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The French Civil Code and Contract: A Comparative Analysis of Formation and Form¹

Arthur von Mehren*

I

This article considers comparatively two basic areas of the French and common law of contracts—formation and form. The topic was chosen, from among the many possible subjects in the field of contract law which would repay comparative study, in part because it touches fundamental questions of contract law. In addition, these two areas of contract law raise sharply (especially if the French law is found upon examination to be superior to the common law²) a problem which transcends the

1. This article is a slightly revised version of a paper entitled "The Code Civil and Contract—A Comparative Analysis of Formation and Form," read at the Sesquicentennial Celebration of the Code Napoleon held on December 13, 14, and 15, 1954, at New York University. The proceedings of the Celebration are to be published.

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2. It should be noted that certain areas of the French law of contracts are in a rather unsatisfactory state when compared with the common law. For example, the French courts have not been able, in the absence of applicable Code provisions, to develop satisfactory rules for handling contracts by correspondence. The general rule appears to be that the offer can be withdrawn at any time by a revocation communicated to the offeree (see note 3 *infra*) before acceptance and that the point at which the acceptance becomes effective is a question of fact. The legal writers have argued, advancing various theoretical justifications, that offers, at least if they set a definite time period, should be irrevocable. See, e.g., 2 RIFERT & BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL 126-27, § 334 (4th ed. 1952) (withdrawing of offer constitutes a fault); 2 COLIN & CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 35-36, § 46 (10th ed., Julliot de la Morandière 1953) (discusses three theories: civil delict, pre-contract to hold offer open, unilaterally assumed obligation). The courts do not appear, as a general matter, to have accepted these theories. See, e.g., de Portes v. Vuillier, Cour de cassation, chambre civile, Feb. 3, 1919, [1923] Dalloz Jurisprudence [hereinafter D.] I. 126. A few cases can, however, be cited in support of the proposition that, in certain situations, the offer is not fully revocable. See, e.g., Schmitt v. Mey, Cour d'appel de Colmar, Feb. 4, 1936, [1936] Dalloz Hebdomadaire 187 (pre-contract theory); Jahn v. Charry, Cour d'appel de Bordeaux, Jan. 17, 1870, [1871] D. II. 96 (withdrawing of offer effective to prevent a contract from arising, but considered a fault). It can be noted that the commission preparing a draft for a new Civil Code has proposed that "The offeror may revoke his offer if it has not yet been accepted. However, when the offer sets a period for acceptance or such a period re-

law of contracts as such—the problem of the relationship between the substantive solutions found in various areas of the law and a legal system's general technique. Consequently, there will be considered here both the differences in the treatment accorded to formation and form in the French and common laws, and the extent to which these differences are produced by, and related to, the former's codified structure and the case law system of the latter.

II

In French law a contract is created, as a matter of general theory, by the parties agreeing to a proposition.³ The legal

sults from the circumstances of the case, the offer cannot be revoked before this period has expired, except in the case where the offer has not yet come to the attention of the offeree." TRAVAUX DE LA COMMISSION DE RÉFORME DU CODE CIVIL ANNÉE—1948-1949, art. 11, at 705 (1950).

The rule that the question when an acceptance is effective to form a contract concluded by correspondence is a question of fact now appears firmly established in the case law of the Cour de cassation. See, e.g., *Cave Coopérative de Novi v. Ricôme*, Cour de cassation, chambre des requêtes, Jan. 29, 1923, [1923] D. I. 176, [1932] SIREY, RECUEIL GÉNÉRAL DES LOIS ET DES ARRÊTS [hereinafter S.] I. 168; cf. *Le Lloyd de France v. Faucheux*, Cour de cassation, chambres des requêtes, March 21, 1932, [1933] D. I. 65 (note Sallé de la Marnierre), [1932] S. I. 278. There does not appear to be any judicial discussion of standards to be applied by the courts in determining this question of fact. It is not clear whether the result depends on the intention of the parties, the equities of the situation or the reliance of the offeree. The commission preparing a draft for a new Civil Code has proposed the rule that "In the absence of a stipulation to the contrary, a contract is formed between persons not present at the same place at the time and place of the emission of the acceptance." TRAVAUX DE LA COMMISSION DE RÉFORME DU CODE CIVIL ANNÉE—1948-1949, art. 13, at 706 (1950).

3. The basic code provision is article 1108, which provides that: "Four conditions are essential to the validity of a contract:

"The consent of the party who binds himself;

"His capacity to contract;

"A defined object which forms the subject matter of the obligation;

"A licit cause in the obligation."

Only one of these conditions, the first, is of importance for the topic under discussion in this paper. With regard to the first condition, the language of the Code is misleading, both parties must consent to the transaction even if the agreement obligates only one of the parties. Cf. 2 COLIN & CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 30, § 40 (10th ed., Julliot de la Morandière 1953). It is also clear that when consent to a transaction has been communicated to the other party, as, for example, by an offer, this consent remains effective, even though the party subsequently changes his mind, until his change of attitude has been communicated to the other party. Cf. 2 RIPERT & BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL 125, § 327, 126, § 331 (4th ed. 1952). Compare also note 2 *supra*.

It should perhaps be noted that the fourth condition, the requirement of a licit cause, does not make the enforceability of the agreement turn upon the presence of an element of bargain in the transaction. The doctrine of cause is much discussed and its implications much disputed in French legal writing. See, in general, CAPITANT, DE LA CAUSE DES OBLIGATIONS (3d ed. 1927); Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 632-34 (1919). As it has been developed and applied by contemporary

system sets, of course, various limits to the power to create by agreement legally enforceable obligations. Thus, certain categories of agreements are not binding if formal requirements have not been met. And agreements which deeply offend the community's sense of justice are refused enforcement. In French law the question whether an enforceable contractual obligation has been formed is, however, approached by analyzing whether there was an agreement between the parties.

The general requirements for the formation of a contract at common law are more complex. The *Restatement of Contracts* states them to be "A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration for his promise . . ." and "a sufficient consideration. . ."⁴ Of course, just as in French law, not all transactions meeting these requirements are enforceable, but the question whether a contract has been formed is ordinarily approached by the common law in terms of assent and consideration.⁵

French law, the doctrine is complex and serves a variety of purposes. It does not today, however, represent a requirement that the transaction contain an element of bargain. This can be clearly seen from the fact that the donor's liberal intention is considered the *cause* of a promise of a gift. Cf. 1 MAURY, *ESSAI SUR LE RÔLE DE LA NOTION DE L'ÉQUIVALANCE EN DROIT CIVIL FRANÇAIS* 39-72 (Thesis Toulouse, 1920). A promise to give in French law is never held unenforceable on the ground that it has no *cause*, but instead only on the ground that it has not been made in the proper forms. See CODE CIVIL arts. 931, 932. "It does not follow [in French law] that, because the *cause* of an agreement does not have economic value, the agreement has no *cause* if it is possible to find in it an intention to make a sacrifice for one's tranquility, for one's respect, or for the peace of one's conscience." 1 LAROMBIÈRE, *THÉORIE ET PRATIQUE DES OBLIGATIONS* 288 (2d ed. 1885). "Every obligation, every promise or transfer which has on the part of the obligor a normal explanation in the mores of the community is valid." 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 544, n° 747 (1923). *Cause*, in this connection, becomes a description of what might be called the generalized motivation of the transaction; it does not require that the transaction, to be enforceable, contain an element of bargain or reciprocity.

4. 1 RESTATEMENT, CONTRACTS § 19 (1932). The old common law also recognized the possibility of forming a contractual obligation by a writing under seal. This possibility has been removed by statute in most of the states of the United States. See 1 WILLISTON & THOMPSON, *A TREATISE ON THE LAW OF CONTRACTS* 659-62, § 218 (rev. ed. 1936); Comment, *The Present Status of the Sealed Obligation*, 34 ILL. L. REV. 457 (1939).

