The Law of Obligations

Roman Foundations of the Civilian Tradition

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> "Generaliter sancimus omnes donationes lege confectas firmas illibatasque manere, si non donationis acceptor ingratus circa donatorem inveniatur, ita ut iniurias atroces in eum effundat vel manus impias inferat vel iacturae molem ex insidiis suis ingerat, quac non levem sensum substantiae donatoris imponit vel vitae periculum aliquid ei intulerit vel quasdam conventiones sivc in scriptis donationi impositas sive sine scriptis habitas, quas donationis acceptor spopondit, minime implere voluerit."[97]

This provision proceeded through the ius commune[98] into the modern codifications." To see a woman cash in donations from her spouse and then commit adultery, [10]o for example, is unlovely and hardly acceptable. So is the idea of a donee bringing hunger and distress upon the donor and his family by insisting on fulfilment of the promise of a gift. § 519 BGB therefore entitles the donor to refuse such fulfilment if he is not in a position to honour his promise without endangering his own reasonable maintenance or the fulfilment of his obligations to furnish maintenance to others.[101] This equitable inroad on the effects of the promise to make a donation goes back, beyond Justinian, into the 2nd century A.D., when Antoninus Pius granted the donor the privilege to be condemned only in "id quod facere posset".[102] From the 16th century this became known as "beneficium competentiae". According to § 528 BGB, the donor may even demand the return of the gift on account of having been impoverished subsequent to its execution. This claim (which has no Roman precursor)[103] is, however, subject to certain limitations;[104] for the donor's distressed situation must be balanced against the interests of the donee, who may well have relied on the effectiveness of the transfer and made his disposition accordingly.[105]

7. Donation under the ius commune and in modern law

(a) The concept of donation; insinuatio actis

Of the various conceptions of donation which have been *en vogue* at one

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[97] C. 8, 55, 10 pr.

[98] Cf. e.g. Voet, *Commentarius ad Pandectas*, Lib. XXXIX, Tit. II, XXII; Grotius, *Inleiding*, III, II, 17; Coing, p. 486; P.R. Owens, "Donation", in: Joubert (ed.), *The Law of South Africa*, vol. 8 (1979), n. 128.

[99] Artt. 953, 955 code civil; §§ 948 sq. ABGB; § 530 BGB.

[100] Cf. e.g. RG, \9\0 *Juristische Wochenschrift* 148.

[101] Cf. also § 947 ABGB.

[102] Ulp. D. 23, 3, 33; Ulp. D. 39, 5, 12; Paul. D. 42, 1, 19, 1; for details, see Wieslaw Litewski, "Das 'beneficium competentiae' im romischen Recht", in: *Studi in onore di Edoardo Volterra*, vol. IV (1971), pp. 563 sqq.; Antonio Guarino, *La condanna net limiti del passibile* (1975), pp. 44 sqq.; Joachim GUdemeister, *Das benejicium competentiae im klassischen romischen Recht* (1986), pp. 26 sq., 26 sqq.

[103] But see § 1123 1 11 PrALR.

[104] For details, see §§ 528, 529, 534 BGB.

[105] According to C 8, 55, 8, a gift by a patron without filii to his freedman reverts to the patron if he subsequently has children. In the practice of the ius commune, this rule was often applied in an extended version: any gift could be revoked by the subsequent birth of children to the donor (cf. e.g. Voet, *Commentarius ad Pandectas*, Lib. XXXIX, Tit. V, XXVI); it was not, however, incorporated into the BGB. For details of the development, see William M. Gordon, "The Interpretation of C. 8, 55, 8", in: *Studi in onoredi Edoardo Volterra*, vol. IV (1971), pp. 413 sqq.

