

Louisiana and the Common Law: *Le Jour de Gloire, Est-Il Passé?*

James Gordley*

In the year 2000, I contributed to a symposium on how the law should develop over the century ahead. I described my hope for the common law of contract and tort. My hope was that they would become “much like the civil law.”¹

The civil law consists in large part of Roman rules about particular torts and contracts which have been brought within larger organizing principles. In tort, a plaintiff could bring an action under the *lex Aquilia* for harm done by fault, whether intentionally or negligently. He could bring an action for *iniuria* for harm to his dignity or reputation. Centuries ago, continental jurists brought these two actions together under a general principle: a person who causes harm to another intentionally or negligently must make compensation. That principle is found in the Louisiana Civil Code and the codes of virtually all civil law countries.² Applying the principle requires hard thought, for example, about whether recovery for non-economic harm should be given as freely as for physical harm, and about the kinds of dignity and reputation that should be protected. In civil law jurisdictions, courts have to work out answers case by case. But at least the principle provides a framework for the thinking that ought to take place.

Similarly, the Romans had a law of particular contracts. Some such as sale, lease, partnership and mandate were formed by mutual consent. Others, while requiring the consent of the parties, were not formed until the delivery of an object loaned, deposited or pledged. Still others, such as promises to make gifts, requires a special formality which, since the Middle Ages, has usually been notarization. These contracts and the Roman rules as to when they are formed are found in the Louisiana Civil Code and in the codes of other civil law jurisdictions.³ Centuries ago,

* W.R. Irby Professor of Law, Tulane University School of Law.

1. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CALIF. L. REV. 1817, 1875 (2000).

2. A person who causes another harm by his fault is obliged to repair it. LA. C.C. art. 2315(A). Fault may be intentional or it may be negligent. *Id.* art. 2316.

3. *Id.* art. 2439 (sale); *id.* art. 2668 (lease); *id.* art. 2901 (partnership); *id.* art. 2904 (loan for consumption); *id.* art. 2891 (loan for use); *id.* art. 2926 (deposit); *id.* art. 3133 (pledge).

continental jurists brought them under the larger principle that, to be enforceable, a contract had to be formed by consent and entered into for one of two reasons or *causae* that the law would respect: in the case of a gratuitous contract to exercise liberality; in that of an onerous one, to receive an equivalent for what one gave up. This principle is expressly stated in some civil codes such as that of Louisiana and France and implicit in others. As before, applying the principle requires hard thought about such matters as the other types of agreements, other than the traditional contracts, that the law should enforce, and whether a performance given in return has to be equivalent in value. But again, the principle provided courts and scholars with framework for thinking about such questions.

In contrast, the common lawyers until the eighteenth century organized their thinking, not around such categories as tort or contract, but around writs or forms of action. In medieval England, a prospective litigant could not be heard by the king's courts unless he could bring his case within the scope of a writ or form of action such as assault, battery, trespass to land, trespass to chattels or covenant. If there was no appropriate writ, he lost, not because his claim was deemed to be undeserving, but because it was not the sort of claim that the king's courts would hear. He would have to seek a remedy elsewhere: for example, in a manorial court, a merchant court, or a church court.

Beginning with Blackstone, common law treatise writers refashioned their law on a civil law ground plan. They borrowed the categories "tort" and "contract" from the civil law, and assigned some of their traditional actions to the one category and some to the other. They tried to explain the actions that they now described as tort by the civil law principle that compensation was due for harm caused by fault, either intentionally or negligently. Supposedly, this principle had been lurking behind certain of their writs waiting to be discovered. Thus they described assault, battery, trespass to land, and trespass to chattels as "intentional torts," and said, for the first time, that the defendant would only be liable if he had acted intentionally. Alongside the intentional torts, they recognized a new tort of "negligence." Moreover, they tried to explain their traditional actions as remedies for different types of harm. Thus what had begun as a list of actions that a medieval royal court would hear came to be treated as a list of harms that the law ought to remedy.

