Agreements With(out) Consideration: The World of Gifts and The World of Contracts[1]

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Abstract: Given my intellectual interest in the subject, and for the complexity posed by the world of gift-giving with moral aspects and the world of contract law, in this essay I will: 1) present –and comment– the definitions of the elements that come into play for the discussion –and in this order– of this subject: contract, promise, and gift; 2) I will attempt to answer the question of whether a gift can constitute a valid contract and, therefore, become enforceable; in this section, I will explore both legal and moral issues, although they are related to each other; and, finally, 3) I will offer some brief conclusions from, of course, the observations pointed out in my work.
Keywords: Common law; contract law; gift; promise; enforceability.

Resumen: Debido a mi curiosidad intelectual sobre la materia, y por la complejidad de la teoría del regalo entraña –especialmente por lo que a sus aspectos morales y, a su vez, a su relación el derecho contractual, se refiere– en este artículo persigo: 1) presentar –y comentar– las definiciones de los elementos que entran en juego –y por este orden– para la discusión del tema: contrato, promesa y regalo; 2) Intentaré responder a la pregunta de si el hecho de hacer un regalo puede dotar de validez un contrato y, por consiguiente, si esto lo hace ejecutable; en esta sección me referiré también a sus aspectos morales y legales, a pesar de que están inextricablemente relacionados; y, finalmente, en 3) ofreceré, por supuesto, unas breves conclusiones a partir de las observaciones previamente analizadas.
Palabras Clave: Common law; derecho contractual; regalo; promesa; ejecución de un contrato.

1. Introduction

As a literary and cultural studies scholar and university professor, one of my areas of interest has been related to the application of game theory as a framework and theoretical tool for studying literature; in the same way, and given the interrelation between game theory and gift theory, the latter has interested me in several moments of my professional career.

In regards to the latter, the French sociologist Marcel Mauss (1872-1950) dedicated many of his texts to this very topic; his main study in this area was his celebrated *The Gift. Forms and Functions of Exchange in Archaic Societies* (1925) in which he studies the exchange of gifs in different cultures of the world. Although his work focuses on archaic societies –commonly understood as pre-capitalist, that is, as societies based on an exchange economy–, the truth is that his main thesis is still valid

[1] The title of this paper was inspired by Melvin Aron Eisenberg's, "The World of Contract and the World of Gift," *California Law Review* 85.4 (1997): 821-866.

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today, in full capitalism and, even with the assumption of the new social habits inherited from the French Enlightenment, with the help of education, a new man, more ethical or moral, if one wishes. Nothing is further from reality. The failure of the ideals of the Enlightenment are more than evident today –you just have to think about the Nazi Holocaust or many other violent enterprises that surround us every day–. Be that as it may, Mauss's main thesis is that when you give a gift, what you are actually doing is creating a gift-debt that must somehow be paid –it is expected–; in other words, some sort of moral contract is formed; but is it a contract? Certainly moral issues come into play with this gift exchange between the giver and the receiver, but a valid legal contract is not necessarily created with it. As if the problem that here arises was not enough, and as well expressed by the underrated American author Gene Wolfe (1931-2019), in his celebrated science fiction book *Shadow & Claw* (1983), "[w]hen a gift is deserved, it is not a gift but a payment."

2. Definitions

In order to understand what a contract is and is not under the law, we first must identify some key ideas and meanings; basically, a valid and integrated contract is a binding agreement between two or more parties –who agree to certain terms through a mutual assent or a "meeting of the minds"– and are enforceable by state and federal contract law; the main elements include an offer, an acceptance of an offer, and consideration. The key component to recall when distinguishing between contracts and promises or gifts is *consideration*, understood, in contract law, as a payment or benefit that has to be bargained between the different parties involved in the transaction; in fact the consideration *per se* is the *sine qua non* by which the parties enter into a strictly said contract, so that one consideration is replaced by another; for example: Sam tells Pedro, "I'll sell you my 1974 Ford Bronco for $ 5000. In this hypothetical contract between Sam and Pedro, the consideration is the promise to exchange Sam's 1974 Ford Bronco for Pedro's $ 5000.). It is equally remarkable that, in fact, the foundations of modern contract law must be sought in the late sixteenth century, when English judges declared that "a promise on a promise will maintain an action upon the case" (Horwitz 916).