or other time in the course of Roman legal history, it was, of course, Justinian's that made its way into the ius commune. Donation,[137] from the time that Roman law was received in medieval Europe, was an obligatory transaction, which, at the same time, provided a iusta causa for the transfer of ownership. This transfer could coincide with the conclusion of the contract, but it could also be effected subsequently. Donation, therefore, was not conceived of as a unilateral act; it was based on an agreement between donor and donee. Such an agreement did not have to be cast in a specific form; a mere ("naked") pactum was sufficient. However, there was one form of control over gift transactions which had been devised in post-classical Roman law and which has also been adopted in Europe: the requirement of insinuatio actis (curiae) for donations exceeding a certain, rather considerable sum.[138] Justinian had fixed the limit at 500 solidi, and there were constant disputes as to how this sum was to be "translated" into contemporary currency.

> "Tune solidos non pro denobis florenis, ut quidam consulti responderunt . . . neque pro aureo anglico, een angelot, ut voluere Bodin[us] . . . neque pro auro hongarico, quamvis id vulgo receptum tradat Wesemb[eccius] . . . atque ita in senatu Frisiae judicatum referat Sandc [accipiendus]."[134]

One wonders what could have prompted the Frisian Senate to adopt the Hungarian gold coin. In many places local statutes or customs prevailed.[140] For Savigny, 500 solidi were 2 000 gulden,[141] for Windscheid 500 ducats.[142] The Cape Supreme Court decided in 1886 that the pound sterling was the equivalent of the Roman aureus.[143] In

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[137] Coing, pp. 485 sq. For a particularly detailed discussion, see Voet, *Commentarius ad Pandeclas,* Lib. XXXIX, Tit. V.

[138] Grotius *[Inleiding,* III, II, 15) refrained from expressing an opinion on the matter. He saw the registration requirement as an attempt by the Romans to check excessive liberality ("om de overdadighe mildheid in te tomen") and proceeded to state, with a touch of dry humour: "I do not find anything to this effect in our own laws, perhaps because there is no excess of liberality in this country" ("waer van ich in onzes lands wetten niet en vinde, misschieri omdat de mildheid hier niet te groot is geweest"). The background story on how Grotius tried to establish the law of Holland is told ("ut mihi pro certo relatum") by Van Leeuwcn, *Censura Foretisis,* Pars I, Lib. II, Cap. VIII, 7. But for Grotius, all authorities agreed that the registration rule was in force in Holland; cf. e.g. Voet, *Commentarius ad Pandectas,* Lib. XXXIX, Tit. V, 18, who states that there is no reason to abandon this requirement, since fictitious alienations in fraud of creditors are so commonly practised; Van der Keessel, *Praekctiones ad Grotium,* HI, II, 15.

[139] Groenewegen, De *legibus abrogatis.* Cod. Lib. X, Tit. LXX, 1. 5 quotiescumque.

[140] "Quotiescunque certa summa solidorum ab homine profertur, secundum consetudinem regionis intellcgi atque taxari debent": Groenewegen, loc. cit.; Stryk, *Usus modernus pandectamm,* Lib. XXXIX, Tit. V, § 4.

[141] *System,* vol. IV, § 116 (p. 210).

[142] § 367, 2. Cf. also RGZ 1, 313 (4.666 2/3 Reichsmark).

[143] *Thorpe's Executors v. Thorpe's Tutor* (1886) 4 SC 488 at 490. Cf. further R.G. McKerron, "Registration of Gifts", (1935) 52 *SAL]* 17 sqq.; *Coronet's Curator v. Estate Coronel* 1941 AD 323 at 339 sqq.

post-colonial times this became 1 000 Rand[144] (which, in terms of contemporary monetary value does not bear the faintest resemblance to the ceiling set by Justinian).

(b) Restrictive policies in France

Whatever interests Constantine tried to protect by this form of control,[145] we have found that the general trend down to the time of Justinian was towards relaxation. It is highly intriguing to see how that trend has occasionally been reversed in more modern history. The central government in the France of the *ancien regime* tried to discourage and prevent transactions which had the effect of dissipating the wealth of the leading families.[146] Thus the requirement of registration was extended to gift transactions of every kind, large and small. The code civil essentially maintains these controls. Every gift inter vivos must be notarized, on pain of nullity[147]—and notarization in France is a cumbersome and costly business: donor as well as donee must appear before (usually) two notaries, the terms of the transaction must be reduced into writing, the document must be read aloud, signed by all present, and copied into a public record.