Similarly, the common lawyers borrowed the category of "contract" from the civil law and assigned two writs to it: the writ of covenant, by which a promise could be enforced if it were made under seal, that is, by

making an impression on wax dripped on the paper on which the promise was written, and the writ of *assumpsit*, in which a promise could be enforced provided that it had “consideration.” Before the nineteenth century, the term “consideration” had no definite meaning. Bargains had consideration, but so did promises to people about to marry as well as promises to care for and return objects received as gratuitous loans and deposits.⁴ In the nineteenth century, again borrowing from the civil law, the common lawyers identified consideration with the *causa* of an onerous contract. As A.W.B. Simpson has said, they regarded consideration as a local version of the doctrine of *causa*.⁵ Consideration thus came to mean a performance given as part of a bargain or exchange. Superficially, the common law had then taken on the structure of the civil law. Just as in civil law, one gratuitous promise—the donative promise or promise to make a gift—required the formality of notarization, so, in covenant, gratuitous promises required the formality of a seal. In *assumpsit*, onerous promises or bargains were enforceable without it. The result, however, was that at common law all promises except bargains were unenforceable without a formality. By the twentieth century, the inadequacies of such a doctrine had become apparent. A new doctrine called promissory estoppel was developed to cope with them. An informal promise without consideration was said to be enforceable provided that the promisee had changed his position in reliance on the promise.

In tort and contract, the end result is far from satisfactory. In tort, common lawyers had to explain their traditional writs as actions in tort for harms caused by fault. Yet, traditionally, the defendant’s liability had not depended on fault. The writs were not a list of harms the law ought to remedy but of actions a medieval royal court. The result is a mixture of old common law rules and half assimilated civil law principles. Traditionally, consideration had not meant that only bargains would be enforced. The consequences of equating consideration with bargain, and enforcing only bargains, were wrong enough that the doctrine of promissory estoppel was developed as a remedy. But it was developed quickly, without much thought about whether just one circumstance—reliance by the promisee—should determine which promises the law should enforce. In the article I wrote in the year 2000, I expressed the hope that the common law would eventually get rid of its system of torts

4. A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 416-52 (1975).

5. A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L. QUAR. REV. 247, 262 (1975); see JAMES GORDLEY, PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 137-39 (1991).

that descend from medieval writs, as well as its doctrines of consideration and promissory estoppel. Unfortunately, Louisiana has gone in the opposite direction. Judges have been adopting the common law system of so-called intentional torts. The legislature has amended the Code to provide that a promise has a “cause” when the promisee has changed his position in reliance on it.

As the Louisiana Supreme Court has said, it looks to the common law for guidance as to the meaning of the “fault reparation principles” of the Louisiana Civil Code. The Court has acknowledged that the “labels of specific torts and strictures attached thereto” in common law “do not always coincide” with these principles.⁶ Yet Louisiana courts have sacrificed these civil law principles by looking to a common law that has very little to do with their meaning.

The civil law principle is that compensation is due for harm caused by fault, whether the fault is intentional or negligent. Yet the traditional common law writs did not depend on fault, and even now that they are classified as “intentional torts,” some of them still do not. The defendant is liable for trespass to land, for example, as long as his entry on the land was intentional, even if he intended to do no wrong and innocently believed that the land was his.⁷ He is liable even though he was not at fault. That rule has been adopted in Louisiana,⁸ even though it contradicts the principle of liability for fault. It is not clear why the rule existed at common law. It may have been the result of the failure to distinguish liability based on fault from strict liability. Prosser conjectured that the reason was to provide a way of trying title before there were declaratory judgments.⁹ That is not a good reason for retaining the rule in common law jurisdictions, and certainly not for adopting it in Louisiana, where, as Maraist and Galligan observe in their manual on Louisiana tort law, “the availability of petitory and possessory actions made it unnecessary to use trespass to try title.”¹⁰

Then there are the difficulties of looking to the common law “intentional torts” for guidance on the kinds of harm that should be actionable under the civil law principle. As mentioned, that question requires hard thought, and must be worked out case by case, as the Roman jurists themselves did to decide when the plaintiff could recover

6. *White v. Monsanto Co. & McDermott*, 585 So. 2d 1205, 1209 (La. 1991).

7. RESTATEMENT (SECOND) OF TORTS § 164.

8. *Wendorf v. Corley*, 394 So. 2d 1252 (La. App. 2001).

9. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 81 (1941).

10. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* § 2.06[7] (2d ed. 2007).

in *iniuria* for harm to his reputation or dignity. They decided, for example that the plaintiff could recover for lies told about him and possibly for an embarrassing truth.¹¹ He could sometimes recover for offensive language, as when the defendant assembled people at his house and raised a clamor.¹² A woman could recover if she was “accosted” and propositioned,¹³ or if she was followed “assiduously”—we might say stalked.¹⁴ The plaintiff could recover if his slave were beaten¹⁵ or if someone entered his house without permission.¹⁶ Such cases raise questions about the sort of conduct at which the plaintiff can justifiably take offence, and how offensive the conduct must be to warrant an action. In civil law jurisdictions, those questions are not easy to answer, but at least they are confronted straightforwardly and worked out, as they must be, and as they were by the Romans, from case to case.