Furthermore, even though consideration is an essential component of contracts, the courts do not mandate that they benefit a promisee, nor does there have to be a significant amount or value involved. There only has to be legal harm made to the promisor so that the consideration obligates the promisee to honor the initial promise.

As the terms are explored in greater detail and with concrete examples, it will become apparent that this key element directed not only court rulings over the years but also established itself as a barrier to demonstrate the limitations of contracts in gift-giving.

2.1. Contract

I have spearheaded this work with the word "agreement." Although, by its semantics, we can understand it as "a meeting of the minds," so it could well be considered as a contract; the truth is that the concept of "agreement" is more flexible and includes both contracts per se and certain other "understandings" that do not meet the requirements of a valid contract, legally speaking. This word has been chosen on

purpose, given the nature of the porous matter that concerns me here, the gifts and enforceability of a contract –or agreement (in a more general sense, the concept of "agreement" also includes the category of contracts, although, I just mentioned it, it doesn't have to always be like this)– based on these concepts.

Now then, and returning to the question previously anticipated, what is understood by contract? Brian A. Blum defines it as follows in *Contracts. Examples and Explanations*:

> A contract … [is] an exchange relationship created by oral or written agreement between two or more persons, containing at least one promise, and recognized in law as enforceable. (2)

In other words, all contracts are composed of the following elements: 1) an offer, made by an offeror; 2) a consideration; and 3) an acceptance, made by the offeree. While the offer and acceptance need to be made in a legally valid manner so that the contract will be formed, and therefore will be binding and legally enforceable.

2.2. Promise

There is certainly a great distinction to be made between a contract and a promise – understood as something legally binding; in other words, "[a]n agreement between private parties creating mutual obligations enforceable by law" ("Contract," Legal Information Institute); as was very well explained by Clarence D. Ashley,[3]

> If my contention is correct, as a promise in law is always a "binding obligation" and such obligation is always a "detriment," the conclusion necessarily follows that a promise may always constitute a consideration, and the question in any given case is whether a promise can be found. (321).

In this sense, "detriment" is understood "legal detriment" meaning that you are willing to do something that you do not have to do, or it may also mean that you agree to not do something that you are legally free to do, you have a legal right to do. However, when considering this issue, one should bare in mind that illusory promises do not constitute it and, therefore, are not enforceable since they do not constitute a valid and fully integrated contract under any circumstances. An example of a promise would be: "I will buy your car if I feel like it;" Despite the appearance of promise, there is really no kind of consideration here and any reasonable person would see that it does not exist , consequently, there cannot be any type of contract.

In any case, the question lies with the issue of consideration as noted above. If there is a unilateral promise to bestow a gift and the gift is accepted, this does not mean that there is a contract unless a clear deal or exchange of something of value is demonstrated. Yet, as George S. Geis explains in "Gift Promises and the Edge of Contract Law," the issue of gifts and promises within contract law is difficult to discern precisely because of the ambiguity that the promise many times carries with it:

[3] For a more profound and detailed explanation, see Clarence D. Ashley, "What Is a Promise in Law?," *Harvard Law Review*, Vol. 16, No. 5 (Mar., 1903), pp. 319-328.

> One of the most interesting and persistent theoretical borderlands relates to gift promises. The consideration doctrine formally bars gift promises from the domain of contract law, but there are a number of side doors –such as reliance, moral obligation, and irrevocable trusts— that permit some gratuitous promises to be treated like contractual obligations. (667)

To better understand those "side doors," I will discuss two sample cases that elucidate those moments when promises must be upheld by the judicial system given the degree of reliance or moral obligation therein demonstrated. A case in which the issue of reliance came to the forefront was *Bredemann v. Vaughan Manufacturing Company* from 1963. In this case, Mrs. Bredemann agreed to retire when the company president encouraged her to do so on the promise that she would be compensated $375 per month for the rest of her life. Initially, she was compensated but after two and a half years, when she became eligible for social security, the company began reducing her retirement until it ended it completely. In 1961, the company stopped paying Mrs. Bredemann her retirement and she sued Vaughan Manufacturing Co. It is curious to note that initially summary judgment was entered in favor of Vaughan Manufacturing Co. since the agreement had been made orally as a promise. Yet later, the Illinois Appellate Court "reversed and remanded the matter on the ground that the plaintiff and defendant had entered into an enforceable contract since Mrs. Bredemann's retirement constituted sufficient consideration" (*DePaul Law* 159). That conclusion became possible when Mrs. Bredemann demonstrated that had she not had that promise of income for the rest of her life, she would have chosen to stay with the company and continue working in order to secure her income for her later life. Thus, the initial oral promise made by the company president was eventually interpreted in the courtroom as an *enforceable contract*.

