

The Enforceability of Promises in European Contract Law

edited by
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1 Some perennial problems

A basic difference between modern civil law and Roman law is supposed to be that in modern law, in principle, contracts are enforceable upon consent. In Roman law, when they were enforceable depended on the type of contract in question. A basic difference between the modern common law and civil law is supposed to be that the common law requires a contract to have 'consideration'. The civil law does not. This study is concerned with the extent to which these characterizations are true, and how these and other differences affect the enforceability of promises.

The method is that of the Trento Common Core of European Private Law Project. Experts from different legal systems have been asked how their law would resolve a series of hypothetical cases. Because of the larger purposes of the Project, and because one has to draw the line somewhere, the legal systems are those of member states of the European Community. Sometimes, the expert's opinion about a case is conjectural, and the experts were asked to note when it is. In these instances, admittedly, another expert from the same legal system might decide the case differently. But the value of the expert opinions is not that they tell us how the case will come out. It is that they tell us which cases are clear, which are troublesome, the reasons why they are troublesome, and the doctrines that might be applied to resolve the difficulties. That is all one can hope to know, and enough for us to see how different legal systems approach the same problems.

This method focuses less on rules and doctrines than on the results that are reached by applying them. The reason for doing so is not scepticism about whether rules and doctrines matter. They do. Courts look to them for guidance and use them to explain what they are doing. Nevertheless, when the courts of different legal systems reach similar results, it may be that their underlying concerns are the same even though they are

reflected in different rules and doctrines. When they reach different results, it may be that their rules and doctrines are similar but that the courts applying them have conflicting concerns. Thus the method helps to identify the underlying concerns.

The questions were chosen to illustrate problems which have arisen. The first part of this study will describe these problems and their historical significance. In the second part, the experts will describe how these problems would be resolved in their legal systems. The third part will try to identify similarities, differences, and underlying concerns.

I. The architecture of contract law

A. Civil law

In Roman law, when a contract became enforceable depended on which contract it was. Some contracts, the contracts *consensu*, were binding on consent. They included sale, lease, partnership, and *mandatum*, a gratuitous agency. Other contracts, the contracts *re* or 'real contracts', were binding only on delivery of the object with which the contract was concerned. They included contracts to loan goods gratuitously for consumption (*mutuum*) or use (*commodatum*), to pledge them (*pignus*), and to deposit them gratuitously for safekeeping (*depositum*). Other contracts were enforceable only when a formality was completed. Large gifts required a formality called *insinuatio*. A document describing the gift was executed before witnesses and officially registered. *Stipulatio* was an all-purpose formality that could be used to make almost any promise binding. Originally it consisted of an oral question and answer. Eventually, it became written, and in medieval and early modern Europe, the accepted formality was to execute a document before a member of the legal profession called a notary. Promises that fell into none of these categories, such as informal agreements to barter, were called 'innominate' contracts, contracts without a name, as distinguished from 'nominate' or 'named contracts' such as the contracts *consensu* and *re*. Initially they were not enforceable. Later, they became enforceable after one party had performed. That party could either reclaim his performance or insist that the other party perform as well.¹ The Roman jurists did not explain why, in theory, these distinctions among contracts made sense. They were not interested in theorizing but in working out rules pragmatically.

¹ See generally R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 508–58; A. Watson, *The Law of the Ancient Romans* (1970), 72–3; M. Kaser, *Roman Private Law*, 3rd edn (1980), 196–258.

In medieval and early modern times, in much of continental Europe and in Scotland, the Roman law became a law *in subsidium*, applicable when there was no local statute or custom in point. The medieval jurists preserved the distinctions just described although some found them puzzling. Iacobus de Ravanis noted:

If I agree that you give me ten for my horse there is an action on the agreement. But if I agree that you give me your ass for my horse there is no action on the agreement. If a layman were to ask the reason for the difference it could not be given for it is mere positive law. And if you ask why the law was so established the reason can be said to be that the contract of sale is more frequent than that of barter. And more efficacy is given to sale than barter.²

The greatest medieval jurists, Bartolus of Saxoferrato and Baldus degli Ubaldis, thought they had found a reason, but it was not a very satisfactory one. Bartolus grasped at the term the Roman jurists had used to describe the contracts: they were 'nominate' or 'named' contracts. He thought that the distinction between them and the 'innominate' contracts was not a mere matter of positive law. The nominate contracts, he claimed, derived their name from the *ius gentium* which, according to the Roman texts, was a law 'established among all men by natural reason'.³ One Roman text said that 'nearly all contracts' belong to the *ius gentium*. According to Bartolus, the 'name' made these contracts actionable, for 'nominate contracts give rise to an action by this alone, that they exist and have a name'.⁴ Contracts *consensu* are binding on consent and contracts *re* upon delivery, he said, because of a difference in their names. Consensual contracts such as sale took their names from an act that a party performs by agreeing: I can sell you my house today by agreeing even if I do not deliver it to you until next month. Contracts *re* take their names for an act a party performs by delivering: I cannot say I deposited my goods with you or loaned them to you today if you are not to receive them until next week.⁵ Baldus agreed. He concluded that since these rules were not mere matters of Roman positive law, innominate contracts should not be enforceable even in Canon law.⁶

A modern reader is not likely to find this explanation plausible. It appealed to Bartolus and Baldus because it fitted together the Roman texts

² Iacobus de Ravanis, *Lectura Super Codice* (publ. under the name of Petrus de Bellapertica) (Paris, 1519, repr. *Opera iuridica rariora*, vol. I, Bologna, 1637), to C. 4.64.3. On the authorship, see E. M. Meijers, *Etudes d'histoire du droit*, vol. III *Le droit romain au moyen âge* (1959), 72–7. ³ I. 1.2.1; see Dig. 1.1.9.

⁴ Bartolus de Saxoferrato, *Commentaria Corpus iuris civilis*, to Dig. 12.14.7 no. 2, in *Omnia quae extant opera* 10 (Venice, 1615). ⁵ *Ibid.*

⁶ Baldus de Ubaldis, *Commentaria Corpus iuris civilis* (Venice, 1577), to C. 2.3.27.

that spoke of 'nominate contracts', those that spoke of the *ius gentium*, and the Roman rules. While these jurists occasionally borrowed ideas from the Aristotelian philosophical theory that was then popular, for the most part, like the medieval jurists before them, they were not interested in theorizing but in fitting together their Roman texts.