In Louisiana, they were dealt with that way before the judges began to look for guidance to the common law. In 1920, in the celebrated case of *Nickerson v. Hodges*,¹⁷ a forty-five year old woman with a history of mental problems had been told by a fortune teller that her ancestors had buried a pot of gold nearby. Some practical jokers buried a pot of dirt where she could find it with a note warning her not to open it for three days. She discovered the contents of the pot when she opened it publicly at a local bank. Although she died while her case was still in litigation, the Louisiana Supreme Court said that it would have awarded a substantial amount had she lived. Like a Roman jurist, the court used its own judgment to decide whether her humiliation and distress was the sort of harm for which she should recover.

Since 1920, Louisiana courts have approached similar cases by looking to the common law. At common law, one who has suffered humiliation and distress must find a place for his case within a patchwork of actions. He can recover in battery if the defendant made contact, however slight, with his person or something closely associated with his person.¹⁸ He can recover in assault if the defendant’s action led

11. See James Gordley, *Reconceptualizing the Protection of Dignity in Early Modern Europe: Greek Philosophy Meets Roman Law*, in “INS WASSER GEWORFEN UND OZEANE DURCHQUERT” FESTSCHRIFT FÜR KNUT WOLFGANG NÖRR 281, 282-84 (Mario Ascheri et al. eds., 2003).

12. DIG. 47.10.15.2.

13. DIG. 47.10.15.20.

14. DIG. 47.10.15.22.

15. DIG. 47.10.15.34.

16. DIG. 47.2.21.7.

17. 84 So. 37 (La. 1920).

18. RESTATEMENT (SECOND) OF TORTS §§ 18-19.

him reasonably to believe that he would imminently suffer a battery.¹⁹ He can sometimes recover if, in his presence, his spouse is the victim of a battery or assault.²⁰ He can recover for trespass if the defendant happened to enter his land, whether any harm was done to the land.²¹ He can recover in libel or slander if the defendant made a false factual statement to a third party that would tend to lower his standing in the community.²² The common lawyers have realized that these are not the only cases in which the victim of humiliation ought to recover. Consequently, most common law jurisdictions have recognized a new tort called “the intentional infliction of emotional distress.” For the plaintiff to recover, according to the Restatement of Torts, the defendant’s conduct must be “extreme and outrageous” and cause “severe emotional distress.”²³ Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.²⁴ Consequently, there is a gulf between the protection afforded by the old torts, in which recovery is triggered by the least physical contact or even apprehension of contact, and the new tort, which requires conduct so extreme.

Common lawyers often describe their tort law as though it was the result of decisions, made over time, as to what harms to remedy. The Second Restatement describes the recognition of the tort of intentional infliction of emotional distress as the end result of such a process. “Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone. It is only within recent years that [intentional infliction of emotional distress] has been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort, such as assault, battery, false imprisonment, trespass to land, or the like.”²⁵

If the common law torts had been produced by a series of decisions, over time, as to what harms the law should remedy, then it might make sense for Louisiana courts to look to it for guidance as to the meaning of harm. But no such decisions were made. The “interests” which the

19. *Id.* § 21.

20. *E.g.*, *Rogers v. Williard*, 223 S.W. 15 (Ark. 1920).

21. RESTATEMENT (SECOND) OF TORTS § 163.

22. *Id.* § 559.

23. *Id.* § 46.

24. *Id.* cmt. d.

25. *Id.* § 46 cmt. b.

common lawyers today say that these torts were designed to protect were first identified in the twentieth century, and by treatise writers who were trying to rationalize rules that had grown up without a rationale. Battery and assault puzzled the treatise writers because the plaintiff could recover even if had not been harmed in any obvious way. In 1916, Salmond claimed that the harm was an interference “not merely [with] freedom from bodily harm, but also [with] freedom from such forms of insult as may be due to interference with his person.”²⁶ Harper, Prosser and the Restatements agreed:²⁷ the plaintiff can recover for “unpermitted unprivileged contacts with [his] person”²⁸ and for “harmful or offensive touching.”²⁹ But Salmond was the first to identify this type of harm and claim that the purpose of the tort of battery was to remedy it. Moreover, his idea was not accepted all at once. Blackstone had simply said that the harm was to “life and limb.” According to George Clark, the harm was physical injury but the plaintiff need not be injured because of “the very great importance attached by the law to the interest in physical security.”³⁰ According to Warren Seavey, a “very slight interference is sufficient” because the interest “in bodily integrity” is one of the “most highly protected.”³¹