A second case that was ultimately viewed as contract despite its initial oral promise was *Webb v. McGowin* from the Alabama Court of Appeals from 1952. Additionally, this case sheds light on gift-giving particularly from the moral or ethical stand point since that was the rationale used to make the oral promise be viewed as a contract. In this case, Mr. Webb as an employee of W.T. Lumber Co. prevented an injury on the ground by choosing to instead fall with a piece of pine block to the ground causing himself serious bodily injury in doing so. In fact, he was permanently disabled as a result of the injuries he suffered. It was Mr. McGowin's safety that had been prioritized over his own and recognizing this tremendous generosity, Mr. McGowin promised to pay Mr. Webb $15 every two weeks for the rest of his life in honor of saving his life. In this case, the benefit received was the saving of his life. This arrangement continued until Mr. McGowin died. At that moment, Mr. Webb had to sue McGowin's relatives to continue these payments for the rest of his life. Initially, the McGowin defendants gained a nonsuit but Mr. Webb appealed based on the moral obligation to compensate him and won. In this case, the terms of the contract were also ambiguous, they were made orally and involved only Mr. McGowin and Mr. Webb. Yet the court ruled for Mr. Webb on moral grounds, believing that justice should triumph over the ambiguity of the law. Moral obligation in this case, was sufficient consideration to sustain a promise of payment despite the unclear original contract.

Thus, even when an oral promise could be separated from a contract because proper, initial consideration may be lacking, the court understands and legally upholds circumstances such as reliance or moral obligation where a promise must be

enforceable due to its serious impact on the well-being or livelihood of the promisee. As Seana Valentine Shiffrin notes in *The Divergence of Contract and Promise:* "Such approaches operate as though the law should reflect everyday moral judgments whenever possible, whether because this is the nature of law or because, as a matter of political philosophy, it is what law should aim to do" (713). Thus it seems that when there is a perception that the law should and must allow for moral judgments to triumph over unclear or limited contracts, it will allow consideration to force its way, mandating that imperfect agreements become enforceable contracts.

Another example that can illustrate how a promise can become legally enforceable as a contract would be the following: a new promise to pay a previous obligation, such as a debt, would have been enforceable as a contract supported by consideration. Yet, when it was made the promisor did not have sufficient legal capacity and therefore, it became unenforceable.

2.3. Gift

In contract law, a gift is understand as a voluntary and gratuitous transfer of property from one person to another, without something of value promised in return and, therefore, of no consequence; it is not enforceable as a breach of contract because there is no consideration for the promise. What is important here is that both the idea of contract and promise come into play when considering a gift. As was previously discussed, a contract involves an offer, the acceptance of the offer, and consideration or the exchange of something of value. In most cases, gift-giving will involve an offer of something material or some type of service to a person who will then accept the item or action of service. Yet, what is less clear in the exchange of gifts is the idea of consideration. Clearly, the giver of a gift offers something of value but it is not necessarily in exchange for anything in particular. The promise by one person to give something to another does not necessitate consideration and is therefore, not considered a contract, in most cases. As attorney, Christopher B. Dolan explains in "Is An Oral Promise Of A Gift An Enforceable Contract?": California Civil Code Section 1146 explains a gift as: "a transfer of personal property, made voluntarily, and without consideration" (2). Given this definition, since a gift lacks consideration, it is therefore not a contract. Additionally, the same limitation applies to verbal offers of gifts unless "the means of obtaining possession and control of the thing are given" (Dolan 2). Lastly, Dolan notes that there are three necessary factors for a valid gift exchange:

> (1) there must be an intent, on the part of a donor/giver having capacity to contract, to make an unconditional gift; (2) there must be an actual or symbolical delivery, such as to relinquish all control by the donor/giver; and (3) the done/receiver must signify acceptance, except where it may be presumed. (Dolan 2)

Thus, it becomes clear that in most cases, gift-giving among friends or relatives will result in unenforceable contracts due to the lack of consideration.