Consequently, a major change took place in the sixteenth century when a group of philosophers and jurists, centred in Spain and known to historians as the late scholastics or Spanish natural law school, tried to synthesize Roman law with the philosophy of their intellectual heroes, Aristotle and Thomas Aquinas.⁷ Leaders of the school were Domingo de Soto, Luis de Molina, and Leonard Lessius. They were the first to look systematically for theoretical justifications of the Roman rules. In the seventeenth century, many of their conclusions were borrowed by the founders of the northern natural law school, Hugo Grotius and Samuel Pufendorf. Paradoxically, these conclusions were disseminated throughout northern Europe while the philosophical ideas that had inspired them fell from favour and their roots in this philosophy were forgotten.

The late scholastics explained contract law in terms of three Aristotelian virtues: fidelity, liberality, and commutative justice. For Aristotle, the virtue of fidelity or truth-telling meant keeping one's word.⁸ Thomas Aquinas explained that promises should be kept as a matter of fidelity.⁹ Liberality, for Aristotle, meant not merely giving resources away, but giving them away sensibly, 'to the right people, [in] the right amounts, and at the right time'.¹⁰ Commutative justice in voluntary transactions meant exchanging resources of equivalent value, so that neither party was enriched at the expense of the other.¹¹ Thomas Aquinas explained that a person might part with resources either as an act of liberality or as an act of commutative justice.¹² The late scholastics concluded that liberality

⁷ See generally I. Birocchi, *Saggi sulla formazione storica della categoria generale del contratto* (1988), 25; P. Cappellini, 'Schemi contrattuale e cultura theologico-giuridica nella seconda scolastica: verso una teoria generale' (thesis, Univ. of Florence, 1978/79); M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (1959), 6; H. Thieme, 'Qu'est-ce que nous, les juristes, devons à la seconde scolastique espagnole?' in Paolo Grossi (ed.), *La seconda scolastica nella formazione del diritto privato moderno* (1973), 20; H. Thieme, 'Natürliches Privatrecht und Spätscholastik', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung* 70 (1953), 230; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), 69–133. ⁸ *Nicomachean Ethics*, IV.vii.1127a–1127b.

⁹ *Summa theologiae*, II-II, Q. 88, a. 3; a. 3 ad 1; Q. 110, a. 3 ad 5.

¹⁰ *Nicomachean Ethics*, IV.i.1119b–1120a. Thomas discussed liberality in a similar way. *Summa theologiae*, II-II, Q. 117, aa. 2–4.

¹¹ Aristotle, *Nicomachean Ethics*, V.ii.1130b–1131a; Thomas Aquinas, *Summa theologiae*, II-II, Q. 61, a. 2. ¹² *Summa theologiae*, II-II, Q. 61, a. 3.

and commutative justice were the two basic types of arrangements one could enter into by promising.¹³

It was easier for them to read this distinction into Roman law because, in the fourteenth century, Baldus had already described liberality and exchange as the two *causae* or reasons that a contract must have, even in Canon law, to be enforceable.¹⁴ This distinction was not to be found in the Roman texts which referred to the *causa* of a contract.¹⁵ There is strong evidence, which I have presented elsewhere, that he took the distinction from Aristotle and Thomas Aquinas.¹⁶ He often drew upon their philosophy to explain Roman texts even though, unlike the late scholastics, he did not try to rebuild Roman law on a philosophical groundplan.

In any event, this distinction cut across the Roman classification of contracts. *Mandatum*, *commodatum*, *mutuum*, and *depositum* were all gratuitous contracts but the first was a contract *consensu* and the last three were contracts *re*. Sale, lease, and barter were all contracts of exchange but the first two were nominate contracts *consensu* and the last was an innominate contract. The late scholastics reclassified these contracts according to whether they were based on liberality or commutative justice, and the northern natural lawyers and those they influenced continued the enterprise. Grotius and Pufendorf presented elaborate schemes of classification in which they showed how the contracts familiar in Roman law could be fitted into these two grand categories.¹⁷ Domat and Pothier explained that these are the two *causes* or reasons for making a binding promise.¹⁸

The distinction also inspired fresh thought about when a promise became binding. The late scholastics concluded that all contracts of exchange should be binding upon consent. The Roman rules, they said, were mere matters of positive law, established, no doubt, for some sound pragmatic reason, but not founded in principle.

¹³ L. Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (Paris, 1628), lib. 2, cap. 17, dubs. 1, 3; cap. 18, dub. 2; cap. 21, dubs. 2, 4; L. Molina, *De iustitia et iure tractatus* (Venice, 1614), disp. 252, 259, 348; D. Soto, *De iustitia et iure libri decem* (Salamanca, 1553), lib. 3, Q. 5, a. 3; lib. 4, Q. 1, a. 1; lib. 6, Q. 2, aa. 1, 3.

¹⁴ Baldus de Ubaldis, *In decretalium volumen commentaria* (Venice, 1595), to X. 1.4.11 no. 30; Baldus de Ubaldis, *Commentaria Corpus iuris civilis*, to C. 3.36.15 no. 3.

¹⁵ See Dig. 2.14.7.1; 12.7.1; 44.4.2.3.

¹⁶ J. Gordley, 'Good Faith in Contract Law in the Medieval *Ius Commune*', in R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (2000), 93.

¹⁷ H. Grotius, *De iure belli ac pacis libri tres*, ed. B. J. A. de Kanter-van Tromp (Leiden, 1939), II.xii.1-7; S. Pufendorf, *De iure naturae et gentium libri octo* (Amsterdam, 1688), V.ii.8-10.

¹⁸ J. Domat, *Les loix civiles dans leur ordre naturel*, 2nd edn (Paris, 1713), liv. 1, tit. 1, § 1, nos. 5-6; § 5, no. 13; R. Pothier, *Traité des obligations*, in M. Bugnet (ed.), *Oeuvres de Pothier*, 2nd edn, vol. II (Paris, 1861), § 42.