5. The *Restatement* states, though here it does not accurately reflect the law in all jurisdictions, that "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Id.* § 90; cf. *id.* § 45. Some courts have indicated that this doctrine may be limited to the field of non-commercial transactions. See *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344, 346 (2d Cir. 1933). But see *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654, 661 (7th Cir. 1941) ("The mere fact that the transaction is commercial in nature should not preclude the use of the promissory estoppel.").

The respective merits of the handling of the problem of formation in the two systems can be determined by examining how each treats several concrete situations.

The doctrinal mechanism of both systems functions easily and well for what can be called the normal contract situation, that is to say, where a bargained-for exchange of economic values by each side is contemplated. There is present the agreement required by French law and the assent and consideration which the common law emphasizes.

When the common law comes to deal with situations in which there is no present exchange of economic values, difficulties arise which are avoided in French law. This can be demonstrated in connection with two types of arrangements, the granting of an option and the situation where a promise contemplates an acceptance in the form of an act of performance without the offeree assuming any commitment before performance, that is to say, the so-called offer for a unilateral contract.

In commercial life the option is a normal arrangement. *A* promises *B* to sell him certain property or goods for a stated sum of money if *B* indicates his willingness to buy within a fixed period of time. *B* knows of, and assents to, the option. Does *B* have an enforceable option contract? The solution of the French law is clear.⁶ Agreement is present, and agreement is all that is

6. The result, although indicated by the general approach of the Code to the problem of formation, was not always clear because of articles 1174 ("Every obligation contracted under a potestative condition on the part of the person who obligates himself is void.") and 1589 ("The promise of a sale is equivalent to a sale when there has been reciprocal agreement between the parties relative to the object and the price. . ."). Both of these articles were used in an attempt to fasten the principle of bargain upon the French law of contracts relating to non-gratuitous transactions.

A promise subject to a *condition potestative* can be compared to what is called in the common law an illusory promise. Article 1174 thus gave a basis for arguing that an option contract was not binding because the party holding the option had not promised, as the case might be, to buy or sell. Some early cases accepted this line of reasoning. See, *e.g.*, *Raymond v. Varlet*, Cour d'appel de Paris, 5^e chambre, April 26, 1898, [1898] D. II. 526 (employment contract with employer having right to terminate "at the end of each month by notifying the employee eight days in advance"), *quashed*, Cour de cassation, chambre civile, March 1, 1899, [1899] D. I. 360. It now appears established that article 1174 merely states the platitude that, in a transaction in which neither side makes a binding promise, no enforceable obligation arises. *Cf.* 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 22, n° 475 (1923). However, from time to time, a lower court may even today misapply article 1174 in the context of an option or other one-sided contract. See, *e.g.*, *Vallernaude v. Vignal*, Tribunal de premier instance de Valence, Dec. 19, 1929, [1930] S. II. 85.

The possible bearing of article 1589 on the validity of the option contract requires explanation. Article 1589 treats a promise to sell as equiva-

required, as a matter of general principle, in order to form an enforceable contract. The solution is equally clear in the common law. *B* has given no consideration; consequently, there is no enforceable contract and *A* may revoke at any time before *B* exercises the option.⁷

If, as would seem to be the case, these option arrangements when clearly understood by both parties should be binding,⁸ a general theory of contract formation which blocks enforcement is, to this extent at least, unsatisfactory to modern thinking. The common law courts have done what they could to improve the situation by enforcing option arrangements in which the recipient of the option gives something of value which does not represent a true exchange of values.⁹ This solution necessarily puts a premium on legal sophistication.

To turn now to the handling of the offer for a so-called "uni-

lent, under certain circumstances, to a sale. This gives a basis for arguing that the only promise of sale known to French law is one made in return for a promise to buy, for a completed sale always involves an element of reciprocity. This position was stated by Merlin, an early commentator on the Civil Code, as follows: "And it necessarily follows [from article 1589 of the Civil Code] that the promise to buy is not obligatory if it is not accompanied by the promise to sell and that, reciprocally, the promise to sell is null if it is not accompanied by the promise to buy. . . ." 18 MERLIN, RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE—VENTE 503, § VII (5th ed. 1828). Some early cases accepted this line of reasoning. See, e.g., *Gonguet v. Tardy*, Cour d'appel de Lyon, 2^e chambre, June 27, 1832, [1833] D. II. 95, [1833] S. II. 285. The argument has, however, long since been rejected in French law. See, e.g., *La Ruche Roubaisienne v. Desquiens*, Cour d'appel de Douai, 1^{re} chambre civile, Nov. 2, 1898, 55 JURISPRUDENCE DE LA COUR D'APPEL DE DOUAI 257 (1898).

7. Some courts may today be willing to apply the promissory estoppel theory of section 90 of the *Restatement of Contracts* in these option situations. See note 5 *supra*; see also 1 CORBIN, *CONTRACTS* 869-70, § 263 (1950); 1 WILLISTON & THOMPSON, *A TREATISE ON THE LAW OF CONTRACTS* 176, § 61 (rev. ed. 1936).

For a general discussion of the common law treatment of the option, see 1 CORBIN, *CONTRACTS* 855-925, §§ 259-74.

8. An entirely different situation exists, of course, where the option is contained in a printed form and the full import of the transaction is not understood by one party. The problems presented by the use of standard forms might, however, be better handled through selective doctrines designed to distinguish between the fair and the unfair situation rather than by an approach through the general theory of formation.

9. See 1 CORBIN, *CONTRACTS* 868-69, § 263 (1950); 1 WILLISTON & THOMPSON, *A TREATISE ON THE LAW OF CONTRACTS* 179, § 61 (rev. ed. 1936).

In a few states, statutes have modified the consideration requirement as applied to the option and firm offer problem. See N.Y. Personal Property Law § 33(5); UNIFORM WRITTEN OBLIGATION ACT (adopted Pa. 1927, Utah 1929, repealed Utah 1933). UNIFORM COMMERCIAL CODE § 2-205 would make options for a period not exceeding three months, given by a merchant for the sale or purchase of goods binding if contained in a signed writing.

lateral contract." Here a party is said to seek not a promise, but an act, in return for his promise.¹⁰ "I will pay you \$15.00 if you paint (not *promise* to paint) my porch." Under the traditional common law analysis, the promise to pay \$15.00 does not become binding, because there is no consideration to support it (the act requested has not yet been performed and the promisor does not wish nor receive a promise of performance), until the porch has been painted. A result of this analysis is that the promisor can withdraw his promise to pay \$15.00 at any time before the painting is begun (and possibly at any time before it is completed), even though he knows that the promisee had begun to prepare for performing.¹¹

The whole approach of the common law to these situations is artificial since it eliminates from the court's consideration a perfectly normal interpretation of the parties' intentions and operates with the mechanical alternative that both parties are bound at once or neither party is bound until one party has completed his performance. French law avoids this Procrustean bed. Its theory of contract formation enables it to consider a third possibility, that of an option arrangement. By agreeing to the owner's proposition, the painter concludes a contract under which he is entitled to a certain sum of money if the porch is painted within a reasonable period of time. He does not, presumably, assume any obligation to paint until he has actually begun the job. The availability of this analysis avoids the difficulties which the common law has had in handling these "unilateral" situations and centers the court's attention on the basic functional problem: what did the parties intend?

