our law of contract, central in the sense that it provides a strong affirmative reason for enforcing promises, the reason that is by a wide margin the most often used, though it is not the only one. The reason is persuasive: the promisor receives or is assured that he will receive the kind of advantage that he in fact desires and has expressly promised to pay for. This reason is persuasive enough so that, in the countries to be surveyed here, means were found long ago to enforce substantially all those exchanges that we too enforce and that comply with our tests of bargain. Actually, this is not the issue on which battle is joined. Even the most embittered critics of bargain consideration do not really object to the enforcement of bargains. The

1. G. Gilmore, *The Death of Contract* (Columbus, Ohio, 1974).

objection has been to its transformation into a formula of denial, a formula that would deny legal effect to most promises for which there is nothing given or received in exchange.

In our own law of course the negation is not complete. Some promises are enforced for other reasons. So two questions arise at the outset; a third lurks around the corner. The first question is whether it is true in fact that in France and Germany greater readiness exists to enforce promises for whose performance there is and is to be no exchange. The second question is whether, if such readiness does exist, Europeans have articulated specific reasons for enforcement that we have overlooked or too hastily discarded, so that from European experience we have something useful to learn. The third question throws the first two questions into reverse by asking: Do we enforce promises for reasons that Europeans do not now accept? Reliance by a promisee would be an example. But the main concern will be to discover whether it is true, as is commonly said, that the range of gratuitous promises that are enforced in France and Germany is much wider than it is with us and whether this points to a deficiency that we should try to correct.

In the comparisons that will be made it will fortunately be possible to disregard entirely much debris that the consideration test has accumulated and that has distracted attention from its central idea—bargain as a ground for enforcing promises. The most harmful distortion of the central idea has come, I believe, through extending it to the discharge or modification of obligations. Another piece of debris that has been picked up is the offer, for which consideration (or in some states a seal) is needed if the offeror desires to make his offer irrevocable. This is a needless hindrance to the processes by which agreement is reached and, being artificial as well as needless, was soon made to look silly, so that a dollar, a hairpin, or a false recital would do. It was not quite so mis-

guided to apply detriment tests to transactions in which the promises exchanged leave wide choice on one side and not on the other, so that the obligations in that sense are not "mutual." Imbalances of this kind raise problems that are real and extremely troublesome, but much too complex to be dealt with through the formal tests of detriment and benefit that consideration can supply. In the European systems that will be discussed, problems raised by issues like these are identified by their proper names. This means that when comparisons are called for, the debris can be disregarded and one can concentrate attention on the central idea of bargained-for exchange in its role in the formation of contracts.

I The Legacy from Roman Law

During the period of more than 1,000 years when the law of Rome was an operating system applied and maintained through the authority of a territorial state, no signs appeared that any need was felt for a generalized restriction on contract formation that resembled in any way the consideration test. This is not surprising, if only because during most of that long stretch of time Roman law did not have what could be called a law of contract. There were various types of contracts, each with its separate cluster of rules. They were formed in different ways, they performed different functions that for the most part did not overlap, and they had come to be recognized at different periods of time. As one author put it, "there had to be strong reasons for any contract being recognized as legally binding and, further, for it being recognized at that particular time and place."[1] Certain types of exchange transactions were made enforceable early—sales of land and goods, leases, various forms of partnership. But evidently no need was felt to design a transaction whose primary function would be to aid the generous in giving away something for nothing. The promise of gift as a distinct contract-type, fully enforceable in undisguised form, was not recognized until very late, near the end of Roman law as an operative system.[2]

1. A. Watson, *Contract of Mandate in Roman Law*, p. 1 (1961).
2. Below, note 44.

From an early time, however, it was possible to make or to promise a gift that was disguised in the very limited sense that it employed one of the forms designed for other approved transactions. If this was done, most of the time and between most people no objection at all would be raised. The most obvious example would be a conveyance made in standard form, perhaps with actual or symbolic physical delivery, as in *mancipatio,* the oldest method of transferring ownership.[3] Or if a donor was not ready to convey yet wished to bind himself by promise, there was the ancient ritual of stipulation, in which the promisee formulated the promise and asked: "Do you promise——?" (stating the terms) and the promisor answered "I promise." The exchange of question and answer was oral, face to face. No witnesses or writings were required, though both were commonly used. In the standard form of stipulation there was only one promisor, and no recitals were called for to describe his motive nor any payment or other return from the promisee. This, the familiar, all-purpose formality of Roman contract law, was as serviceable and as widely used as the sealed instrument in earlier English law. Like the sealed instrument, it could clearly be used to promise payment or some other act for which there was to be no exchange at all.[4]

There was, in addition, one group of fully accredited transactions, each with a separate function but with one common feature: all of them were designed to be, and really

3. *Mancipatio* is described by Buckland, *Textbook of Roman Law,* pp. 238–241, 3d ed. (1973). As he points out, the later texts that described less stereotyped forms of transfer related mainly to gift transactions.