Whether gratuitous promises should be binding on consent was initially less clear. The sixteenth-century theologian and philosopher Cajetan, in his commentary on Thomas Aquinas, claimed that the promisor who broke such a promise was unfaithful to his word. But the disappointed promisee was no poorer. Consequently, the promisee had no claim against the promisor as a matter of commutative justice except if he had suffered harm by changing his position in reliance that the promise would be kept.¹⁹ The French jurist Connanus took a similar position.²⁰ Soto, Molina, and Lessius disagreed, followed by Grotius and the northern natural lawyers.²¹ They pointed out that executory promises to exchange were binding even though no one had become poorer. Gifts were acts of liberality but could not be revoked after delivery. They concluded that, in principle, promises of gifts should be binding as long as the promisor intended to transfer a right to the object to the promisee. Roman law required a formality only as evidence of this intention and to ensure deliberation.²²

If, in principle, a promise should be enforced whenever the promisor wished to confer a right on the promisee, then gratuitous agreements to make a loan for consumption or for use, or a deposit, or a pledge should be enforceable even before delivery. The Roman rules were, again, mere features of positive law.

According to the late scholastics, these contracts were also acts of liberality. They differed from contracts to make gifts in that the promisor might be able to benefit the promisee without incurring any cost himself. Indeed, according to Lessius and Molina, the promisor normally made a gratuitous loan for use on the assumption that he would not have a use for the property he loaned. If this assumption proved unfounded, he would have the right to withdraw from the transaction even after delivery. He should not have such a right if he promised a gift of money or property because then he was not acting on the assumption that the gift would be costless.²³ Lessius and Molina reached this conclusion even though it seemed to contradict a Roman text:

¹⁹ Cajetan (Tommaso de Vio), *Commentaria to Thomas Aquinas, Summa theologiae* (Padua, 1698), to II-II, Q. 88, a. 3; Q. 110, a. 1.

²⁰ F. Connanus, *Commentariorum iuris civilis libri X* (Naples, 1724), I.6.v.1.

²¹ Soto, *De iustitia et iure*, lib. 8, q. 2, a. 1; Molina, *De iustitia et iure*, disp. 262; Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 2; Grotius, *De iure belli ac pacis*, II.xi.1.5; Pufendorf, *De iure naturae et gentium*, II.v.9.

²² Molina, *De iustitia et iure*, disp. 278, no. 5; Lessius, *De iustitia et iure*, lib. 2, cap. 18, dubs. 2, 8.

²³ Molina, *De iustitia et iure*, disp. 294, nos. 8–10; Lessius, *De iustitia et iure*, lib. 2, cap. 27, dub. 5.

As lending rests on free will and decency, not on compulsion, so it is the right of the person who does the kindness to fix the terms and duration of the loan. However, once he does it, that is to say, after he has made the loan for use, then not only decency but also obligation undertaken between lender and borrower prevent his fixing time limits, claiming the thing back or walking off with it in disregard of agreed times . . . Favours should help, not lead to trouble.²⁴

Molina agreed that, as a general principle, one should not be able to change one's mind in a way that injures another. But, he argued, the borrower should have understood that the loan was made on the tacit condition that the lender had no need for the object. If the need arose, it was an accident for which the promisor should not be held responsible.²⁵

The late scholastics were discussing when promises were binding in principle, or, as they put it, as a matter of natural law. They acknowledged that Roman law was different. Nevertheless, their work undermined the Roman rules by providing a coherent, philosophically grounded account of which promises should be enforced.

In time, the rules which the late scholastics ascribed to the natural law became accepted as positive law. In some places such as Castile, innominate contracts were made enforceable by statute.²⁶ Elsewhere, beginning in the sixteenth century, jurists simply declared that the custom of the courts was to enforce them.²⁷ As Nanz has shown, the first jurist to mention this custom was Wesenbeck.²⁸ He cited earlier jurists in support who, in fact, had never taken this position.²⁹ By the eighteenth century, this view had become almost universal.³⁰ The Roman rules about innominate contracts were gone. Contracts of exchange were enforceable upon consent. According to many jurists, promises to make gratuitous loans for use or consumption, to accept a deposit, or to give a pledge were binding before delivery, although they often added (following a tradition that went back to Bartolus) that the contracts of *mutuum*, *commodatum*, *depositum*, and *pignus* themselves were formed by delivery since that is what their names implied. This change could not have been caused by a mis-citation.

²⁴ Dig. 13.6.17.3. ²⁵ Molina, *De iustitia et iure*, disp. 279, no. 10.

²⁶ Molina, *De iustitia et iure*, disp. 257–8.

²⁷ J. Voet, *Commentarius ad pandectas* (The Hague, 1698), to Dig. 2.14 § 9; W. A. Lauterbach, *Collegii theoretico-practici* (Tübingen, 1744), to Dig. 2.14 § 68; J. Wissenbach, *Exercitationum ad I. pandectarum libros* (Frankfurt, 1661), lib. 2, disp. 9, no. 35; see B. Struvius, *Syntagma iurisprudentiae secundum ordinem pandectarum concinnatum*, to Dig. 2.14 no. 32 (Jena, 1692) (arguing that some agreements would still not be enforced when the parties did not so intend).

²⁸ K. Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (1985), 85.

²⁹ M. Wesenbeck, *In pandectas iuris civilis et codicis iustiniani libros viii commentaria* (Lyons, 1597). ³⁰ Zimmermann, *Law of Obligations*, 539–40.

Jurists must have thought that they were moving to a sounder position. They thought the position was sounder because it was the one which the leading jurists of their time believed to be theoretically correct.

When older rules did survive, often they were congenial with the principles of the late scholastics and natural lawyers. Contracts to give money or property still required the formality of registration. Certain traditional exceptions to this requirement were also preserved. One was for promises to charitable causes (*ad pias causas*).³¹ Another was for promises to those about to marry (*propter nuptias*).³² Another concerned the so-called *donatio remuneratoria*: the law would enforce an informal promise to reward someone who had conferred a benefit on the promisor in the past.³³ As mentioned earlier, the late scholastics and natural lawyers explained the formality itself as a way of ensuring deliberation. Liberality, to them, meant not merely giving away money but giving it away sensibly. Although they were not explicit, presumably they thought that in these exceptional cases the gift was more likely to be sensible or, in the case of a *donatio remuneratoria*, that it was not truly an act of liberality but compensation for a benefit received.

This change in early modern times gave the civil law of contracts the shape which it still has today. In most continental countries, informal promises of exchange are binding in principle. Promises to give away money or property still require a formality. The most common formality today is to execute a document before a 'notary' who is not the Anglo-American notary public but a member of the legal profession. Nevertheless, as we will see, the traditional exceptions to this requirement have largely disappeared.