Conservation of the fortunes of the aristocracy (which had just been toppled) was, of course, not what concerned the fathers of the code civil. They saw gift transactions as being closely related to the law of succession:[148] and here the conviction had grown, since the late Middle Ages and throughout Europe, that the next of kin of every deceased person should be ensured a predetermined and substantial share in his estate.[149] This principle had become accepted by custom (in the form of a *Ugitime)* and was incorporated into the code civil. [15]° As a result of this, the testator's freedom to dispose of his estate in his last will was limited. It is obvious that gifts inter vivos could seriously undermine this policy:

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[144] See P.R. Owens, op. cit., note 129, n, 125. Today, s. 43 *of* the General Law Amendment Act (70/1968) applies; no longer are donations invalid merely through failure to register the donation. Executory contracts of donation, however, must now be reduced to writing and signed by the donor or by a person acting on a written authority granted by him in the presence of two witnesses. Failure to comply with these formalities appears to render the contract unenforceable, not void (i.e. subsequent performance is not recoverable).

[145] Cf. supra, pp. 492 sq. (note 90).

[146] For what follows, see Dawson, op. cit., note 5, pp. 29 sqq., 42 sqq.

[147] Art. 931 code civil. Cf. also am. 932 sq., 1339 code civil.

[48] This is already apparent from the systematical position of donation next to the law *of* succession.

[144] For an overview, see Dawson, op. cit., note 5, pp. 29 sqq., 123 sqq.; cf. also Coing, pp. 610 sqq.

[150] Art. 913 code civil. The testator can dispose of 3 of his estate only if one legitimate child survives him, of *j* if two and of j if three or more legitimate children survive. For further details, see artt- 914 sq. The BGB provides for a compulsory portion *("Pflichtteil"):* "If a descendant of a testator is excluded by disposition mortis causa from succeeding, he may demand his compulsory portion from the heir. The compulsory portion amounts to one-half the statutory portion. The parents and spouse of the testator have the same rights if they have been excluded from succeeding by a disposition mortis causa" (§ 2303).

they could substantially diminish the estate transmissible on death and thus jeopardize the prospects of inheritance of the donor's closest relations. This open flank had to be covered;[151] hence the renewed endeavours of monitoring gift transactions.

However, the French code civil quite clearly overshot the mark. The courts soon started to map out two main routes of escape from notarization: they exempted the gift of a movable object by delivery from hand to hand (don manuel) from the sweeping provision of art. 931 code civil and they even went so far as to allow the parties to disguise their gift by dressing it up as an exchange transaction.[152]

The sad fate of the notarized gift in French law provides a good example of what can happen when a legislator tries to overreach himself. Even the unworldly, cheerful giver has reappeared in French jurisprudence to join the struggle;[153] for the main purpose of his resurrection has been to free his more mundane and calculating brother-donors from the fetters of notarization (and at the same time to strip them of the benefits of this and other protective mechanisms, especially the right of revocation). Wherever a transaction is tainted by selfish motives rather than inspired by unadulterated generosity, the courts have declared it to be onerous; they have thus been able to sustain and enforce informal gifts by holding that they are not gifts[154]—at least not for the purposes of art. 931 code civil.