In many situations, the common law courts have managed of course, to avoid the consequences which an unsatisfactory doctrine would seem to require. They will, in interpreting an

10. For discussions of the unilateral contract of the common law, see Llewellyn, *On our Case-Law of Contract: Offer and Acceptance*, 48 YALE L.J. 1, 779 *passim* (1938, 1939); McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 654-63 (1914); Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts*, 64 YALE L.J. 515 (1955); Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916); Pollock, *Book Review*, 28 L.Q. REV. 100, 101 (1912).

11. In the hypothetical case stated, it would seem, as a matter of strict theory, that the offer could be withdrawn at any time before the performance was completed. However, a court would presumably treat the situation as one in which the contract was concluded when the painter commenced the job. If this construction were not put on the situation, a quasi-contractual recovery would probably be available to the promisee for any benefit actually conferred on the promisor, but the arrangement could not be enforced as a contract. See 1 WILLISTON & THOMPSON, A TREATISE ON THE LAW OF CONTRACTS 172, § 60AA (rev. ed. 1936).

ambiguous situation, find that a present exchange of promises was intended, thus avoiding the injustice which would be caused by treating the arrangement as an offer for a unilateral contract.¹² Moreover, the doctrine itself has been modified so that today in many jurisdictions partial performance, or the tendering of partial performance, of the requested act in a unilateral contract situation will bind the promisor to the contract.¹³ But, even after the passage of considerable time and the expenditure of much effort, the situation in the common law is still unsatisfactory.

III

A legal system's approach to contract formation foreshadows, and, in considerable measure, determines the general outlines of its treatment of the problem of form. The functional problem of form is the same for all systems¹⁴—the usefulness of certain transactions must be balanced against considerations such as whether enforcing them may encounter unusual difficulties or costs and whether they present in practice special dangers to the person who contemplates entering into them. Formal requirements are indicated where such difficulties or dangers clearly outweigh the complications created by requiring formalities. The problem of form can be said to be successfully resolved if formalities are only required for appropriate categories of transactions, if these categories are clearly marked out, and if adequate and workable formalities are provided.

Because its theory of contract formation is based on agreement, French law approaches form as a problem analytically distinct from formation and imposes its formal requirements directly. The two most important categories of transactions in which the *Code Civil* requires formalities are agreements to confer a gratuitous benefit (gift) (articles 931 and 932) and agreements in non-business transactions¹⁵ where the sum or value

12. See *id.* at 76-77, § 31A, 166, § 60; 1 RESTATEMENT, CONTRACTS § 31 (1932).

13. See 1 RESTATEMENT, CONTRACTS § 45 (1932); 1 WILLISTON & THOMPSON, A TREATISE ON THE LAW OF CONTRACTS 167-75, §§ 60A-60B (rev. ed. 1936).

14. For excellent discussions of the problem of form, see 2 IHERING, GEIST DES RÖMISCHEN RECHTS (2d Part), § 45, 470-504 (8th ed. Basel [1954]); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). Professor Fuller distinguishes three possible functions of legal formalities: the evidentiary function, the cautionary function, and the channeling function. See *id.* at 800-01. In the text of this paper, in order to simplify the comparative analysis, the channeling function is not taken into account.

15. Under article 109 of the Commercial Code, as now interpreted by the courts, the judge can admit oral testimony, when he considers such testimony desirable, to prove any transaction which is commercial in the

involved exceeds 5,000 francs (approximately fifteen dollars) (article 1341).

In the common law, formal requirements are, in considerable part, implied in the system's theory of formation. The doctrine of consideration indirectly requires a form in all transactions in which there is not a bargained-for exchange of real economic values. In addition, formalities are directly imposed by statute of frauds legislation on a variety of transactions including: agreements to sell goods the value of which exceeds a certain amount (usually fifty, one hundred or five hundred dollars), contracts to sell any interest in land, agreements not to be performed within one year from the making thereof, and suretyship agreements.

Considerable evidence exists that both the French law and the common law impose formal requirements in transactions where evidentiary or cautionary protection is today not needed. There appears to be little justification, under modern conditions, for the *Code Civil's* imposition of a formal requirement upon all non-business transactions involving more than approximately fifteen dollars. In modern times this requirement of French law has been steadily watered down.¹⁶

technical sense unless the law expressly requires a writing. *Jaladon v. Rocher*, Cour de cassation, chambre des requêtes, March 24, 1825, [1825-1827] S. I. 90; see 4 FUZIER-HERMANN, CODE CIVIL ANNOTÉ, comment 216 to article 1341 (Demogue ed. 1938).

16. This watering-down of the formal requirement has taken two forms: a very broad conception of the *commencement de preuve par écrit* (article 1347) and a willingness to find that it would have been morally impossible, under the circumstances of the case, for the party to have obtained a writing (article 1348).

The scope of article 1347 has been particularly expanded by the use of procedures, made more effective by a law of May 23, 1942, which amended articles 324 to 336 of the Code of Civil Procedure, by which the court, either on its own motion or upon the request of one of the parties, can question the parties upon the subject matter in litigation. The answers given by a party in response to the questions put can represent an admission which will constitute a *commencement de preuve par écrit*. Moreover, if a party does not appear when summoned for such an interrogation, or, upon appearance, does not answer the questions asked, the court can, pursuant to article 336 of the Code of Civil Procedure, consider this conduct as "equivalent to a beginning of proof by writing under the conditions of Article 1347 of the Civil Code." Hébraud, in a comment on the law of May 23, 1942, [1943] Dalloz, Recueil Critique, Législation 10, indicates that, as a consequence of this legislation, the formal requirement of article 1341 may be virtually eliminated in practice. See *id.* at 11; see also Meurisse, *Le déclin de la preuve par écrit*, [1951 2^e sem.] GAZETTE DU PALAIS. *Doctrine* 50; MANUEL, LE COMMENCEMENT DE PREUVE PAR ÉCRIT (Thesis Lyon, 1937).

For an example of the application of the doctrine of moral impossibility under article 1348 see *Ihasusta v. Bianchi*, Cour de cassation, chambre civile, March 17, 1938, [1938] D. I. 115 (note Mimin); see also *Lyon-Caen*, note to *Boutenjeun v. Reynier*, Cour de cassation, chambre des requêtes,

The provisions of the Statute of Frauds relative to the sale of goods and to contracts not to be performed within a year have recently been repealed in England on the ground, among others, that "they had outlived the conditions which generated and, in some degree, justified them. . . ."¹⁷ Nor is the requirement, resulting from the doctrine of consideration, of a formality in option agreements justified.

The categories of transactions in which formalities are required are perhaps somewhat more clearly marked out in French law than in the common law. The broad scope and general form of article 1341 avoids certain of the perplexing borderline cases which arise under statute of frauds legislation.¹⁸ Furthermore, it is probably easier to mark off the limits of the formal requirements applicable to gratuitous transactions where the approach is, as in French law, through the concept of gift rather than through the doctrine of consideration. Many of the difficulties encountered in this area are, however, inherent in the subject matter and no structure of doctrine can completely avoid problems of the type discussed in the common law under the headings of moral consideration, past consideration and charitable subscriptions.¹⁹

March 27, 1907, [1907] S. I. 209, notes 1-4 (this system has "from the practical point of view, . . . a great advantage because it leads, in fact, to a system in which any method of proof is admissible. . . .").

17. Law Reform Committee, *First Report*, CMD. No. 8809, at 3 (1953); see generally Recent Statute, 68 HARV. L. REV. 383 (1954).

18. Williston devotes forty pages to a discussion of the statute of frauds provision relating to the sale of goods. See 2 WILLISTON & THOMPSON, A TREATISE ON THE LAW OF CONTRACTS 1474-513, §§ 505-24A (rev. ed. 1936).