In Scotland, matters took a somewhat different course in early modern times, and, as a result, the shape of Scots law today differs from that of other civil law jurisdictions. As on the continent, the older Roman rules were largely discarded.³⁴ Jurists such as Stair agreed with the late scholastics and natural lawyers that promises were binding in principle.³⁵ Nevertheless, Scots law did not adopt the continental solution that promises to give money and property required the formality of registration or, later, notarization. Their rule was that such a promise was enforceable only if the promisor acknowledged the promise in a written document or under oath.³⁶ By way of exception, it was enforceable if the promisor had

³¹ Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, no. 9; Molina, *De iustitia et iure*, disp. 279, no. 2. ³² Molina, *De iustitia et iure*, disp. 279, no. 7. ³³ *Ibid.*, disp. 279, no. 6.

³⁴ James, Viscount of Stair, *Institutions of the Law of Scotland*, vol I. ed. D. M. Walker (1981), I.x.4, 12. ³⁵ *Ibid.*, I.x.10.

³⁶ D. M. Walker, *The Law of Contracts and Related Obligations in Scotland*, 2nd edn (1985), § 10.2.

acted in a way that acknowledged the existence of the promise (homologation) or allowed the promisee to change his position in reliance upon it (*rei interventus*).³⁷ These traditional rules have now been replaced by the Requirements of Writing (Scotland) Act 1995, which nevertheless reflects their influence. Under the Act, a gratuitous promise³⁸ must be made in writing unless undertaken in the ordinary course of business.³⁹ Absent a writing, the doctrine of *rei interventus* applies in an altered form:⁴⁰ the promisee may still have an action if he changes his position in reliance on the promise with the promisor's knowledge and acquiescence.⁴¹

The civil law retained this shape even after the Aristotelian ideas that had inspired the late scholastics fell from favour. By the nineteenth century, these ideas seemed strange and unacceptable. The contract theories of the late scholastics and the natural lawyers were replaced by the so-called 'will theories'. In these theories, contract was defined in terms of the will of the parties. The innovation was not the concept of will. Jurists had always known that parties enter into contracts by expressing the will to be bound. The innovation was to define contract simply in terms of the will without reference to the types of arrangements that the parties might legitimately will to enter into or the reasons why the law should enforce them.⁴²

Consequently, the principle that contracts are binding on consent was now understood differently. It now meant that, in principle, whatever the parties willed should be enforced. The consequence was not so much a change in the rules of contract law. It was that the point of some of these rules now became hard to understand. If whatever the parties willed should be enforced, it was hard to see why the law should only enforce certain promises. The doctrine that there were two kinds of *causa* seemed puzzling. French jurists pointed out that it seemed merely to mean that the promisor must have some reason for promising which might or might not be to receive something in return.⁴³ Jurists still said that promises of gifts required a formality to ensure deliberation, but the reason why

³⁷ Walker, *Law of Contracts*, §§ 13.35–13.36.

³⁸ More technically, gratuitous unilateral obligations.

³⁹ Requirements of Writing (Scotland) Act 1995, s. 2(a)(ii).

⁴⁰ W. M. Gloag and R. C. Henderson, *The Law of Scotland*, 10th edn, ed. W. A. Wilson and A. Forte (1995), § 8.3. ⁴¹ Requirements of Writing (Scotland) Act 1995, s. 1(3) and 1(4).

⁴² See Gordley, *Philosophical Origins*, 161–213.

⁴³ C. B. M. Toullier, *Le droit français suivant l'ordre du Code*, 4th edn, vol. VI (Paris, 1869–78) § 166; A. M. Demante and E. Colmet de Santerre, *Cours analytique du Code Civil*, 2nd edn, vol. V (Paris, 1883), § 47; C. Aubry and C. Rau, *Cours de droit civil français d'après la méthode de Zachariae*, 4th edn, vol. IV (Paris, 1869–71), § 345 n. 7; F. Laurent, *Principes de droit civil français*, 3rd edn, vol. XVI (Paris, 1869–78), §§ 110–11.

deliberation was particularly necessary was left obscure. The rules that governed gratuitous loans, deposits, and pledges were often different from those governing either gift or exchange, but the reason why was no longer clear.

On the eve of the twentieth century, then, the civil law was the product of three quite distinct historical influences: the Roman system of particular contracts; the late scholastic and natural law theories of fidelity, liberality, and commutative justice; and the nineteenth-century will theories.

B. Common law

The common law was not taught in universities until the eighteenth century. The common lawyers were either practitioners or judges, and, until the nineteenth century, there was little literature on what we call contract law aside from the reports of decided cases.⁴⁴ Blackstone devoted only a few pages to contract. The first treatise on the common law of contract was written by Powell in 1790.⁴⁵ Until the nineteenth century, the law was organized, not according to doctrines or principles, but by writs. A writ was needed to bring a case before the royal courts, and eventually the number of writs was limited. To succeed, a plaintiff had to bring his case within one of these writs.

What we call the common law of contract grew out of two writs. One was covenant which could be used to enforce a promise given under seal, a formality originally performed by making an impression in wax on a document containing the promise. The other was assumpsit. To recover in assumpsit, the promise had to have 'consideration'.

There is a famous and inconclusive debate over whether the common law courts borrowed the idea that a promise needs consideration from the civil idea of *causa*. However that may have been, the doctrines had quite different functions. The doctrine of *causa*, as we have seen, identified the reasons why, in principle or in theory, a party might make a promise or the law might enforce one. The doctrine of consideration was a pragmatic tool for limiting actions on a promise to those cases in which courts thought an action was appropriate. These cases were so heterogeneous that the term 'consideration' had no single meaning.

In some of these cases, the promise was made to obtain something in return. But in some it was not. The promise of a father to give money or

⁴⁴ A. W. B. Simpson, 'Innovation in Nineteenth Century Contract Law', *LQ Rev.* 91 (1975), 247 at 250–1. ⁴⁵ J. Powell, *Essay upon the Law of Contracts and Agreements* (London, 1790).

land to a man who was to marry his daughter had consideration. The consideration was sometimes said to be a gain or benefit the father derived from seeing his daughter married.⁴⁶ It was sometimes said to be parental love and affection.⁴⁷ Gratuitous loans and bailments had consideration. Sometimes the consideration was said to be the benefit to the party who received the goods.⁴⁸ Lord Coke said that ‘every consideration . . . must be to the benefit of the defendant or charge to the plaintiff’,⁴⁹ and this formula – benefit to the promisor or detriment to the promisee – was often repeated. Yet as A. W. B. Simpson has noted, it can only be applied to the marriage cases by very artificial reasoning.⁵⁰ Moreover, in one famous case in which the promisor had agreed to transport the promisee’s cask of brandy free of charge, the consideration was said to be the delivery of the cask, even though delivering it was neither a benefit to the promisor nor a detriment to the promisee.⁵¹ Sometimes, as Simpson points out, the consideration was that the promisor agreed to do something he already ought to do: for example, return a lost dog, or pay a debt.⁵² Promises to pay debts barred by the statute of limitations⁵³ or discharged in bankruptcy⁵⁴ or incurred as a minor⁵⁵ were held to be actionable. Sometimes the consideration in such cases was said to be the fulfilment of a moral obligation.