There are, however, some interesting legal cases regarding gift-giving as can be seen through the review of Dougherty v. Salt from the New York Court of Appeals in 1919. In Dougherty v. Salt, the guardian for a child (Dougherty) sued the executor (Salt) for a promissory note for $3,000 intended for a child from his deceased aunt. The aunt had told the nephew that she wanted to take care of him and went as far as to

sign a preprinted note that was to be the future gift. It is curious that in this case there was a printed note regarding the gift. Additionally, Dougherty was the only one present when the aunt spoke to the child; she claimed that the aunt wanted the note payable upon her death. There was no evidence shown or available to prove this other than Mrs. Dougherty's word. Given these details, the case was initially dismissed even though the jury did find that there was *sufficient consideration*. Again, being the key component that distinguishes between a gift and a contract, this detail was crucial in continuing with the legal battle. Furthermore, the appellate court then reversed this decision, finding that there was due consideration. Again, the determining factor was this perception that there was sufficient consideration for the gift to be considered as a contract. Yet ultimately, the New York Court of Appeals found for Mr. Salt given that sufficient evidence of consideration was not proven and the promissory note was unenforceable. A key detail that was brought to light was that neither the boy nor his aunt regarded the gift as a contract and ultimately consideration was disproved. If we go back to Donor's definition of a gift described above, there was certainly the intent of the aunt to give the money to her nephew as demonstrated through the pre-printed note but the nephew never received the money while the aunt was alive. Mrs. Dougherty could not prove otherwise, and the child's life was not altered by the aunt's promise of a future gift as it was in *Bredemann v. Vaughan Manufacturing Company* discussed above.

Additionally, one must consider what happens when a third-party beneficiary comes into play; that is, when a person who was not part of the initial contract charges fees on him. Therefore, if in the case that the promise of the gift is interpreted with a valid and fully integrated contract, then the general rule would apply to the third-party beneficiaries; that is to say, those who are outside of an original contract, cannot then enforce the agreement. This is what it means to lack privity or a relationship between people who have formed a contract. However, if the third party, outside of the original contract was to benefit from the contract, then they can enforce it. Such a person would be a creditor or a donee beneficiary. Their benefit is still limited to the contract.

3. Conclusion

Through the review of key contract law definitions and the details discussed above, it should be clear that a contract has three components that must be met in order to be enforced by law: there must be an offer, an acceptance of the offer, and consideration in reaching a mutual agreement or assent. Promises and gifts will for the most part not be considered contracts because they will lack the element of consideration. Legal cases such *Bredemann v. Vaughan Manufacturing Company*, *Webb v. McGowin*, and *Dougherty v. Salt* all point to the focus of the court on the issue of consideration, especially in relation to reliance and moral obligation–idea that comes from the Latin "dictum" *pacta sunt servanda*, which origin can be found in canon law. In all three cases promises were made involving future gifts and as was discussed in two of the three examples those oral promises, without a signed written-contract were ultimately viewed as contracts due to the major implications they had for the well-being of Mrs. Bredemann and Mr. Webb respectively. Conversely, the young child who would not receive the promised money from his aunt, was not deprived of a current or future opportunity to make a living and have a fulfilling professional life. I would further argue that in the first two cases, Mauss' main thesis described in the introduction to this paper further asserts the importance of gifts as "debt payment." In both cases, the promise of the gift made was in fact considered a "contract" for the *debt payment* signified in those initial promises. Furthermore, in

both cases the gift was deserved, and as such transformed into a "payment" as Wolfe would have described in his text noted in the introduction to this paper. Particularly, as was shown, in cases where there is an additional moral obligation to the promise, such as was the case for Mr. Webb who injured himself in order to save another. The moral issue between the giver and receiver in this case necessitated that the promise be ultimately interpreted as consideration by the courts. In such a way it becomes clear that agreements with consideration will most likely be deemed contracts while those without shall in most cases be simple promises or gifts.

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Recebido para publicação em 06-09-19; aceito em 08-10-19