19. Both the French and the common law must face the problem of classifying borderline transactions for the purposes of formal requirements. The common law approaches the question by an analysis based on consideration, imposing a formal requirement if no consideration is found in the transaction in question. The comparable analysis in French law is in terms of the concept of gift. French law reaches in borderline situations results somewhat more restrictive of the scope of formal requirements than does the common law. For example, a sufficiently strong moral obligation will lead a French court to refuse to classify a transaction as a gift when a common law court, in a comparable situation, would fail to find consideration. Compare *Pageà v. Frères Saint-Jean-de-Dieu à Lyon*, Cour de cassation, chambre des requêtes, May 5, 1868, [1869] D. I. 285 with *Mills v. Wyman*, 20 Mass. (3 Pick.) *207 (1825); for the general problem of the moral obligation in French law, compare *Darier v. Dubois*, Cour d'appel de Paris, 8^e chambre, Nov. 5, 1925, [1925] Dalloz Hebdomadaire 656 (promise of man to continue to support former mistress who later made a "rich marriage" held a promise of a gift) with *P. v. docteur de L.*, Cour d'appel de Rennes, 1^{ere} chambre, March 7, 1904, [1905] D. II. 305 (note Planiol), [1907] S. II. 214 (promise of man who lived twenty years with a woman to support her after the relationship was terminated held not a promise of a gift); see also 7 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 316-18, § 982 (2d ed. 1954).

A charitable subscription is, it appears, treated in French law as a dis-

Various defects can be noted in the adequacy and workability of the formalities provided in each system. Under the *Code Civil* an agreement to confer a gift is enforceable if embodied in a notarial contract and expressly accepted by the donee.²⁰ The courts have also come in time to accept an alternative, party-created formality—the disguised donation in which the gratuitous transaction is cast in the guise of an onerous transaction.²¹ The formality provided by the Code is probably excessively strict in requiring an express acceptance by the donee.²² This requirement is avoided by the use of the disguised donation.²³ In the case of a transaction involving a sum or value of more than 5,000 francs, the formal requirement of French law can be satisfied either by a written instrument, executed in the presence of a notary or signed by the parties, or by a beginning of written proof (that is to say, a writing, emanating from the party sought to be held and indicating the existence

inct form of transaction and, consequently, is not classified as a gift. *Cf.* *Bailly v. Ville de Nancy*, Cour de cassation, chambre civile, Feb. 5, 1923, [1923] D. I. 20. This treatment is to be contrasted with the approach in the American common law through consideration, an approach which has led to some rather curious analyses in the courts' attempt to work out an acceptable solution. See 1 WILLISTON & THOMPSON, A TREATISE ON THE LAW OF CONTRACTS 403-09, § 116 (rev. ed. 1936).

20. CODE CIVIL arts. 931, 932.

21. See 3 RIPERT & BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL 1067-68, § 3350 (4th ed. 1951); *cf.* *Malapert v. Devaux et Pauly*, Cour de cassation, chambre civile, July 11, 1888, [1889] D. I. 479, [1888] S. I. 409. In order to have a disguised donation, the donor must cast the gratuitous transaction in the guise of an onerous transaction. For example, a father will sign what is, on its face, a contract of sale with his son. If the intention of the parties was that the father's performance was to be uncompensated, the father can be required to perform and the son need not make his performance. Similarly, if the parties recite in a document that the son has paid the father a sum of money in return for which the father obligates himself to make a certain performance, the father must perform even though the son has not, in fact, made such a payment.

The disguised donation can be compared with the doctrine of nominal consideration. In this connection it is interesting to consider the justification advanced for the disguised donation: "[T]he will of the donor finds in the deception to which the donor believes it is necessary to have recourse the equivalence of the protection which the [code] requirement of form would have procured for it. The donor must so arrange the contract containing the gift as to give it the appearance of an onerous juridical act. The donor is thus clearly aware of the scope of his obligation." 3 RIPERT & BOULANGER, *op. cit.* supra at 1068, § 3351.

22. The requirement of an express acceptance has been criticized. "It is an element of the formalism of the act, designed to make the donation still more solemn and, as a consequence, still more difficult. The *Parlement* of Paris introduced this rule. . . . There is no longer today any reason to preserve this exaggerated formalism. It is curious that the drafters of the Civil Code maintained the rule without any criticism having been made of it." Capitant, *Preface* xiv in 1 REGNAULT, LES ORDONNANCES CIVILES DU CHANCELIER DAGUESSEAU—LES DONATIONS ET L'ORDONNANCE DE 1731 (1929).

23. *Morizot et Guérard v. Compagnie le Phénix*, Cour de cassation, chambre civile, Oct. 18, 1909, [1910] D. I. 462, [1911] S. I. 489 (note Tissier).

of the obligation which is to be proved).²⁴ This last alternative has, as was probably inevitable, given rise to considerable litigation in the process of defining its scope.²⁵

The common law statute of frauds legislation provides adequate and workable formalities: a memorandum or note in writing, signed by the party to be charged or by his authorized representative, and, alternatively, for the sale of goods, the giving of "something in earnest to bind the bargain or in part payment." A major defect in the common law's handling of the problem of form exists, however, in its failure to provide an adequate and workable formality for those transactions where the lack of consideration results in a promise unenforceable without form. In the older common law a satisfactory formality was available in the seal. Today, a gratuitous promise under seal is not enforceable in most jurisdictions.²⁶ The only other formality available is nominal consideration—the casting of the gift transaction in the form of a bargained-for exchange of economic values.²⁷ The involvement of the question of available formalities with the general doctrine of consideration has complicated the judicial administration of this formality. It may, by obscuring the true function of nominal consideration, have led some courts to refuse, due to a misunderstanding of the real problem at issue, to accept certain types of nominal consideration. Thus, in the case of *Schnell v. Nell*,²⁸ where the gift promise of money was cast in the form of an exchange by the donee promising one cent in return, the court refused to enforce the promise even though the parties had obviously used the technique of nominal consideration in an effort to find a formality by which the promise could be made binding. In some states there is, in consequence, no longer any legal device available which will bind the promisor to a gratuitous promise.²⁹ Even when nominal

24. CODE CIVIL art. 1341 requires a written instrument either executed in the presence of a notary or signed by the parties. Articles 1347 and 1348 introduce certain exceptions to this formal requirement, the most important of which is the provision that a so-called beginning of written proof will satisfy the formal requirement of article 1341.

25. For one aspect of the evolution of article 1347, see note 16 *supra*.

26. See 1 WILLISTON & THOMPSON, A TREATISE ON THE LAW OF CONTRACTS 659-62, § 218 (rev. ed. 1936).

27. If A asks, in return for his promise to give B \$10,000, that B promise to give (or that B give) A a pepper corn, B's promise (or performance) furnishes consideration to support A's promise.

28. 17 Ind. 29, 79 Am. Dec. 453 (1861); see also *Fischer v. Union Trust Co.*, 138 Mich. 612, 101 N.W. 852 (1904) (promise of an indeterminate value, nominal consideration of one dollar held not to satisfy requirement of consideration).

29. See FULLER, BASIC CONTRACT LAW 318 (1947).

consideration is recognized, it remains a formality which is less comprehensible to the layman than is the notarial contract of French law.

Thus, the French Civil Code appears to be somewhat superior to the common law in its handling of the problem of form. The superiority here is not so marked, however, as was the case with regard to contract formation.

IV

The superiority of the French Civil Code to the common law in these two basic areas of the law of contracts is not purely fortuitous. It would seem to be due, at least in part, to the fact of codification and to the habits of thought and patterns of development associated with codification on the Continent of Europe. In both legal systems the law of contracts was, in its beginnings, primitive and unsuited to the commercial and industrial societies which were later to emerge.