Conversely, sometimes there was held to be no consideration for a promise even though the promise was not made to confer a gratuitous benefit on the promisee. There was no consideration for a creditor’s promise to take less than the amount due if he were paid immediately.⁵⁶ There was no consideration to pay more for a performance that the promisee had already agreed to do for less.⁵⁷

The common law judges had never felt a need to explain the doctrine of consideration with much precision. Beginning with Blackstone, however, treatise writers tried to describe English law more systematically. One innovation was to say that the rules that governed actions of covenant and assumpsit constituted an English law of contract. Another was to look for a conceptual structure underlying these rules. Part of that task was to try to define consideration. A first step was taken when Blackstone and Powell,

⁴⁶ *Sharrington v. Strotton* (1556) Plowden 298 at 301. ⁴⁷ Plowden 298 at 303.

⁴⁸ *Byne v. Playne* (1589) 1 Leon. 220, Cro. Eliz. 218.

⁴⁹ *Stone v. Wythipol* (1588) Cro. Eliz. 126, 1 Leon. 113, Owen 94, Latch 21.

⁵⁰ A. W. B. Simpson, *A History of the Common Law of Contract: the Rise of the Action of Assumpsit* (1987), 487. ⁵¹ *Coggs v. Bernard* (1703) Holt 13, 131, 528, 2 Ld Raym 909.

⁵² Simpson, *History*, 485–6. ⁵³ *Hylings v. Hastings* (1699) 1 Ld Raym 389, 421.

⁵⁴ *Trueman v. Fenton* (1777) 2 Cowp. 544. ⁵⁵ *Ball v. Hesketh* (1697) Comb. 381.

⁵⁶ *Cumber v. Wane* (1721) 1 Strange 426, followed in the famous case of *Foakes v. Beer* (1884) 9 App. Cas. 605. ⁵⁷ *Stilck v. Myrick* (1809) 2 Camp. 317, 6 Esp. 129.

drawing on continental learning, identified consideration with the *causa* of an onerous contract.⁵⁸ As Simpson has observed, early nineteenth-century treatise writers regarded consideration as a local version of the doctrine of *causa*.⁵⁹ They did not explain why, if that was so, consideration was sometimes present when there was no exchange. Nevertheless, once this step had been taken, the common law of contract began to look on paper as though it had the structure of continental law. Contracts were either bargains, in which case they were enforceable without a formality in assumpsit, or they were liberalities, in which case they were enforceable with the formality of a seal in covenant.

The first truly systematic treatise on the law of contract was written by Sir Frederick Pollock late in the century. Like the earlier treatise writers, he identified consideration with the presence of an exchange or bargain. He thought, however, that he could bring all or most of the decided cases within a single definition of bargain. While consideration had frequently been said to be either a benefit to the promisor or a burden to the promisee, the important element, he said, was that the promisee have incurred some detriment by doing or promising to do something which he was not already obligated to do. If the promisor had ‘bargained’ for him to incur this detriment, there was consideration. ‘[W]hatever a man chooses to bargain for must be conclusively taken to be of some value to him.’⁶⁰ That was so even if the man himself had received nothing, consideration having moved to a third party. Therefore, consideration meant simply that one party ‘abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise’ of the other party.⁶¹ This formulation became widely accepted not only in England but also in the United States. It was borrowed by Oliver Wendell Holmes⁶² and Samuel Williston⁶³ and has appeared in both the first and second *Restatement of Contracts*.⁶⁴

The formulation could be made to fit the cases in which the promise was to reduce a debt in return for immediate payment or to pay more for a performance than originally agreed. In these cases, supposedly, the promise

⁵⁸ W. Blackstone, *Commentaries on the Laws of England*, vol. II (London, 1766, repr. Chicago, 1979), *444–6; J. Powell, *Contracts and Agreements*, vol. I (London, 1790), 331.

⁵⁹ Simpson, ‘Innovation’, 262.

⁶⁰ F. Pollock, *Principles of Contract*, 9th edn (London, 1921), 186. ⁶¹ *Ibid.*, 177.

⁶² O. W. Holmes, Jr, *The Common Law* (1881), 293–4. On the debt to Pollock, see Letter from Holmes to Pollock, 17 June 1880, in M. Howe (ed.), *Holmes–Pollock Letters*, 2nd edn, vol. I (1961), 276.

⁶³ S. Williston, ‘Consideration in Bilateral Contracts’, *Harv. L. Rev.* 27 (1914), 503 at 527–8.

⁶⁴ *Restatement of Contracts* (1932), § 75; *Restatement (Second) of Contracts* (1979), § 71.

could not have been made to induce the promisee to incur a detriment because, legally, it was not a detriment for him to pay or do what he was already under a legal duty to pay or do. It could fit some of the cases of gratuitous loans or bailments: the borrower's promise to take care of the property loaned was made, at least in part, to induce the lender to make the loan. Pollock even thought that the formula explained why there was consideration for a promise of a gift to those about to marry: it was made, at least in part, so that they would marry.⁶⁵ He rejected the explanation an English court had given in *Hammersley v. De Beil*⁶⁶ that the promisor was bound because he had made 'representations' on which the promisee had 'acted'. Had he not done so, the English might have developed a doctrine of promissory estoppel considerably earlier.⁶⁷ Williston, in his edition of Pollock's treatise, noted that the rationale of *Hammersley* explained certain American decisions better than the bargained-for-detriment formula for consideration.⁶⁸ Williston included the principle of promissory estoppel along with the bargained-for-detriment formula in the first *Restatement*,⁶⁹ and the success of this principle in the United States may have influenced Lord Denning when he adopted a more moderate version of it in *Central London Property Trust v. High Trees House Ltd* in 1947.⁷⁰

Nevertheless, there were some cases that the formula did not fit, strain as one might. It did not fit the case in which a person promised gratuitously to take care of property he could not use himself, as in the case of the promise to transport another's cask of brandy. It did not fit any of the cases in which the promise was to perform a pre-existing legal or purely moral obligation.