4. The enormous practical importance of the *stipulatio* in all branches of Roman private law and procedure is described by M. Kaser, *Das römische Privatrecht,* 2d ed. (1971), 1: 538. As he says, it was a promise that could be used in conjunction with a variety of other contracts, to modify or to reinforce them. He describes it as "one of the most original and important creations of Roman law."

were supposed to be, entirely unremunerated. Two of them we would call bailments of movables: the deposit (*depositum*), which gave bare custody, and the loan for use (*commodatum*), which gave privileges not only to use but to draw income from the asset loaned. For any net profit the borrower was accountable but otherwise he must pay or give no fee or reward. This absence of any recompense was built into the definition.[5] In truth it was mostly an issue of definition, for if a price was to be paid the transaction would become a lease and in that guise would, as a rule, be fully enforceable. The absence of any payment by the depositee lowered the standard of care required of him in preventing loss or injury, so the question whether any payment had been agreed to could occasionally have some importance. Even though no payment was provided for, the duty to provide safe custody was explained as a product of contract, and in the loan for use, at least, a fixed term for its duration that was agreed to at the outset was enforced against a lender who later changed his mind.[6] In retrospect these forms of gratuitous promise seem important mainly because they serve as clues to the thinking of the Roman jurists, who regularly included them on the list of enforceable contracts while continuing to insist that any such transaction was necessarily gratuitous if it was to fit the type.

More ancient and much more important was the repayable loan, the *mutuum*, usually a loan of money, though

5. Buckland, *Textbook*, pp. 464–469; J. Michel, *Gratuité en Droit Romain*, pp. 56–70, 74–94 (Brussels, 1962). Related to the deposit and loan for use was the pledge. The pledge became highly developed and was much used, but it raised somewhat different issues, which are discussed by Buckland, *Textbook*, pp. 471–476.

6. D.13.6.17.3 is explicit on this as to *commodatum*. As to gratuitous lending of land, Michel (*Gratuité*, pp. 51–53) argued that a provision for a fixed term was similarly enforceable against the lender-owner, but the evidence he offered to support this contention was less convincing.

other fungibles would do. It was called a "loan for consumption" because the borrower was free to spend it and was obligated only to repay an equal sum. Since he was obligated to repay, we would no doubt label this an exchange transaction, but, seen through the lenses of the Roman jurists, it appeared in substance to be gratuitous because the sum to be repaid was an equal sum and no more. It was an essential feature of the *mutuum* that borrowers could not bind themselves to pay more than had been lent. This was not because of hostility to interest or other premiums for the use of money; the permissible rate of interest was long regulated by public legislation, but within the limits so defined, interest was entirely lawful. Indeed, it could be agreed in advance that, as an incident to a loan of money, payment of interest would be promised in the form of a stipulation, the ritual of question and answer being performed on the side. There is evidence from other sources that by classical times this had become common practice. So it seems strange that official sources continued to insist that through the *mutuum* the borrower could not promise any increment whatever beyond exact repayment of the sum or quantity that he had received. The *mutuum* was without doubt an enforceable contract, one of the first to become enforceable. Its function was not to produce gain for the lender but to provide a friend, relative, or one in need with disinterested aid. For this form of service it would be dishonorable to exact a return.[7]

Still more was this true of mandate, the nearest Roman equivalent of our agency. This was a contract to render service to another. Roman law recognized only partially the notion of representation, so that the mandatary (agent) would not be empowered to create rights in his principal, and in relations with third parties would purport to act on his own

7. Buckland, *Textbook*, pp. 462–465; Girard, *Manuel Élémentaire du Droit Romain*, 7th ed. (1924), pp. 516–524; Michel, *Gratuité*, pp. 105–118.