In the case of assault, no plausible harm was ever identified. Harper, Prosser and the Restatements finally described the rationale of the action as protecting an “interest” which they described as “the interest in freedom from apprehension of a harmful or offensive contact.”³² Apprehension is not the same as fear. If even for a moment, the plaintiff reasonably thinks that he might imminently be the victim of a battery, however trivial, he can recover. None of them explained why such an odd sort of “harm” should have a remedy. Once again, however, the explanation came late, and was derived, not by thinking about what harms the law should remedy, but by assuming that the law was trying to

26. JOHN W. SALMOND, *THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES* 383 (4th ed. 1916).

27. PROSSER, *supra* note 9, at 44-45; FOWLER VINCENT HARPER, *A TREATISE ON THE LAW OF TORTS: A PRELIMINARY TREATISE ON CIVIL LIABILITY FOR HARMS TO LEGALLY PROTECTED INTERESTS* 38 (1933); *RESTATEMENT OF TORTS* ch. 2, tits., topics 1 & 2 (1934); *RESTATEMENT (SECOND) OF TORTS* ch. 2, tits., topics 1 & 2 (1965).

28. PROSSER, *supra* note 9, at 43.

29. HARPER, *supra* note 27, at 39; *see* *RESTATEMENT OF TORTS* §§ 13, 15, 18-19 (1934); *RESTATEMENT (SECOND) OF TORTS* §§ 13, 15, 18-19 (1965).

30. GEORGE L. CLARK, *THE LAW OF TORTS* 10 (1926).

31. Warren Seavey, *Principles of Torts*, 56 *HARV. L. REV.* 72 (1942).

32. PROSSER, *supra* note 9, at 48; HARPER, *supra* note 27, at 43 (same, but speaking of a “harmful or offensive touching”); *RESTATEMENT OF TORTS* ch. 2, tit., topic 3 (1934); *RESTATEMENT (SECOND) OF TORTS* ch. 2, tit., topic 3 (1965).

remedy some sort of harm and trying to imagine what this harm might be. Blackstone said the action redressed harm to “personal security” caused by “threat.” Others said it was given because of “fear of personal harm.”³³ Seavey said that the reason was the importance of personal security, as though that explained the matter.³⁴ Once again, it had taken a long time for the treatise writers to discover what the tort was supposed to protect.

Yet these distinctions among common law actions are now part of Louisiana law. In one Louisiana case, an automobile executive played a practical joke at an office Christmas party by touching a salesman with a charged automobile condenser to give him a mild electric shock. In another case, an assembly line worker in a Louisiana munitions plant played a practical joke by putting a frog shaped fishing lure into a canister where it would be seen when the canister was inspected by another worker who had a pathological fear of frogs. In both cases, the plaintiffs suffered serious medical consequences. In the first case, he recovered, according to the court, because the act constituted a battery. He was touched by the condenser.³⁵ In the second case he did not.³⁶ He wasn't touched by the frog. In a third case, a man recovered when, after an exchange of insults, although he could easily have moved out of harm's way, he had a reasonable apprehension of being touched.³⁷ Common law courts have split hairs even more finely. A defendant who had insulted the plaintiff by blowing cigar smoke in his face was held liable because the smoke was “particulate” and made contact.³⁸ When a shop keeper made a lewd suggestion to a female customer and then lunged at her across a counter, the court worried about whether the counter was narrow enough for her to apprehend that she might imminently be touched.³⁹ If the prankster at the office party had given the salesman a mild electric shock without touching his skin with the auto condenser, I suppose the Louisiana court would have had to consider whether a flow of electrons is “particulate.” If the assembly line worker in the munitions plant had thought the frog shaped fishing lure

33. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 161 (1880); see FRANCIS M. BURDICK, THE LAW OF TORTS: A CONCISE TREATISE ON THE CIVIL LIABILITY AT COMMON LAW AND UNDER MODERN STATUTES FOR ACTIONABLE WRONGS TO PERSON AND PROPERTY 268 (2d ed. 1908) (“the right to live in society without being put in reasonable fear of unjustifiable personal harm”).

34. Seavey, *supra* note 31, at 73.

35. Caudle v. Betts, 512 So. 2d 389 (La. 1987).

36. Bradley v. Morton Thiokol, Inc., 661 So. 2d 691 (La. App. 1995).

37. Wattik v. Lewis Grocer Co., 476 So. 2d 444, 449 (La. App. 1985).

38. Leichtman v. WLW Jakor Commc'ns, 634 N.E.2d 697 (Ohio App. 1994).

39. W. Union Tel. Co. v. Hill, 150 So. 709 (Ala. App. 1933).

might jump at him, I suppose the Louisiana court would have had to consider the depth of the canister and whether the lure resembled one of the legendary jumping frogs of Calaveras County or some less athletic species.