Paradoxically, these efforts to explain consideration were made at the same time that the common lawyers were also turning to 'will theories'. As Simpson has said, they regarded the will as a sort of *Grundnorm* from which as many rules as possible were to be derived.⁷¹ But if contracts were enforceable simply because of the will of the parties, then it was hard to see why whatever the parties willed should not be enforceable. In the nineteenth century, the common lawyers did not think they had to justify the doctrine of consideration. It was simply part of English positive law, and their job was simply to explain what it meant.

⁶⁵ See Pollock, *Principles of Contract* 186, 757–8. ⁶⁶ (1845) 12 Cl. & F. 45, 62, 88.

⁶⁷ Pollock, *Principles of Contract*, 757–65.

⁶⁸ F. Pollock in G. H. Wald and S. Williston (eds.), *Principles of Contract*, 3rd American edn (1906), 650 n. 1.

⁶⁹ *Restatement of Contracts* § 90 (1932), even though, in his treatise, he had said that the doctrine 'at present . . . is opposed to the great weight of authority'. S. Williston, *The Law of Contracts*, vol. I (1920), § 139. ⁷⁰ [1947] KB 130. ⁷¹ Simpson, 'Innovation', 266.

In the nineteenth century, moreover, common lawyers found two additional ways to limit the enforceability of promises that seemed more compatible with will theories. One was to insist that the parties must have intended their promise to be legally binding. As we have seen, civil lawyers had said that they must since at least the time of Molina. In the nineteenth century, English treatise writers such as Pollock began to mention such a requirement,⁷² and in the famous case of *Balfour v. Balfour*, English courts accepted it.⁷³

The second way was the doctrine of offer and acceptance. In civil law, the question of whether an offer was binding without an acceptance had been addressed only obliquely by the Romans. Some late scholastics such as Soto, Molina, and Covarruvias thought that since an offer was a promise and a promise should be binding, in principle, an acceptance was not needed.⁷⁴ Lessius disagreed on the grounds that the promisee's acceptance was usually a *sine qua non* condition of the promise.⁷⁵ The Scots jurist Stair concluded that a promise was binding as long as it was not conditional on acceptance.⁷⁶ His view passed into modern Scots law: a promise not conditional on acceptance constitutes a 'unilateral obligation', in contrast to 'mutual contract', which requires an offer and an acceptance.⁷⁷ Grotius simply said that a promise requires an acceptance.⁷⁸ His opinion was followed by Pufendorf, Barbeyrac, and Pothier,⁷⁹ and passed into continental civil law. The English finally adopted it in the late eighteenth and early nineteenth centuries.⁸⁰ Common law treatise writers, like some of the civil lawyers, explained it as a consequence of the will theory: contract was the will of the parties, and therefore each had to express his will to be bound. When they did so seriatim, an offer was followed by an acceptance, and the contract was not formed until the acceptance because, until then, both parties had not expressed their will.⁸¹

In this study, we will be concerned with only one of the uses to which

⁷² Pollock, *Principles of Contract*, 3. ⁷³ (1919) 2 KB 571, 578.

⁷⁴ Soto, *De iustitia et iure*, lib. 3, q. 5, art. 3; Molina, *De iustitia et iure*, disp. 263; D. Covarruvias, *Variarum ex iure pontificio, regio et caesareo resolutionum* (Lyons, 1568), p. 2, § 2, no. ult., § 4, no. 6. ⁷⁵ Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 8.

⁷⁶ Stair, *Institutions of the Law of Scotland*, I.x.4. On the influence of Molina on Stair, see A. Rodger, 'Molina, Stair, and the *Ius Quaesitum Tertio*', *Jur. Rev.* 14 (1969), 34.

⁷⁷ Gloag and Henderson, *Law of Scotland*, § 5.1. ⁷⁸ Grotius, *De iure belli ac pacis*, II.xi.14.

⁷⁹ Pufendorf, *De iure naturae et gentium*, III.vi.15; J. Barbeyrac, *La droit de la nature et des gens . . . par le baron de Pufendorf* (Amsterdam, 1734), II.xi.15; Pothier, *Traité des obligations*, § 4.

⁸⁰ See *Payne v. Cave* (1789) 3 Term. R. 148; *Cooke v. Oxley* (1790) 3 Term. R. 653; *Adams v. Lindsell* (1818) 1 Barn. & Ald. 681.

⁸¹ Pollock warned against this tendency to regard the need for an offer and acceptance as arising from the very definition of contract. Pollock, *Principles of Contract*, 10–11.

the common lawyers put this doctrine. They used it to explain some further peculiarities of the case law concerning consideration. Traditionally, it had been said that the consideration for a promise might be something done at the time the promise was made. It might instead be something done before the promise was made provided it was done at the promisor's request. Or it might be something the promisee was to do in the future. In that case, the promisee had to plead that he had actually performed this act. Suppose, however, the consideration was a promise made in the present to perform an act in the future. Would the promisee need to plead that he had performed? English courts had traditionally held that he need not because the promise counted as consideration given at the time it was made even though its performance lay in the future. They drew this distinction long before English lawyers considered when the promisee's refusal to perform a promise could be used as a defence by the promisor.⁸²

In the nineteenth century, the doctrine of offer and acceptance was pressed into service to explain this difference in pleading. Some offers, it was said, could not be accepted by promising in return but only by doing the act which the promisor requested.⁸³ If he offered a reward for the return of property, the offeree could only accept by returning the property. Such an offer was sometimes called one of 'unilateral contract', as distinguished from an offer of 'bilateral contract' which could be accepted in the ordinary way by making a promise. It seemed to follow that until the offeree had actually done the act requested, an offer of unilateral contract was an unaccepted offer and therefore revocable. That consequence troubled Pollock since the promisor could then revoke after the promisee had done a substantial part of the work requested. He suggested that the offeree could accept by making 'an unequivocal beginning of the performance requested'.⁸⁴ Before that time, however, the promisor could revoke. Thus another reason had been found why a promise might not be enforceable.