(c) German law: form and definition of donation

The draftsmen of the German Code took a more balanced point of view as far as the question of authentication and identification of gift transactions was concerned. The requirement of public registration was abandoned and substituted by a comparatively uncomplicated form of notarization,[155] which was, furthermore, confined to promises of gift.[156] Any defect of form is "cured" by the performance of the

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[151] Cf. § 2325 I BGB: "Where a testator has made a gift to a third party, a compulsory beneficiary may claim, as supplement to his compulsory portion, the amount by which the compulsory portion would be increased if the object given were added to the estate." However, a ten-year limit is imposed as far as this retrospective review of gifts is concerned (§ 2325 III BGB). According to the French code civil, donations can also be cancelled or scaled down retrospectively if the total of the descendant's gifts exceeded the disposable quota. Here not even a time limit exists. Cf. art. 922 code civil.

[152] For details, see Dawson, op. cit., note 5, pp. 70 sqq., 74 sqq.

[153] Marcel Planiol, Georges Ripert, *Traite pratique de droit civil francais* (2nd ed., 1957), vol. V, p. 325.

[154] Dawson, op. cit., note 5, p. 87.

[155] § 128 BGB: "If notarial authentication of a contract is prescribed by law, it is sufficient if first the offer and later the acceptance of the offer be authenticated by a notary."

[156] § 518 I BGB. The reasons given for the formality have been well summed up by Dawson, op. cit., note 5, p. 134: to ensure care and deliberation by promisors; the need for better evidence than the informal and ambiguous language often used in spontaneous expressions; the undesirability of allowing the strict requirements of form for testamentary gifts to be bypassed too easily; the need to prevent exploitation of the thoughtless and

promise.[157] As a result, the executed gift is valid, whether it be preceded by a formal promise of gift, an informal one or no promise at all. What are the essential elements constituting a gift? § 516 BGB provides the following definition:

> "A disposition whereby one person out of his property enriches another is a gift, if both parties agree that the disposition is to occur without recompense."

Certain time-honoured elements, on which this conception of gift is based, are immediately recognizable: we are dealing with a bilateral transaction which must have the characteristic double effect of impoverishing the donor and enriching the donee—the old pauperior-locupletior requirement that had once been carved out to check donations between husband and wife.[158] What is conspicuously absent from § 516 BGB is any reference to animus donandi. The intention of the donor to enrich was the cornerstone of Justinian's perception of a gift, and it remained the essential test for distinguishing gifts from other transactions, down to the days of the pandectists.[159] It was even incorporated into the first draft of the BGB. The great writers of the 19th century had stripped it of any unrealistic implication of magnanimity and unselfishness.[160] The donor, as Savigny had put it, may hope to gain, by way of his donation, some goodwill and affection which will in the long run bring him much greater advantages; he may make his gift out of mere vanity, in order to make others admire his wealth and generosity. In all these cases the transaction is a gift because the donor genuinely intends the other person's enrichment, albeit only in order to achieve certain ulterior purposes.[161]

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good-natured and to protect their creditors and heirs. Cf. "Motive", in: *Mugdan*, vol. II, p. 162; Protokolle, in: *Mugdan*, vol. II, p. 743. Cf. also supra, pp. 85 sqq.

[157] § 518 II BGB.

[158] The same applies in French law. As to how this requirement and the ensuing restriction of the concept of donation fits in with the new purposes for policing gift transactions, see Dawson, op. cit., note 5, pp. 54 sqq., 142 sqq., 221 sqq. He emphasizes that, for instance, promises made without recompense to render a service or to permit the use of some piece of property are exempt from all restrictions because they are not regarded as promises of gift, but fall into separate contractual categories. In England, on the other hand, they will all be void for want of consideration. On locupletior-pauperior cf. further, for example, Savigny, *System*, vol. IV, §§ 145 sqq.; Archi, op. cit., note 10, pp. 75 sqq.

[159] Burckhard, op. cit., note 69, pp. 76 sqq.

[160] Cf. e.g. Savigny, *System*, vol. IV, § 153, pp. 86 sq.; Windscheid/Kipp, § 365; Dernburg, *Pandekten*, vol. II, § 106, 2.