The formless, fully executory agreement, so necessary for trade and commerce, was not enforced. The economic life of England and the Continent had to flow, even when a trading economy began to develop, within the legal framework of the formal contract and of the half-executed transaction, that is to say, a transaction fully performed on one side. In neither legal system was the task of developing a law of contracts appropriate for the emerging economic order simple or easy. Ultimately, both legal orders made available what was indispensable: a body of contract doctrine by which ordinary, executory business agreements, involving a future exchange of values, could be made enforceable.

The new law of contracts began to grow up on the Continent and in England through the practices of merchants, which early developed into a *jus mercatorum* administered by courts of merchants. The practices of merchants were, at first, devoid of all sanction by the legal order and could not be invoked in the existing law courts. But as early as about 1116, the Count of Flanders "instituted in most of his towns local courts of *échevins*, chosen from among the burgesses and alone competent to judge them. Sooner or later the same thing happened in all countries. In Italy, France, Germany and England the towns obtained judicial autonomy, which made them islands of independent

jurisdiction lying outside the territorial custom."³⁰ Merchants came in the eleventh century to assert the force of their own practices against the customary law.³¹ For example, they claimed that sales concluded at fairs should be binding regardless of whether they were made in the proper legal forms, for such was the custom of merchants.³² Mercantile practices tended, in general, to develop informal and flexible transactions appropriate for active commercial life. And the merchant courts provided expeditious procedures and prompt justice administered by men who were themselves merchants and fully aware of mercantile problems and customs.³³

In the twelfth and thirteenth centuries the development of the law of contracts on the Continent and in England began to diverge as different forces came into play in molding the common and the civil laws. In England, the common law of contracts was to be developed pragmatically and judicially. Until the fifteenth century this development went forward in the King's and many other courts. Indeed, the Courts of the Boroughs, of the Fairs and of the Staples administered a law of contracts more suited to the needs of business than that available in the King's Courts.³⁴ In the fifteenth and sixteenth centuries, the jurisdiction of the King's Courts showed a pronounced tendency to become progressively more exclusive. It was perhaps logical and inevitable that, after an effective, centralized administration of justice had been established, it should seek to acquire an exclusive jurisdiction. In all events, with the decline of the Courts of the Fairs and other local courts in the second half of the fifteenth century, the common law of contracts entered upon a decisive stage in its evolution. It was not without importance for the law which developed that this stage was presided over by the common law courts and the practicing legal profession.

From perhaps the thirteenth century, the medieval common law had dealt with contractual problems primarily through two actions, debt and covenant.³⁵ Where a fixed sum of money was

30. PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE* 53 (Clegg transl. 1937).

31. See GOLDSCHMIDT, *UNIVERSALGESCHICHTE DES HANDELSRECHTS* 305 (1891).

32. MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* 10-11 (1904).

33. See *id.* at 12-16.

34. See generally FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 289-98 (1949).

35. See *id.* at 330. The availability of certain special techniques, such as the penalty bond under seal, recognized by the common law courts, should not be overlooked. See Thorne, *Tudor Social Transformation and Legal Change*, 26 N.Y.U.L.Q. REV. 10, 19-22 (1951).

owed, under an express or implied agreement, for a thing or benefit given, simple debt lay to recover the sum. Debt on a specialty was available for breach of a promise, made in a sealed instrument, to pay a fixed amount of money. Covenant could be brought for breach of a promise under seal (but until rather late in the history of the action only if the promise were not to pay a fixed sum of money).³⁶ These actions did not provide a remedy for the breach of an informal, executory agreement.³⁷ In the fifteenth century, the common law courts started to develop a form of action which would render such agreements enforceable. By "the middle of the sixteenth century the modern conception of contract [in the common law] had, in essence, been formulated."³⁸ Assumpsit provided a comprehensive remedy for executory, parol agreements.

It was now necessary for the common law courts to determine the limits of the new action. The problem was put in an early case. "Truly, if this action is maintained, one shall have trespass on the case for breach of any agreement in the world."³⁹ The courts found the limiting principle in the doctrine of consideration.⁴⁰ This doctrine came, as it was developed, to embody the concept of bargain. Many theories have been offered to explain why the common law adopted the principle of bargain while the continental legal systems were developing in the direction of a principle of agreement which would enable them to deal more simply and directly with promissory situations in

36. It is interesting to note that a writing under seal was originally not always required for the action of covenant. See FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 219-20, 257-58 (1949). At first there was no great point made of the requirement of a deed or even a writing in covenant, which was then used chiefly between landlord and tenant and to enforce other agreements relative to land. It "might have been adapted to the enforcement of contractual promises in general, and it was almost a century [i.e., almost the fourteenth century] before the common law definitely indicated that it would not take this important step." *Recommendation of the Law Revision Commission Relating to the Seal and Consideration* 15 (1936) in *STATE OF NEW YORK SECOND ANNUAL REPORT OF THE LAW REVISION COMMISSION* 95 (1936). If the requirement of a seal had not grown up the common law would have had a general contractual action, based not upon bargain but upon a unilateral promise, at a very early date. See FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 257 (1949).

37. Some concessions were made by the common law in the case of sales, which became in effect a consensual contract with the seller having an action in debt and the buyer an action in detinue. But this change, due in part to mercantile pressure, was only "an artificial, if salutary, refinement upon existing principle." *Id.* at 330.

38. *Id.* at 339. The evolution of assumpsit was slow and involved. Fifoot gives an excellent sketch of the development. See *id.* at 330-57.

39. *Y.B.* 3 Hen. 6, 36, pl. 33.

40. For an excellent discussion of the development of the doctrine of consideration see FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 395-443 (1949).

which there is no element of bargain. Doubtless there is no single or simple explanation. However, at least four elements in the English picture may help to explain this divergent development.

First, there is the fortuitous element of the inherited materials with which the system had to work. "The Elizabethan judges, though the choice was not consciously present to their minds, were impelled by every tradition of the common law to prefer the principle of bargain. Gratuitous promises were associated with the writ of covenant and were excluded from the province of Debt sur contract. During the early experiments with *assumpsit* the idea of reciprocity was constantly asserted."⁴¹ It is thus understandable that the judges came to insist, through the doctrine of consideration, upon an element of bargain in the transaction which they were asked to enforce.

Second, case law, in the process of formulating the principle that executory parol agreements were enforceable, would have found it rather difficult to develop a formality, such as the notarial contract adopted in France, to provide guarantees against the dangers inherent in gratuitous promises. Such guarantees were already present in the actions of debt upon a specialty and covenant, which could be brought to enforce gratuitous promises under seal. It may, therefore, well have been sound judicial statesmanship to leave the enforcement of gifts to these actions.

Third, the development of *assumpsit* was doubtless basically due to pressures from important commercial interests and was carried on largely by the practicing legal profession. Such interests, and such advocates, did not seek a general sanction for all executory agreements, including charitable gifts, but only for business enterprise.⁴²

Fourth, the common law of contract was little influenced by the speculation of learned men, relatively remote from the day to day practice of the law as were many of the civilians and canonists who played such a large role in the development of the general principles of the law of contractual obligation in France. The common law of contracts developed concretely and pragmatically, not systematically and speculatively. The absence of general theory can be seen even as late as Blackstone (1723-

41. See *id.* at 398.

42. *Cf. id.* at 399.