II. The questions

Historically, then, both the civil law and the common law were built a layer at a time. Roman law was reshaped through the influence of the late scholastics and natural lawyers to reflect philosophical ideas originally taken from Aristotle. Heterogeneous common law cases which had been decided

⁸² Simpson, *History*, 452–65.

⁸³ Pollock, *Principles of Contract*, 23–8.

⁸⁴ *Ibid.*, 26.

pragmatically were later explained by the bargained-for-detriment formula for consideration and the doctrine of unilateral contract. In the nineteenth century, both civil and common lawyers were attracted to will theories which made it hard to find any principled explanation of what promises should be enforced. If contract was the will of the parties, it would seem that whatever they willed should be enforceable. Civil and common law systems entered the twentieth century with rules that were the product of very different historical influences and without a principled explanation of them. In the twentieth century, will theories have fallen from favour, but there is no generally accepted explanation of what promises, in principle, the law should enforce.

We will examine what promises the law of European countries does enforce by framing a series of hypothetical questions which are suggested by the historical account just given. In civil law, as we have seen, traditionally, promises of gifts of money and property were treated differently. They required a formality. In common law, such promises were a paradigm case of a promise that lacked consideration and therefore was enforceable only in covenant which also required a formality. We have also seen that at one time, both civil and common law recognized certain exceptions. In civil law, the formality was not required for promises to charities and people about to marry. It was not required for promises to pay compensation for a benefit received in the past such as a rescue. In common law, consideration was found for promises to those about to marry. It was found for promises to pay time-barred debts, debts discharged in bankruptcy, and debts incurred as a minor.

Our first questions test whether a formality is still required, and whether exceptions like these are still recognized.

Case 1: Gaston promised to give a large sum of money (a) to his niece Catherine on her twenty-fifth birthday, (b) to his daughter Clara because she was about to marry, (c) to the United Nations Children's Emergency Fund for famine relief, or (d) to a waitress with a nice smile. Is he bound by the promise? Could he bind himself by making the promise formally or by using a different legal form such as a trust? Is his estate liable if he dies before changing his mind? Does it matter if the promisee incurred expenses in the expectation that the promise would be kept?

Case 2: Kurt promised a large sum of money to Tony who had suffered a permanent back injury saving (a) Kurt or (b) Kurt's adult child from drowning after a boating accident. Can Tony enforce the promise if Kurt changes his mind? Does it matter if Tony was a professional lifeguard or if he had performed the rescue as part of his normal duties?

Case 3: Ian, now solvent and an adult, had once owed money to Anna that she could not claim legally because (a) Ian's debt had been discharged in bankruptcy, (b) the debt was barred by the passage of time (by prescription or by a statute of limitations), or (c) the debt was incurred when Ian was too young to be bound by his contracts. Ian now promises to pay the debt. Can Anna enforce the promise if he changes his mind?

As mentioned earlier, still another ground for refusing to enforce a promise, in civil law as early as Molina, and in common law since the nineteenth century, is the absence of an intention to bind oneself legally. The fourth question tests the limits of this principle.

Case 4: Carlo, a famous musician, agreed to come to a dinner to be held in his honour by a private music conservatory. Two days before the dinner, he was offered a large sum of money if he would give a performance in another city the night of the dinner, taking the place of another musician who had become ill. He notified the conservatory that he could not come because he had accepted a conflicting invitation. The conservatory cancelled the dinner after it had already spent a large amount of money on publicity and food. Can the conservatory recover against Carlo?

Moreover, as we have seen, in civil law gratuitous promises to loan or to store property or to do services were not treated in the same way as gifts. They did not require a formality. In Roman law, contracts to loan and to store property were contracts *re*, binding only on delivery. The late scholastics and natural lawyers thought they should be binding on consent. But they thought that the lender should be able to recover his property if he needed it so that a promise intended to be costless would remain so. They also accepted a special Roman rule applicable to gratuitous contracts: the party who was doing the favour was held to a lower standard of care. As we have seen, English law also treated gratuitous bailments differently. They sometimes had consideration although it was hard to explain why they should, at least if one identifies consideration with bargain. The next three questions examine the extent to which these contracts are still treated differently.

Case 5: Otto sold his house and all his furniture except for a valuable antique table and chairs. Charles promised to store them for three months without charge while Otto found a new house to buy. Is the promise binding? Does it matter (a) if Charles refused to store the table and chairs before they are delivered or a month afterwards? (b) if Charles was a friend of Otto, or the antiques dealer from whom he recently purchased the table and chairs, or a professional storer of furniture? (c) if Charles refused to store them merely because he had changed his mind or because he had

unexpectedly inherited furniture which he had no place else to store? (d) if Otto could instead have stored his furniture with Jean, who had also offered to store it without charge, and has now withdrawn that offer? or (e) if Otto had previously contracted with a warehouse to store his furniture, had cancelled the contract because of Charles' offer, and now can only store his furniture at a higher price?

Case 6: Richard promised to mail some documents to Maria's insurance company so that the company would (a) insure, or (b) cancel an insurance policy on Maria's small private plane. He failed to do so. Is he liable (a) if Maria's plane crashes and she cannot recover its value because it was not insured, or (b) if Maria has to pay an extra monthly premium because her insurance was not cancelled? Does it matter if Richard promised to help because he was a friend whose profession was completely unrelated to aircraft, insurance, or the mailing of documents? Does it matter if he promised to help because he had just sold and delivered the plane to Maria?

Case 7: Barbara promised Albert that he could use her car without charge for three months while she was on vacation. She now needs the car because she cancelled her vacation plans after injuring her left foot. Can she have it back? Does it matter if she told Albert he could not have the car a week before she was supposed to deliver it or a week after she actually did? Does it matter if Albert has taken a job that requires him to have a car but does not pay enough for him to rent one?

As we have seen, in common law, just as sometimes consideration was found for some promises that were not bargains, sometimes it was not found for promises which were not favours or gifts. Since these promises are often made in a commercial context, one wonders what reason there might be for refusing to enforce them. Certainly, the reason is not to protect the promisor against his own generous impulses, as it might be in other contexts. One possibility is that covertly, the doctrine was being used to strike down contracts that were unfair because one party was not getting anything in return for his own commitment. If so, perhaps it is still used for that purpose. Or perhaps common law systems have found some more sensitive way to deal with it. The doctrine of consideration is a rather blunt instrument since a commitment is not necessarily unfair because nothing is received in return, and it may be unfair even if something is.