[161] This, for Savigny, also settled the highly problematical question whether a remuneratory gift was a gift. For if the pursuit of selfish and egoistical purposes does not detract from the nature of the transaction as a gift, it would indeed be odd if the unselfish motive of gratitude for services rendered would. The qualification of remuneratory gifts has always been very controversial: Paul. D. 39, 5, 34, 1. Those who regarded donationes remuneratoriae as true donations and as such as being subject to all the positive rules governing donations (such as Savigny, *System*, vol. IV, § 153 or Windscheid/Kipp, § 368) tended to look at this text as an exception, which related specifically to rescue situations. Others regarded it as the expression of a general principle covering all instances of remuneratory gifts (cf. e.g. Miihlenbruch, *Doctriria pandectarum, %* 443). That led some writers to the conclusion that remuneratory gifts are not true donations at all, and,

(d) Absence of agreed-upon recompense

But however realistic the assessment of the donor's motives, and however penetrating the analysis of the Roman animus donandi requirement, the fact remained that it was an entirely subjective criterion; and to make legal distinctions depend on the purpose or intention of one of the parties is problematic, at least from the point of view of legal certainty. Also, if a donation is based on the consent of the

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consequently, that none of the rules governing donations are applicable. Others tried to strike a compromise and contended that, while remuneratory donations had to be classified as donations, they were exempted at least from some of the rules applying to donations: the right to revoke the gift and possibly also the requirement of insinuation and the prohibition of donations between spouses. Most of the Roman-Dutch lawyers drew a distinction between donatio propria and impropria (or mera and non-mera or eygentlijke and oneygentlijke schenkinge). But whereas Voet put donationes remuneratoriae into the first category *{Commentarius ad Pandectas,* Lib. XXXIX, Tit. V, III), Huber *(Heedendaegse Rechtsgeleertheyt,* III. Boek, XIV. Kap.), Van Leeuwen *(Centura Forensis,* Pars I. Lib. IV, Cap. XII, 22) and others argued that they could not properly be called donations. This is, however, largely a merely terminological difference, for it did not follow for Voet that all the rules relating to donations had to be applied to remuneratory gifts. As a result, there was widespread agreement, for instance, that no registration was required. "The reason (for this) . . . is not far to seek. The formality of insinuatio was required in the interests of the donor and his heirs; it gave the donor time for reflection, thus putting him on guard against himself and at the same time protecting the interests of his heirs. Its object was to check impulsive liberality. . . . Where the donation is not a genuine donation and does not arise from sheer liberality, the donor having been influenced by some other inducing reason or reasons and, therefore, presumably having considered the matter and not having acted on a generous impulse of the moment, the safeguard of registration was not considered necessary" *(Avis v. Verseput* 1943 AD 331 at 365, per Tindall JA). Grotius based the exemption of remuneratory gifts from certain rules applying to donations on usage: "Doch is by ghebruick aenghenomen, dat schenckinge die uit verdienste gheschied niet en is onderworpen de wetten die tot nadeel van die schenckinghen iet bevelen" *(Inleiding,* III, II, 3). There was a difference of opinion, however, as to whether remuneratory donations were exempted from registration absolutely or only in so far as they did not exceed the value of the services received from the donee (in the latter sense, for instance, Voet, *Commentarius ad Pandectas,* Lib. XXXIX, Tit. V, XVII). But this limitation would have been totally impractical because it is hardly possible to draw up a comparison between the benefit received and the remuneration given (Savigny, *System,* vol. IV, § 153).

Modern South African law still draws the distinction between donatio mera and non mera; remuneratory and reciprocal donations fall into the second category and are not subject to the formalities and restrictions which apply to a donatio mera. Cf. for instance, *Brink, Executors of Van der By! v. Meyer* (1832) 1 Mem. 552; *Fichardt Ltd. v. Faustmann* 1910 AD 168 and particularly the very thorough and interesting decision *of Avis v. Verseput* 1943 AD 331 sqq., esp. the judgments of Watermeyer ACJ (pp. 347 sqq.), Tindall JA (pp. 363 sqq.) and Fischer AJA (pp. 381 sqq.).