Moreover, to remedy the deficiencies in the traditional common law torts that it has borrowed, Louisiana has recognized the common law tort of last resort, intentional infliction of emotional distress. The result, as in common law jurisdictions, is a gulf between the protection afforded by the traditional torts, where the plaintiff can recover if there has been the least contact or apprehension of contact, and the new tort, where the defendant's conduct must be so outrageous as to go beyond all possible bounds of decency. In a case in which a supervisor during a tirade screamed obscenities at a female employee who then suffered headaches and had to seek medical care, the action was dismissed on the ground that these bounds had not been exceeded.⁴⁰ It is understandable that the authors of the Second Restatement would set the bar as high as they did because they were introducing a new and unfamiliar tort. It is less understandable why Louisiana courts would unreflectively follow.

In contract, it might seem, Louisiana law has more successfully resisted infiltration. Its courts have never accepted the common law doctrine of consideration. Unfortunately, in 1984, its legislature amended the Civil Code to include the common law doctrine of promissory estoppel. This doctrine had been developed to remedy the imperfections of the doctrine of consideration, much as the tort of intentional infliction of emotional distress had been adopted to remedy those of the traditional actions in tort. It is not wise, however, to take a remedy for a disease you do not have. It may do more harm than good. So it is, I believe, with promissory estoppel.

The problem began when, beginning with Blackstone, the common lawyers identified consideration with the *causa* of an onerous contract. As mentioned earlier, traditionally, consideration had no definite meaning. A bargain or exchange had consideration, but so did marriage settlements and agreements to care for goods received as a gratuitous loan or deposit. One difficulty the common lawyers faced was to explain the enforceability of these arrangements. Sir Frederick Pollock found that he could explain many of these cases by defining a bargain in an artificial way, as what came to be known as a "bargained for detriment."⁴¹ Although Williston accepted that definition, in his enormously influential

40. *White v. Monsanto Co. & McDermott*, 585 So. 2d 1205 (La. 1991).

41. SIR FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT* 164 (10th ed. 1936).

treatise he suggested that there might be another explanation for the enforceability of the marriage settlements. The promisee had changed his position in reliance by marrying. He suggested that this principle, which he called promissory estoppel, could explain other cases in which a promise was enforced without the formality that would normally be required, either because the promise was donative, or because it was a transfer of land.⁴² When, as Reporter, he proposed to incorporate this doctrine in the First Restatement of Contracts, he cited these cases as well as the ones about gratuitous loans and deposits.⁴³

That doctrine is now contained in Article 1967 of the Louisiana Civil Code where it can only cause confusion. The tasks the doctrine performs in common law jurisdictions could be better performed by using civil law ideas which the Louisiana Civil Code already contained.

One task, as just noted, is the enforcement of informal donative promises as in the case of marriage settlements. Nevertheless, Article 1967 precludes the use of the doctrine when there has been “[r]eliance on a gratuitous promise made without the required formalities.” David Snyder has observed that Louisiana courts have sometimes enforced such promises by one fiction or another: for example, by holding that the transaction was an exchange or a remunerative donation. He suggests that “[i]f such cases were to multiply, an underground group of cases could lead to a case-based common law promissory estoppel in Louisiana.”⁴⁴ My own view is that if the courts are to enforce such promises in spite the language of the Code, it would be far better to do so without the doctrine of promissory estoppel. According to that doctrine, such promises are to be enforced when the promisee has relied upon them. But that does not capture the reason that even common law courts have sometimes enforced such promises without the required formalities. They enforce marriage settlements without asking whether the couple only married in reliance on the promise or would have married anyway for love. They have enforced promises to charitable organizations without asking whether the promisee relied. The Second Restatement provides that in the case of marriage settlements and charitable subscriptions, the promisee will be “deemed” to have relied on the donor’s promise. One hopes that the donee’s reliance has become a pure

42. 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 139, at 312 n.36 (1920).

43. See AM. L. INST., *COMMENTARIES ON CONTRACTS: RESTATEMENT* No. 2, at 14 (commentaries (a), Mar. 9, 1926). On the origins of the doctrine of promissory estoppel, see James Gordley, *Enforcing Promises*, 82 CALIF. L. REV. 547, 562-66 (1995).