1780) who disposes of the subject of contract in a few pages forming a kind of appendix to his treatment of the law of property.⁴³ It is perhaps inherent in the method and manner of the development of the common law that the doctrine evolved to rationalize, and limit, the enforceability of parol executory agreements should not be "as wide as morality and as warm as conscience" but should rather be "commercialized into the price of a bargain."⁴⁴

On the Continent of Europe, the process through which a law of contracts appropriate for the needs of the emerging commercial society was developed is significantly different. By the twelfth and thirteenth centuries, speculative and systematic thought began to play a role of increasing importance in the development of the new law of contracts. The characteristics of the theory of formation and of the approach to the general problem of form today found in the French Civil Code result, in considerable measure, from the efforts of speculative and systematic thinkers in reworking the primitive contract law with which both they and the common law began.

The Church supported strongly the proposition that a simple, formless promise should be binding: *pacta sunt servanda*. This attitude was to encourage the development of formless contracts even though the canonists were divided on the question whether formless civil obligations could be enforced by the Church in those fields where it had civil jurisdiction.⁴⁵ By the thirteenth century canonists were writing that "even the 'nude pact' [of Roman law] should be enforced, at any rate by penitential discipline."⁴⁶ In the course of the development of the canonists' thinking on these matters, the notion of *causa*, which had played such a limited role in Roman law,⁴⁷ came to be used as a new

43. See FULLER, BASIC CONTRACT LAW 303-04 (1947).

44. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 398 (1949).

45. See SEUFFERT, ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE 52 (1881).

46. 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 195 (2d ed. 1898). The teaching of the later canonists has been summarized as follows: "(1) The promise must be intentional; (2) it is subject to be taken back in consequence of a material change of circumstances; (3) it must have a reasonable cause, which may consist either in a material equivalent or moral considerations; (4) a liberal disposition is to be deemed a sufficient cause in the case of gifts; (5) promises to moral persons, to political, learned, or religious bodies are legally valid if they are made for the sake of their moral aims, e.g. for the honour of God, the advancement of learning, assistance of the poor, and the like." Vinogradoff, *Reason and Conscience in Sixteenth-Century Jurisprudence*, 24 L.Q. REV. 373, 382 (1908).

47. The law of contracts found in Justinian's Institutes and Digest recognized several categories of transactions: Four types of nominate or named

vestimentum ("garment"), thus maintaining continuity with Romanist teaching by fitting the canonist doctrine of *pacta sunt servanda* into the framework of the *pacta vestita* ("clothed pact")⁴⁸ and providing a substitute for formal requirements by insuring, through the requirement of a *causa*, that a serious intention to assume a legal obligation had existed.⁴⁹

Perhaps the most important speculative and systematic influence upon the development of contract law in Europe from

contracts were enforced at this stage in the development of Roman law: *re*, a contract (of which there were four types: *mutuum*, a loan for consumption, *commodatum*, a loan for use, *depositum*, a deposit, *pignus*, a pledge or a pawn) in which the obligation arose from the handing over of a thing; *verbis*, a contract (the well-known stipulation) in which the obligation depended upon a form of words; *litteris*, a contract (which had become obsolete) in which the obligation depended upon a special kind of writing; and *consensu*, a contract, of which only four special cases (sales, hire, partnership, and mandate) were recognized, in which the obligation rested upon agreement alone. A large group of transactions, which were not referable to one of the recognized named contracts, formed a second group of contracts, the so-called innominate or unnamed contracts (including exchange and compromise). In all of these contracts there is the common feature that something is done or given on one side which gives rise to a duty on the other. See LEE, THE ELEMENTS OF ROMAN LAW 335, § 510 (3d ed. 1952). A third group of agreements, some of which came to be enforceable, were not classified as contracts but as pacts. An unenforceable pact was called a bare pact and could be pleaded as a defense. See *id.* at 335-37, § 511. Pacts which were made actionable were called *pacta vestita*, clothed pacts.

The principal reference to *causa* found in the Justinian Code is in THE DIGEST, 2. 14. 7. pr.-4. The passage has been commented upon as follows: "[This] famous passage [especially D. 2. 14. 7. 4, which states that: 'If there is no additional ground (*causa*), in that case it is certain that no obligation can be created, (I mean) on the mere agreement; so that a bare agreement (*nudum pactum*) does not produce an obligation, it only produces an *exceptio*.'] on which the whole theory of *cause* was based, and which was taken to mean that every contract must have a *cause*, in reality says nothing of the kind. It distinguishes between agreements which have been recognized as nominate contracts, such as sale and hire, and agreements for which no special régime has been laid down. Then it goes on to say that in all these latter cases there will still be an action provided that there is also *cause*. The text, which may well be due to the compilers, clearly deals with what later came to be known as innominate contracts, and *causa* here means what English lawyers call executed consideration. The contracts are of the type *do ut des*, *do ut facias*, *facio ut des*, or *facio ut facias*. Then the passage goes on to say that if there is no *causa*, it is a case of *nudum pactum*, which will give rise to an exception but not to an action.

"*Causa* is here evidently made to play a part only in the theory of innominate contracts. It has nothing to do with the consensual contracts, which have always been recognized to present a serious difficulty, but it has also, for the purposes of this passage, nothing whatever to do with the real or verbal contracts either. In other words, all it says is that executed consideration is required where no régimes have been set up for particular contracts." BUCKLAND & MCNAIR, ROMAN LAW AND COMMON LAW 229-30 (2d rev. ed., Lawson 1952).

48. See CHEVRIER, ESSAI SUR L'HISTOIRE DE LA CAUSE DANS LES OBLIGATIONS 174-75 (1929).

49. See *id.* at 15-16. See also the discussion at page 705 *infra* and the quotation from the *Summa* of Angelus Carletus given in note 59 *infra*.

the twelfth century on was the revived study of Justinian's *Corpus Juris Civilis*. Certain Roman law practices had, of course, been continued as custom in the period before the revival of Roman law. The revival of classical Roman law, however, increased immeasurably the Roman influence upon the developing law of contracts.

This influence was to lie in two directions. First, the study of the *Corpus Juris Civilis* stimulated men to rediscover or construct a general law concerning the validity of agreements. Second, the Roman law, as crystallized in Justinian's law books, tended both to confirm the notion already present in the old customary practices that something more than a formless expression of agreement must be required if an action is to be given and to introduce the idea, through the learning about innominate or unnamed contracts,⁵⁰ that the number of recognized types of enforceable, purely consensual transactions was limited. The Roman law maxim, "*ex nudo pacto non oritur actio*"⁵¹ was commented upon, often in picturesque phrases,⁵² and became a part of the civilian's doctrine of contract.⁵³

The Roman learning relative to innominate contracts, and Roman maxims such as "*ex nudo pacto non oritur actio*," could have formed the basis for a development in the civil law of contracts of a doctrine rather similar to the common law doctrine of consideration. It would not have been difficult, by

50. See note 47 *supra*.

51. See note 47 *supra*.

52. Azo, in his famous *Summa*, written in the first quarter of the thirteenth century, discussed the clothing of naked pacts as follows:

"Moreover, a pact is clothed in six ways: by a thing, by words, by consent, by a writing, by having a connection with a contract and by the interposition of a thing. It must be observed that the pact is said to be clothed in these first four ways because it was never without these garments and began to have them upon its coming into existence. It is clothed in the last two ways after its birth. When we make a pact it is, in fact, born naked, as is proved by the continuation of the two sections . . . [D. 2. 14. 7. 4 and 5], but, once born, the pact looks around and opens its eyes to see whether it has been preceded or can be followed or whether there is at once some contract, the clothes of which it puts on so as to drive away the north wind and the fury of the storm and be able to give its help to its master in the action. The pact is made, in fact, immediately, that is, a little before the contract or a little after the contract or in the same contract—I do not distinguish whether the contract is *bonae fidei* or *stricti juris*. . . . A pact can [also] be clothed by the interposition of a thing, as in the innominate contracts, which do not at the beginning give any action but, in which, after the thing is interposed and delivered the action belongs to him who clothed the contract by the interposition of the thing. . . ." Translated from the Latin text as given in SELECT PASSAGES FROM THE WORKS OF BRACON AND AZO 143-44 (Maitland ed., Selden Society, 1895).