The German BGB makes one special concession for a certain group of remuneratory donations: "Gifts which are made in compliance with a moral duty or for the sake of common decency are not subject to recall or revocation" (§ 534). Apart from this, remuneratory donations do not enjoy a special status. In modern practice, difficulties of classification can crop up where employees receive an additional bonus, gratification, etc. from their employers. Remuneration or remuneratory donation? Interesting, too (even though very rarely the cause of litigation), the legal qualification of the tip (usually taken to be extra-remuneration for satisfactory fulfilment of contractual obligations on the part of the waiter, porter, etc., not donation; consequence: taxable as income. On the problems connected with the social institution of the tip, see Rudolf von Jhering, *Das Trinkgetd* (3rd ed., 1889)). On remuneratory donations in French law, see Dawson, op. cit., note 5, pp. 96 sqq.

parties and has to involve an enrichment of the donee, one may well ask whether anything was really gained by bringing in the intention of the donor as a separate requirement characterizing the enrichment: by postulating, in other words, that the purpose of enriching the donee must be to enrich the donee.[162] It was Otto Lenel, the distinguished Romanist, who did indeed ask this question and who argued that, in order to mark off gifts from other transactions, one should rather concentrate on a somewhat more objective characteristic of the former, namely the absence of any agreed recompense.[163] So convincing was this argument that it had an immediate impact on the *traveaux preparatoires* of the new Civil Code[164] and caused the second commission to change the draft BGB accordingly. The notion of the unrecompensed benefit has remained the most significant feature of donations ever since; it has proved to be a useful tool for confining the area within which the policing devices laid down in the §§ 516 sqq. BGB are to be applied. What matters is whether certain actions or abstentions on the part of the donee constitute a recompense for what the donor has given; whether, in other words, the "gift" is connected with a counterperformance. This has to be determined from the point of view of the parties to the contract. In so far the test is obviously not an objective one and can still throw up very difficult borderline questions.[165] But by relating the issue of compensation to the contractual agreement of the parties, one is effectively converting the whole enquiry into a question of interpretation of contract: a question which judges have to face wherever they are dealing with contractual relationships.

(e) English law: the doctrine of consideration

The idea of a recompense or, as one could also put it, a bargained-for exchange, must have a familiar ring to any common lawyer. For in order to define the scope of donation, the German Code is using here, under negative auspices, what has traditionally been, in a positive version, the essential test for the enforcement of promises in the English common law; the absence of any agreed-upon recompense characterizes

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[162] Oawson, op. cit., note 5, p. 138.

[163] "Die Lehre von der Voraussetzung (im Hinblick auf den Entwurf cines burgerlichen Gesetzbuches)", (1889) 74 *Archiv fur die civilistische Praxis* 230 sqq.

[164] Cf. the account by Franz Haymann, *Die Schenkung unter einer Auflage* (1905), pp. 1 sqq.

[165] Cf., particularly, Werner Lorenz, "Entgeltliche und unentgcltliche Geschafte", in: *lus privatmn gentium, Festschrift fiir Max Rheinstein*, vol. II (1969), pp. 547 sqq. One of the main problem areas is that of gifts with charge (donationes sub modo). Here it is often difficult to decide whether the parties intended to conclude a donation or an onerous contract. On donations sub modo, see Savigny, *System*, vol. IV, § 175; Windscheid/Kipp, § 369; Haymann, op. cit., note 164, pp. 22 sqq.; Schulz, *CRL*, pp. 568 sq.; Michel, *Gratuite*, pp. 265 sqq.; Coing, pp. 486 sq.; on modern law: Lorenz, *Festschrift Rheinstein*, vol. II, p. 561; Dawson, op. cit., note 5, pp. 103 sqq., 166 sqq.