44. David V. Snyder, *Comparative Law in Action: Promissory Estoppel and the Mixed Jurisdiction*, 15 ARIZ. J. INT. & COMP. L. 695, 736 (1998).

fiction, that the young couple will recover even if they blurt out on the witness stand that they would have married anyway for love, and that the charity will recover even if it is perfectly clear it has done nothing differently. The trouble with the doctrine of promissory estoppel is that it is founded upon a mistake about the reason why courts want to enforce such promises. The reason is that because of their nature and the relationship of the parties, these promises are specially deserving of enforcement. It is not that the promisee relied.

In the case of gratuitous loans for use, loans for consumption, and deposits, there is no need for the doctrine in Louisiana since the Civil Code contains the Roman rule that such contracts are formed by delivery and impose obligations on the borrower or deposittee. Indeed, the doctrine would give the wrong results if the requirement of reliance were taken seriously. Suppose that when Bassanio asked his friend Antonio, the merchant of Venice, for a loan of money so that he could win the hand of Portia, Antonio loaned it only to preserve their friendship, thinking that Bassanio had no chance of succeeding and so becoming able to pay him back. He would not have changed his position in reliance on Bassanio's promise. In a civil law jurisdiction, he would be bound to repay the money since he had entered into a loan for consumption, as Portia could no doubt have pointed out. Or suppose a passenger who had learned just before embarkation that he could not take a case of liquor with him on a cruise, had entrusted it to the only person to be found upon the dock who was willing to take charge of it. The passenger would not have relied to his detriment since his only alternative would have been to abandon it. Yet it would seem that a promise to look after the liquor should be enforceable, as it would be in civil law.

Another task that courts in common law jurisdictions have found for the doctrine of promissory estoppel is to enforce a promise made gratuitously to do some service for the promisee. Most often, such a promise was made in a commercial context. Sometimes, it was made to the other party to a contract but only after the contract was concluded. For example, the seller of property promised to file papers to insure it.⁴⁵ A railway promised to help one of its customers obtain a rebate by filing papers with a government agency.⁴⁶ The holder of a security interest in

45. *Dalrymple v. Ed Shults Chevrolet, Inc.*, 380 N.Y.S.2d 189, 190 (App. Div. 1976), *aff'd*, 363 N.E.2d 587 (N.Y. 1977); *see also* *N. Commercial Co. v. United Airmotive*, 101 F. Supp. 169 (D. Alaska 1951) (holding seller of airplane not liable on promise to keep it insured until buyer could get insurance, only because buyer did not exercise due diligence to do so).

46. *Carr v. Me. Cent. R.R. Co.*, 102 A. 532 (N.H. 1917).

property promised to insure it at the promisee's expense⁴⁷ or at his own expense for a short time.⁴⁸ In other cases, three parties were involved in a transaction, and one agreed to do something, not for the party who was paying him, but for the third party. For example, the senior creditor in a financing arrangement agreed to give notice of default to a junior creditor.⁴⁹ A general contractor agreed to write checks payable to his subcontractor's supplier instead of to his subcontractor alone.⁵⁰

In a civil law jurisdiction such as Louisiana, there is no difficulty about enforcing such a promise. The promisor has entered into a contract of mandate. The Louisiana Civil Code defines it as a contract by which one person "confers authority on another person . . . to transact one or more affairs" for him.⁵¹ The "affair" may be, not only to enter into a legal transaction on his behalf, but to perform what the courts call a "material act." For example, it may be to collect a debt,⁵² to make a repair estimate,⁵³ or to receive a payment.⁵⁴ As in other civil law jurisdictions, the promise is enforceable even if it is made gratuitously.⁵⁵

Since such a promise does not have consideration in the sense of a bargained-for-detriment, scholars in common law jurisdictions have said that the real reason for enforcing it is the reliance of the promisee.⁵⁶ They are contradicted by the case law. Courts have rarely demanded that the promisee prove that he changed his position. In some cases, the promisee could have done the act himself or found someone else to do it: for example, he could have taken out his own insurance. But he is not required to prove that he would have done so. In other cases, the promisee could not have done the act himself, but, had the promisor refused to do it, the promisee might have been able to exert pressure by threatening something within his legal rights. For example, in the three party situations, the junior creditor could have told the senior creditor, or the supplier of the subcontractor could have told the general contractor,

47. *E. Providence Credit Union v. Geremia*, 239 A.2d 725 (R.I. 1968).

48. *Siegel v. Spear & Co.*, 138 N.E. 414 (N.Y. 1923).

49. *Miles Homes Div. of Insilco Corp. v. First State Bank*, 782 S.W.2d 798 (Mo. Ct. App. 1990).