53. See SEUFFERT, ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE 34-45 (1881).

using the concept of *causa*, to have fastened the principle of bargain upon the civil law. Some such development might well have occurred if the civil law of contracts had developed judicially and pragmatically. That it did not occur is doubtless due in part to chance, but also, it would seem, in part to the speculative and systematic thought of jurists. Consider the tendencies discernible in the Italian literature of the fifteenth century: First, the actionability of formless contracts concluded between merchants was generally accepted. Second, the theory was current that a *nudum pactum geminatum* (a "twin-born naked pact") was actionable: It was held that a nude pact produced a natural obligation and that the repetition of the nude pact made this original natural obligation enforceable. This theory was based upon an extension of the *constitutum*⁵⁴ of Roman law and a misunderstanding of the Roman law conception of the *naturalis obligatio*.⁵⁵ It was also connected with the explanation, which now came to be offered for the Roman law rules relative to nude pacts, that such pacts were not enforceable because of the need for protecting inexperienced persons from the consequences of unconsidered statements.⁵⁶ The repetition of the statement tended to provide a safeguard against inconsiderate action, the reason for not enforcing the transaction thus ceasing to exist.⁵⁷ Third, some jurists held that an action *de dolo* would lie for damages caused by breach of an informal pact.⁵⁸ Fourth, the canon law doctrines were discussed by most civilists. But only at the very end of the century, and then only with a very few writers, was there any notion of the general applicability of these doctrines.⁵⁹

54. The *constitutum* was a praetorian action based on an informal undertaking to pay an existing debt at a fixed time. At first the debt had to be of money, but this rule had disappeared by the time of Justinian. The *constitutum* was void if there were no real debt, but a *naturalis obligatio* sometimes sufficed (see note 55 *infra*) to satisfy this requirement. See BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 308-09 (2d ed. 1939).

55. See SEUFFERT, ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE 76-77 (1881). In Roman law a nude pact usually did not create a natural obligation, although there were a few exceptions. See BUCKLAND, A TEXTBOOK OF ROMAN LAW 553 (2d ed. 1932). The effect of a natural obligation varied, however. The only rules common to all natural obligations were that no action lay and that a payment made to discharge such an obligation could not be recovered. See *id.* at 552. In particular, not all natural obligations could form the basis of a *constitutum*. See SEUFFERT, *op. cit. supra*, at 19.

56. See *id.* at 68, 76-77.

57. See *id.* at 76-77, 80.

58. See *id.* at 84-85.

59. See *id.* at 85-86. It is interesting to note in this connection that the canonists were, in their turn, influenced by the teachings of the civilians. By the fifteenth century the canonists sought to reconcile their teachings with the Roman law principle, *ex nudo pacto non oritur actio*, by develop-

By the sixteenth century the importance of speculative and systematic thought in shaping continental thinking on contract law is clearer and greater. The natural law philosophers took up such ideas as the principle, *pacta sunt servanda*, supported originally by the Church, the merchants,⁶⁰ and certain civilists. The influence of natural law can be seen in the work of a jurist and legislator such as the German Ulrich Zasius (1461-1535). In his legal writings Zasius taught the Roman law rule that an action could not be based on a *nudum pactum*.⁶¹ When, however, asked in 1520 to draft the city law of Freiburg he provided for the enforceability of nude pacts.⁶² But Zasius did not, even as a legislator, abandon the Roman teaching relative to innominate contracts.⁶³ The city law of Freiburg explicitly provided that an exchange is not binding without part performance.⁶⁴ The influence of natural law theories is also seen in the writings of the German, Matthäus Wesenbeck (1531-1586), and the Frenchman, Charles Dumoulin (1500-1566), who were probably the most influential supporters in the sixteenth

ing the doctrine of a *causa* clothing the naked pact. A pact was declared valid if it were adorned by an adequate *causa*. "The definition of *causa* was a more embarrassing task and encouraged ingenious speculation, but, by the general consensus of opinion, the doctrine required the plaintiff to prove only that the promise had been made with a serious purpose. Unless his design was manifestly unreasonable or improper, the promisor was bound. Nor need his aim be commercial: benevolence, piety or the discharge of a moral obligation sufficed." See FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 306 (1949); see also note 46 *supra*. Fifoot quotes an interesting fifteenth century example of such writing from the *Summa Angelica* of Angelus Carletus:

"The question is whether a man is bound by a naked pact or simple promise. The answer is that he is so bound by canon law and in conscience, under pain of mortal sin, provided that a cause is expressed, as if I promise you ten pounds because you have sold me such a thing or have lent me the money, and so forth. But if it be so naked that no cause is added, he is not bound even in conscience; and the reason is that he is taken to have made the promise in error. . . . But notice that, if a man say, I promise to give you a hundred pounds, then the liberality of the promise is presumed to be the cause of the gift, and so it is not without cause. So, too, if anything is promised to a pious foundation, because he is taken to have bound himself for motives of piety. . . . No one is bound from whatever cause unless he has intended to bind himself. He is not required, under pain of mortal sin, to keep a naked pact, unless there exist a cause which requires him to be so bound by moral precept, as if I have promised my robe to my father, who is perishing with cold; for in such a case as this a man is bound, even if he never intended to be bound." *Ibid*.

60. MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 102 (1904).

61. See SEUFFERT, ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE 96-97 (1881).

62. See *id.* at 99-102. Seuffert considers this the earliest German legislation providing for the actionability of nude pacts. See *id.* at 101.

63. See note 47 *supra*.

64. See SEUFFERT, ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE 100 (1881).

century of the validity of informal contracts.⁶⁵ However, Wesenbeck, as had Zasius, still made the actionability of innominate contracts, especially contracts of exchange, depend upon part performance.⁶⁶

The speculative and systematic thought embodied in the principle of the enforceability of formless contracts did not, therefore, operate at this period to break down completely the limited contractual categories of the Roman law.⁶⁷ Some of the writers appear to have failed to see that the actionability of nude pacts led logically to the binding effect of consensual innominate contracts. Others rationalized the result by seeing in an innominate transaction before part performance only preliminary, non-obligatory dealings.⁶⁸ Only a very few, among them the German Peter Gudelin (1550-1619), argued for the binding effect of innominate contracts before part performance.⁶⁹

By the end of the sixteenth and the beginning of the seventeenth century, the number and influence of the supporters among legal writers and philosophers of the validity of formless contracts increased markedly, even though the opposing view did not entirely disappear.⁷⁰ The writings of Grotius (1583-1645)⁷¹ and Pufendorf (1632-1694), which based the binding effect of formless, executory contracts on natural law, had great influence. The large majority of seventeenth century writers continued, however, to treat innominate contracts as unenforceable in the absence of part performance.⁷² The great

65. For Wesenbeck, see *id.* at 106-08; for Dumoulin, see SPIES, *DE L'OBSERVATION DES SIMPLES CONVENTIONS EN DROIT CANONIQUE* 221-25 (Thesis Nancy, 1928).

66. See SEUFFERT, *ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE* 107-08 (1881).

67. See *id.* at 119-29.

68. See *id.* at 143.

69. See *id.* at 128-29.

70. See *id.* at 118-19; see generally *id.* at 119-29.

71. See especially *DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, c. xi (1625), where Grotius argues that every deliberately made promise is binding. For an English translation of this work see 2 GROTIVS, *DE JURE BELLI AC PACIS LIBRI TRES* (Kelsey transl. 1925).