donations in Germany, the presence of bargain consideration[166] provides the normal reason for enforcing a promise in England. The doctrine of consideration, as it has developed in English and American law,[167] is a most intricate and highly complex legal institution. Its application leads to many odd results.[168] The continental lawyer usually perceives it as one of the strange and idiosyncratic features which have the effect of turning the English common law into such an ungodly and impenetrable jumble. But even among Anglo-American lawyers it has evoked dismay, scorn and hostility.[169] The courts have tried to devise a variety of escape routes,[170] and legal writers have repeatedly pleaded for the total abolition of this doctrine.[171] This is

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[1JIA] For a classic "definition", see *Currie v. Mha* (1875) LR 10 Exch 153 at 162: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."

[1] For a recent summary of the position in modern law, see Treitel, *Contract*, pp. 52 sqq.; Basil S. Markesinis, "La notion de consideration dans la common law: vieux problemes; nouvelles theories", (1983) 35 *Revue intematicmale de droit compare* 735 sqq.; Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine", (1985) 94 *Yale LJ* 1066 sqq.; cf. also infra, pp. 554 sqq.

[I<] * Cf. e.g. the famous case of *Stitk v. Myrich* (1809) 2 Camp 317.

[169] Cf. e.g. (Lord) Wright, "Ought the Doctrine of Consideration to be Abolished?", (1936) 49 *Harvard LR* 1225 sqq.; P.S. Aliyah, "Consideration: A Restatement", in: idem, *Essays on Contract* (1986), pp. 179 sqq.

[17] As an example of a successful one cf. the doctrine of promissory estoppel which has been developed in the United States (cf. e.g. *Restatement Contracts* 2d (1981), § 90: "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"; judicial adoption of this principle, which is designed to protect reliance, into German law has been urged by Zweigert, 1964 *Juristenzeitung* 354). For an unsuccessful attempt to break through the confines *of* the consideration doctrine, cf. Lord Mansfield's moral consideration theory ("Where a man is under a moral obligation, which no Court of law or equity can inforce, and promises, the honesty and rectitude of the thing is a consideration. . . . [T]he tics of conscience upon an upright mind are a sufficient consideration" *(Hawkes v. Saunders* (1782) 1 Cowp 289 at 290)); since every promise engenders a moral duty to perform, Lord Mansfield's theory would have led to a total collapse of the consideration doctrine. Not long after his death, it was rejected in *Eastwood v. Kenyan* (1840) 11 Ad & El 438, because, in the words of Lord Denman, it "might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult" (pp. 450 sq.)- Some years before, Lord Mansfield (and his court) had, incidentally, launched an even more direct assault on the doctrine of consideration. In *Pillans v. Van Mierop* ((1765) 3 Burr 1663 sqq.) it was held that the enforceability of "naked promises" is not based on consideration; what matters is merely whether the undertaking "was entered into upon deliberation and reflection" (p. 1670). In this context, Wilmot j referred to civilian contractual doctrine and quotes Vinnius, Grotius and Pufendorf. Lord Mansfield argued that "the ancient notion about the want of consideration was for the sake of evidence only" (p. 1669). However, in 1778 the House of Lords confirmed the doctrine of consideration: "It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such

obviously not the place to discuss the merits of these arguments. One point, however, may perhaps be borne in mind. The requirement of consideration (at least originally) is not really all that much of an insular curiosity. At the cradle of what appears to be such a striking and characteristic feature of the common law of contract there stood a midwife wrapped in Roman-Canon dressing: the medieval doctrine of causa.[172]

The word "consideration" originally indicated the reasons or motives for the giving of a promise. A promise without consideration was not binding;[173] being without reason or motive, it was somewhat silly[174] and could not have been seriously intended. In the course of time, it has been argued, the concept of consideration was "over-loaded", it acquired

> "three superfluous functions, excluding as elements in any agreed exchange performances that are the subject of pre-existing duty, reinforcing offers, and promoting 'mutuality' "-[175]