50. *United Electric Corp. v. All Serv. Elec., Inc.*, 256 N.W.2d 92, 95-96 (Minn. 1977).

51. LA. C.C. art. 2989.

52. *Alaynick v. Jefferson Bank & Trust Co.*, 451 So. 2d 627 (La. App. 1984).

53. *Craft v. Trahan*, 351 So. 2d 277 (La. App. 1977).

54. *Roth v. B & L Enters., Inc.*, 420 So. 2d 1094 (La. 1982).

55. LA. C.C. art. 3002.

56. Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents* (pt. 1), 50 MICH. L. REV. 639, 665-74 (1952); Warren A. Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951); Warren L. Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 918 (1937).

that it would not supply credit or materials unless the senior creditor promised to give notice of default or the general contractor promised to issue checks in its name. Again, however, the promisee was not required to prove, or even allege, that he would have made the threat or that it would have been successful. Moreover, sometimes the promisee recovered even though it is hard to see what he could have done had the promisor refused to promise. The former customer of a railroad recovered when the railroad failed to send a government agency papers entitling him to a rebate, though it is not clear he could have somehow obtained the rebate had the railroad refused from the beginning to cooperate.⁵⁷ The doctrine of promissory reliance does not explain these cases. The best explanation is that when the promisor enters into the sort of transaction which is known to civil law as a mandate, his promise is enforceable without regard either to consideration or to reliance.

Another task that common law jurisdictions have found for the new doctrine is to enforce the bids of subcontractors. Roger Traynor did so in the famous case of *Drennan v. Star Paving Co.*⁵⁸ A general contractor had received a bid from a sub-contractor which he used in his own bid. The sub-contractor then wished to withdraw before his bid was accepted by the general contractor. Traynor held that the subcontractor could not do so because the general had relied upon his bid by using it in his own. For Traynor, the advantage of this solution was that, while the subcontractor was bound by his bid, the general was not bound to enter into a contract with the subcontractor. He could decide to have the work done by someone else. That result seemed fair. The general contractor often receives the subcontractor's bid shortly before his own is due. He may be unable to decide whether to accept it until he has more time and until he knows his own bid is accepted and he therefore knows that his own efforts to find the best subcontractor will be rewarded. The simplest way to reach this result, however, would be to say that an offer such as this one is irrevocable. That possibility was not open to Traynor because, at common law, an offer is not irrevocable unless something has been paid that can serve as consideration for holding it open. So Traynor had to make an imaginative use of promissory estoppel. In a civil law jurisdiction such as Louisiana, however, an offer does not need consideration to be irrevocable.⁵⁹ If a court wants to hold the subcontractor to his bid in a case like *Drennan*, it need only say that to make a bid under such circumstances is to implicitly manifest an intent to

57. Carr v. Me. Cent. R.R., 102 A. 532 (N.H. 1917).

58. 333 P.2d 757 (Cal. 1958).

59. LA. C.C. art. 1928.

stand by it. If that were not his intent, he should say so, and then he will not be bound. Thus, as David Snyder has said, “[a]s long as they are properly interpreted, subcontractor’s bids may be deemed irrevocable for long enough to protect the relying general contractor, without any need to resort to promissory estoppel.”⁶⁰

Indeed, the case of *Percy J. Matherne, Contractor v. Grinnell Fire Protections Systems Co.*,⁶¹ decided by a federal district court under Louisiana law, illustrates why the result should turn on whether an offer is irrevocable rather than on whether the offeree relied. In that case, the court held that a subcontractor was bound by its bid even though the general contractor had not relied, as in *Drennan*, by committing itself to a bid of its own based on the subcontractor’s bid. The general contractor’s own bid was irrevocable for thirty days. That period had expired before he made use of the subcontractor’s bid. In the meantime, he had learned that the subcontractor wished to revoke it. Consequently, it is hard to see in what sense the general contractor had changed his position in reliance on the sub-contractor’s bid, as he would have to do, for the subcontractor to be bound under the doctrine of promissory estoppel. Nevertheless, the court applied that doctrine and held that the subcontractor was bound. . The court may have reached the right result. The subcontractor had had ample opportunity before submitting a bid to consider whether he would stand by it. Perhaps he should not be able to withdraw even if the bid had not yet been used. But such a result is much easier to explain by saying that the bid was an irrevocable offer than by saying that the general contractor relied. Consider what should happen if the subcontractor wished to modify his bid before the general contractor relied upon it because the subcontractor learned of the next lowest bid to his own and wants to revise his bid upward. He should not be allowed to do so, but the reason is not that the general contractor relied.