The civil law, by contrast, has traditionally had ways of considering directly whether a transaction was unfair. In some situations, Roman law required the parties to act in good faith.⁸⁵ Medieval lawyers developed a

⁸⁵ See Gordley, 'Good Faith'.

remedy for *laesio enormis* – deviations by more than one-half from the contract price – by generalizing a Roman text concerned with the sale of land.⁸⁶ Canon lawyers developed the doctrine that promises are no longer binding when circumstances change sufficiently, and Baldus imported it into civil law.⁸⁷ The late scholastics explained the need for good faith and relief for *laesio enormis* by the Aristotelian principle that an act of commutative justice required equality so that each party gave a performance equal in value to what he received. They explained the doctrine of changed circumstances by the Aristotelian idea of equity. Because promise-makers, like law-givers, cannot imagine all the circumstances that might arise, their promises or laws should not extend to all circumstances. These doctrines again became standard among the natural lawyers. The next six questions deal with situations in which a contract may be unfair because a party has committed himself without receiving anything in return. They test whether common law systems still deal with them with the doctrine of consideration and whether civil law systems have used the doctrines just described or other doctrines to give relief.

In some of the situations in Case 8, the promise may be unfair because the other party can order whatever quantity he wishes.

Case 8: Alloy, a steel manufacturer, promised to sell Motor Works, a car manufacturer, as much steel as it ordered during the coming year for a set price per ton. Is the promise binding (a) if the market price rises to 20 per cent more than the contract price, and Motor Works orders the amount of steel it usually needs? (b) if the market price rises to 20 per cent more than the contract price, and Motor Works orders twice the steel it usually needs? (c) if the market price falls to 20 per cent below the contract price, and Motor Works buys no steel from Alloy, buying its requirements of steel on the market instead?

In some of the situations in Cases 9 to 12, a promise may be unfair because the promisor is agreeing to take more (or less) in return for a performance to which he is already entitled.

Case 9: Robert promised (a) to restructure a building for Paul who plans to use it as a restaurant, or (b) to sell Paul restaurant equipment including stoves, tables, chairs, cooking equipment, plates, and glasses. Paul promised him a fixed amount in payment. After performing part of the contract, Robert refused to continue unless he received one and a half times

⁸⁶ See J. Gordley, 'Just Price', in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, vol. II (1998), 410.

⁸⁷ See J. Gordley, 'Contract in Pre-Commercial Societies and in Western History', *Int. Enc. Comp. L.* 7 (1997), 2-58-2-59.

the amount originally promised. There had been no change in the circumstances of the parties since the contract was made except that Paul will now experience considerable delay opening his restaurant if he has to turn to someone else to complete the performance promised by Robert. Fearing this delay, Paul promised Robert the amount he demanded. After Robert completed performance, Paul refused to pay more than the amount originally agreed. Must he do so?

Case 10: Vito was an executive working for Company, a business firm, on a contract obligating him to continue working, and Company to continue employing him, for a period of ten years. Company promised to pay him a large sum of money, equal to a year's pay, (a) in the midst of his term of employment because he received an offer of immediate employment at higher pay from a competing firm, or (b) at the end of his term of employment, after he had announced his intention to retire, to thank him for his services. Is Company obliged to keep this promise? Does it matter if Vito has already bought a vacation house he could otherwise not afford?

Case 11: Contractor, a construction company, agreed to build an office building for Realty, a real estate company. According to their agreement, Contractor was to receive a fixed amount 'which shall be due after an architect appointed by Realty certifies that the building is finished according to the specifications' contained in the contract. While the building was under construction, Contractor promised, without demanding or being offered additional payment, to install more expensive glareproof windows than the specifications called for. Some time later, Realty promised that Contractor would be paid without seeking an architect's certificate. Are either of these promises binding? Would it matter if Realty had already advertised the glareproof windows, or Contractor had already covered over portions of the building the architect would have needed to inspect, before the other party threatened not to keep its promise?

Case 12: Realty, a company dealing in land, leased space to Travel, a travel agency, for ten years at a fixed monthly rent. One year later, Travel's business fell off because of an economic recession. Realty agreed that Travel could pay half the agreed rent for the duration of the recession. Two years later, when the recession ended, Realty demanded that Travel pay the remainder of the originally agreed rent for the previous two years. Can it recover that amount from Travel?

In some of the situations in Case 13, the promise may be unfair because one party can choose whether the contract is to be binding.

Case 13: Realty, a company dealing in land, was looking for a site for a new building. It told Simon it might be interested in purchasing a lot that

he owned, but that it would need time to conduct a study. Without charging anything, Simon promised that he would sell his land to Realty for a fixed price (a) if Realty chose to buy it at any time within the next month, (b) if Realty chose to buy it at any time within the next two years, or (c) when Realty completed its study of the land, unless, in its sole and absolute judgment, Realty thought the economic prospects were unsatisfactory, in which case Realty had the option to withdraw. Realty accepted. Is the promise binding? Does it matter if there was an abrupt rise in the market price, and Realty wants to buy the land, not for a building, but for immediate resale?

As we have seen, in common law, other promises were said not to be binding because they were 'offers of unilateral contract' which could be revoked before the offeree performed or began to perform. This doctrine may also have covertly played a useful role. It may have allowed the promisor to change his mind when he can do so without harming the promisee. If he should be able to, then perhaps civil law systems have found some way to allow him to do so. Perhaps common law systems have found other ways as well. The last two questions examine these possibilities.

Case 14: A burglar stole Simone's valuable diamond necklace. She offered a large sum of money payable if it was discovered and returned (a) to Raymond, a private detective, or (b) in a newspaper advertisement, to whomever succeeded in finding the necklace. Three months later, after (a) Raymond or (b) others incurred expenses looking for the necklace, she wishes to withdraw her promise because she has changed her mind about how much she is willing to pay for the return of the necklace. Can she do so?

Case 15: Claude, wishing to sell his house, listed it with Homes, an agency that assists sellers in finding buyers. Homes was to receive 5 per cent of the sales price of the house if it found a buyer. Three months later, after Homes had taken various steps to do so and incurred expenses, Claude decided not to sell his house. Is he liable to the agency for 5 per cent of the sales price or for its expenses? Does it matter if the agency has found a buyer who has expressed his willingness to buy the house although no contract has been signed? Does it matter if Claude had promised that he would list the house only with Homes or whether he remained free to list it with other agencies?