Atiyah, too (albeit from a totally different perspective) emphasizes that consideration was "in search of a new role" in the course of the 19th century: "the doctrine . . . tended . . . to become fragmented into a number of subdoctrines concerned with specific [public policy]

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agreement is nudum pactum ex quo non oritur actio; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law" (per Lord Skynner). On *Pillans v. Van Mierop* cf. the analysis by Nikolaus Benke, "No inefficacy arises merely from a naked promise", (1987) 14 *Ius Commune* 1 sqq.; cf. also Peter Stein, "Continental Influences on English Legal Thought", in: *La formazione storica*, vol. HI, p. 1117. *Ward v. Byham* [1956] 2 All ER 318 (CA) offers a good example of the doctrinal difficulties which the modern courts have to circumnavigate, in order to try to reach a reasonable result.

[171] Cf. e.g. A.G. Chloros, "The Doctrine of Consideration and the Reform of the Law of Contract", (1968) 17 *International and Comparative Law Quarterly* 137 sqq.

[172] On the origin of consideration cf, in particular, J.L. Barton, "The Early History of Consideration", (1969) 85 *LQR* 372 sqq.; Simpson, *History*, pp. 316 sqq., 375 sqq. The idea of causa, incidentally, reappeared in Lord Mansfield's moral consideration theory; cf. generally Holdsworth, vol. VIII, pp. 42 sqq. Lord Mansfield, the towering figure on the English legal scene in the second half of the 18th century, had attended lectures on Roman law at Oxford and was thus familiar with civil-law ideas. His Scottish background may have contributed too. For details cf e.g. C-H.S. Fifoot, *Lord Mansfield* (1936); cf also Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons* (London, 1988), pp. 282 sqq.

[173] Cf., for example, Sc. Germain's famous dialogue *Doctor and Student* (1530), as quoted by Simpson, *History*, p. 322: ". . . But if his promise be so naked that there is no manner of consideration why it should be made, then I think him not bound to perform it." On St. Germain's work and his sources, see Simpson, pp. 376 sqq.

[174] In a similar vein Voet, *Commentarius ad Pandectas*, Lib. XXXIX, Tit. V, III: ". . . donatio sine ulla praecedente causa ad donandum impellente profusio magis ac prodigalitas, quam liberalitas est."

[175] Dawson, op. cit., note 5, pp. 220 sq.; for further details, see pp. 207 sqq. The point that "consideration . . . has given a spurious unity to legal problems that are substantially dissimilar" (Edwin W. Patterson, "An Apology for Consideration", (1958) 58 *Columbia LR* 938) has been made by many authors.

issues."[176] Perhaps one can say, therefore, that something has gone wrong with the doctrine of consideration[177] in the course of the last 200 years. That should not detract from the fact that consideration, as an indicium of seriousness,[178] performs a function for which analogous tools are employed in modern civil-law systems.[179] More particularly, in the present context, it excludes liability based upon informal promises of gift,[180] as did classical Roman and as does modern German law.

[176] *Rise and Fall*, p. 453. Ariyah relates the change of function and content of the doctrine of consideration to the profound changes in the conceptual structure of contractual liability, more particularly the rise of the executory contract during the "age of freedom of contract".

[177] Or, as Professor Atiyah would probably say, with the conceptual structure of contractual liability. For a critical analysis of Atiyah's views on consideration, see G.H. Treitel, "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement", (1976) 50 *Australian LJ* 439 sqq.

[178] Zweigert/Kotz/Weir, pp. 60 sqq., with a very valuable comparative review of the problem.

[179] On civil-law analogies to consideration in general, see Arthur T. von Mehren (1959) 72 *Harvard LR* 1009 sqq.; cf. also B.S. Markesinis, "Cause and Consideration: A Study in Parallel", (1978) 37 *CLJ* 53 sqq.

[180] Promises which have not been made against a consideration are actionable if they are "under seal" (i.e. contained in a sealed document).