In another situation, in common law jurisdictions, the new doctrine has been used to hold the promisor liable for the damages that the promisee incurred in reliance on the promise when the promise was too indefinite to constitute an offer that the promisee could accept. The celebrated case is *Hoffman v. Red Owl Stores*.⁶² The plaintiff was promised a franchise if he did a number of things, including raising a certain amount of capital. When Red Owl Stores denied him the franchise, the court invoked the doctrine of promissory estoppel to hold it liable. The reason, the court said, was that Red Owl had not yet made an

60. Snyder, *supra* note 44, at 741.

61. 915 F. Supp. 818 (M.D. La. 1995).

62. 133 N.W.2d 267 (Wis. 1965).

offer of a franchise that was sufficiently definite for the plaintiff to accept. As David Snyder has noted, Louisiana courts have sometimes been asked to apply the doctrine when, as in *Red Owl*, a final and definite agreement had not been made,⁶³ for example, when a manager was fired while his two year contract was under negotiation,⁶⁴ or a partner spent money on an office building before getting the other partner's approval,⁶⁵ or a telephone company moved a manhole on the defendant's property before he agreed to pay the expenses.⁶⁶ In all these cases, the court held that the doctrine did not apply because no promise had been made. Nevertheless, supposing a promise had been made, as in *Red Owl*, it is hard to see why the doctrine of promissory estoppel should be necessary in a civil law jurisdiction such as Louisiana. In *Hoffman*, the plaintiff had not committed himself to do anything, even to raise capital. Consequently, there was no consideration for *Red Owl*'s promise. Louisiana does not have a doctrine of consideration. Consequently, it does not need a doctrine of promissory estoppel. Indeed, on facts similar to those of *Red Owl*, that doctrine would give a strange result. The plaintiff in *Red Owl* did change his position in reliance on *Red Owl*'s promise by raising capital and doing other things as well. But suppose he had not needed to do them because, shortly after the promise was made, he inherited the capital. Suppose he raised it by selling stock or selling a store that he would have sold anyway. It was no business of *Red Owl* how the money was raised. It should still be liable. But it is hard to explain why by speaking of the reliance of the promisee.

Moreover, on the level of theory, the doctrine can only lead to confusion. It is supposed to supplement the traditional doctrine of *causa* by identifying another reason why a promise should be enforced. The confusion arises because, as already mentioned, the doctrine of *causa* identifies two good reasons that a person would have to make a agreement, and the law would have to enforce one: conferring a benefit on another person, or receiving something in return. The doctrine of promissory estoppel identifies a reason that a promise should be enforceable: the promisee has changed his position in reliance on it. The amended Louisiana Civil Code tries to mesh these ideas by stating, first, that "cause" is "the reason why a party obligates himself," and, immediately following, that "[a] party may be obligated by promise when he knew or should know that the promise would induce the other party to

63. Snyder, *supra* note 44, at 741-43.

64. Carter v. Huber & Heard, Inc., 657 So. 2d 409 (La. App. 1995).

65. Garner v. Hoffman, 638 So. 2d 324 (La. App. 1994).

66. S. Cent. Bell Tel. Co. v. Rouse Co., 590 So. 2d 801 (La. App. 1991).

rely on it to his detriment and the other party was reasonable in relying.” How can one put the two statements together? If a promise does not have a cause, in the sense of a good reason the law should enforce it, then presumably it should not be enforceable even if the promisee did rely on it, and the promisee would not be reasonable in doing so. If it does have a cause, in the sense of a good reason the law should enforce it, then why should the law not do so, whether the promise was relied upon or not? There are some promises with a cause that the law will not enforce, notably, promises of gift made without the requisite formalities. Such promises are made for a reason the law respects, but the law also requires a formality to ensure the promise was actually made and made with deliberation. Yet that is a case to which, by the express language of the amended Code, the doctrine of promissory reliance does not apply.

Here again, civil law jurisdictions should not be taking lessons from the common law. Just as they cannot learn much about fault and harm by examining the common law torts, so they cannot learn much about when to enforce a contract from the common law’s unfortunate experiences with consideration and promissory estoppel. The civil law has traditionally recognized that onerous contracts are not the only ones that ought to be enforced, and that gratuitous arrangements such as loans for consumption or use, deposit and mandate should not require the same formalities as a donation. It is the common law that is in difficulty, and it is in difficulty because it borrowed but failed fully to assimilate civilian doctrine. It is natural for a lawyer to be proud of his own legal system, and that tendency may lead to arrogance. But the problem in Louisiana seems instead to be a lack of self-confidence.