72. See the quotations in SEUFFERT, *ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE* 130-38 (1881). Spies considers that the general enforceability of formless, executory contracts was accepted in French practice during the first half of the sixteenth century. See SPIES, *DE L'OBSERVATION DES SIMPLES CONVENTIONS EN DROIT CANONIQUE* 217, 221 (Thesis Nancy, 1928). He connects this development in the practice with the Ordinance of Villers-Cotterets (1539) which ended the plaintiff's right to choose between civil and ecclesiastical courts in ordinary personal actions. See *id.* at 217-19. If the civil courts had not so changed the rules of law which they administered, certain formless, executory contracts, which were formerly enforced in the ecclesiastical courts, would have been rendered unenforceable by the abolition of the ecclesiastical jurisdiction.

French lawyer Domat (1625-1696) was one of the few who considered all formless, executory contracts binding. "[A]ll contracts, whether they have a particular name or not, have always their effect, and oblige the parties to what is agreed on."⁷³ The legislation of this period fell by and large into the same pattern. It accepted, in general, the actionability of formless contracts but did not draw from this principle the conclusion that innominate contracts were enforceable without part performance.⁷⁴

The eighteenth century saw the speculative and systematic thought of jurists and philosophers finally and fully carry the day. The enforceability of formless contracts was generally recognized and most legal writers supported the proposition that executory innominate contracts were also thereby made actionable.⁷⁵ And the position taken by the legal writers is reflected in the legislation of the period.⁷⁶

Such are the general outlines of the long and complex process which gave France, along with Western Europe as a whole, the basis for a general law of contractual obligations largely freed from historical anachronisms and capable of being developed in functional terms. Consensual and formless contracts had been accepted by the legislator and justified by the theorist. The Roman law's closed contract system which, through the learning about nominate contracts, innominate contracts and nude pacts, in effect held contractual transactions within the limiting framework of recognized contractual types, had been supplanted by the new learning. Men were now permitted to transact more freely in terms of their needs and desires. The ground was cleared for the great codifications of the nineteenth century. They could, starting with a theory of formation based on agreement, approach rationally the problem of the element of formality which should be required before the legal order will sanction a particular type of transaction.

The theory of contract formation and the approach to the problem of form thus prepared for the drafters of the French Civil Code fitted in remarkably well with their intellectual pre-

73. DOMAT, LES LOIS CIVILES DANS LEUR ORDRE NATUREL, Book I, Title I, § 1, VII (2d ed. 1695); for an English translation, see 1 DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER 162, para. 150 (Strahan transl., Cushing ed. 1850).

74. See SEUFFERT, ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE 144-65 (1881) for examples of such legislation.

75. See *id.* at 138-44.

76. For example, the state law of Bavaria recognizes, with a clear reference to natural law, the actionability of formless contracts, including executory, innominate contracts. See *id.* at 165-66.

conceptions and with the technique of a code. The theory of formation, based as it was on agreement, was rational, offered the generality which codification required, and raised directly and clearly the problem of form. This problem could in its turn be handled in a code through formalities, particularly various requirements of writing, that were understandable to the ordinary person and peculiarly appropriate for legislative adoption.

The common law, as has been pointed out above, never managed to develop a general approach to formation and formality which went beyond the requirements of the typical business transaction, envisaging an exchange of economic values, to deal helpfully with more marginal problems such as those presented by the commercial option, the so-called "unilateral contract," and the promise to give. Lord Mansfield, perhaps the most speculative of the great common law judges, attempted such a further development of the doctrinal structure of the common law in *Pillans v. Van Mierop*.⁷⁷ He made two arguments: First, that the case, being commercial, was governed by the customs of merchants which did not require consideration. Second, that consideration, even where no business interest was involved, had a purely evidentiary function and, consequently, need not be shown where the agreement was in writing. But Mansfield's attempted innovations were soon repudiated.⁷⁸

The more satisfactory treatment accorded problems of formation and form in the *Code Civil* as compared with the common law seems to be due, in large measure, to the role which speculative and systematic thought played in the evolution and ultimate codification of the French law. At least until recent

77. 3 Burrows 1663, 97 Eng. Rep. 1035 (K.B. 1765).

78. The efforts of Lord Mansfield and the subsequent reaction are sketched in FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 406-11 (1949); see also FIFOOT, LORD MANSFIELD 118-41 (1936). *Pillans v. Van Mierop* was overruled by the House of Lords in *Rann v. Hughes*, 7 Term R. 350 note, 101 Eng. Rep. 1014 (1778). "In *Rann v. Hughes* Lord Mansfield had held an administratrix liable upon a written promise, made in her personal capacity, to pay a debt due by the deceased to the plaintiff. [Footnote omitted.] The judgment was reversed in the Exchequer Chamber and the reversal sustained in the House of Lords. Buller, for the plaintiff, urged uncompromisingly the intrinsic validity of a written agreement. He dared to impugn the sanctity of the Deed. To affix a seal was notoriously a farce, and, if so trivial an act dispensed with consideration, why should it be required where the parties, by embodying their terms in a document, even if unsealed, had attested to their serious purpose? But two centuries of precedents were not to be 'melted down into common sense.' The general opinion of the judges, accepted by the Lord Chancellor, declared the antithesis of written and oral agreements to be heretical; and consideration remained a vital element in all contracts not under seal." FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 409 (1949).

times, the common law has not benefited from any comparable efforts to think legal problems through systematically and to develop a rationalized body of legal solutions, rules, principles and doctrines. Nor has the common law had the benefit of a thorough legislative reshaping in the course of which many inherited complexities and encumbrances could be discarded. In some areas of the law of contracts the common law may be better today just because this has not taken place; but it would seem that the common law pays a price in other areas—areas which can benefit from rationalized, speculatively developed doctrines and in which the greater freedom of action at any given point in time ordinarily possessed by a legislature as compared with a court can be of considerable importance in determining the shape the law will take. At least these are the conclusions suggested by a comparative study of the evolution of contract in the civil and common laws.

V

This brief investigation of the history and present day functioning of legal concepts in two important areas of the French and the common law of contracts—the theory of formation and the problem of form—may be suggestive for the comparative study of contracts. They may also be significant for an understanding of fundamental differences between the common and the civil laws.

There are various areas of the law in which general and relatively rationalized doctrines appear to operate more effectively than do doctrines whose fabric, though richer, is more pragmatic and less capable of generalized application. These are the areas where a general policy is needed, a policy which can then be tailored to take into account particular difficulties by the use of more specific, supplementary rules. The common law may have more difficulty than the civil law in developing and using such general policies as guides to legal reasoning. It has been suggested above that this is the case with respect to formation and formality in the law of contracts. And it should be remembered, in this connection, that the basis for the relatively satisfactory approach to the problems of form and formality found today in French law was laid in a codification made one hundred and fifty years ago.

In other areas of the law, of course, more precise and concrete principles are needed. In these areas the advantage may

lie with the common law, particularly when compared with a relatively old codification such as the *Code Civil*. It is perhaps true that in such areas a codified system tends more than the common law to treat rules and principles as ultimate verities rather than working hypotheses. Here the process through which the common law develops probably tends to operate, over the long run, to its advantage. In the common law rather more than the civil law "Every new case is an experiment. . . . The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be reexamined."⁷⁹

79. SMITH, JURISPRUDENCE 21 (1909). See also von Mehren, *The Judicial Process in the United States and in France—A Comparative Study*, 22 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 235 (1952-53); von Mehren, *The Judicial Process in the United States and Germany, A Comparative Analysis*, in 1 Festschrift für Ernst Rabel 68 (1954).