Gifts and Contracts: A Comparison with Quebec Civil Law

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INTRODUCTION

There are perhaps few distinctions more widely assumed within the Anglo-American common law tradition than the distinction between gifts and contracts.¹ Whatever might be said about the differences in the values which underlie each type of transaction, however, it is also widely known that most, if not all, civil law systems do not share the common law's classificatory approach to gifts. The case of Quebec's civilian private law provides a particularly clear example in the Canadian context: rather than amounting to a distinct legal category, as is the case in the other provinces and territories, the gift is presented by the Civil Code of Québec (the "CCQ") as a contract by which one party, the donor, conveys property gratuitously to another, the donee.²

The implicit assumption, at least in many English-language sources, is that this classificatory divergence can be attributed

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² See e.g. Jane B Baron, "Gifts, Bargains, and Form" (1989) 64:2 Ind LJ 155 ("It is a truism of Anglo-American law that there is a difference between gifts and bargains, between donative transfers and contractual exchanges. The two types of transactions are commonly presumed to accomplish divergent purposes in distinct settings" at 155). See generally Melvin A Eisenberg, "The World of Contract and the World of Gift" (1997) 85:4 Cal L Rev 821.

See art 1806 CCQ. See also art 931 CcF (1804) (the equivalent provision in the French Code civil, which undoubtedly inspired the approach taken to the classification of gifts in Quebec and elsewhere).
primarily to the unique role of consideration as an essential element of a contract in common law jurisdictions, by contrast to its much more marginal role as a means of distinguishing between gratuitous and onerous contracts in those that follow civilian private law. It is ostensibly for this reason that those authors who equate contract with a form of market or bargain-based arrangement have generally been dismissive of the civil law view of gifts, even within comparative accounts of gift law. It is also for this reason that opponents of consideration in common law jurisdictions have tended instead to draw upon the example of the civil law in support of their arguments: they believe—wrongly—that the classification of gifts as contracts means that these legal systems generally enforce both executed gifts completed by means of delivery and promises of gift to which the common law typically denies any legally-binding effect.

By contrast to the primary role attributed to consideration within existing comparative accounts of gift law, this article aims to provide an alternative and, arguably, more complete way of understanding the divergent classification of gifts in common law and civil law jurisdictions. Focusing on the examples of Quebec civil law and Canadian common law, I argue that this state of affairs can be accounted for, and perhaps even justified, by drawing on the relationship that each set of legal systems presents between two potentially distinct classes of agreement—the first

3 See Richard Hyland, Gifts: A Study in Comparative Law (Oxford: Oxford University Press, 2009) at paras 230–36; Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (New York: Oxford University Press, 1996) at 504–07. But see Hyland, supra note 3 (“Yet the consideration doctrine is only part of the problem. Even without the consideration doctrine, the notion of contract that prevails in the common law would not admit the institution of the gift. Instead, gifts are generally examined from the standpoint of property law—usually as a chapter in treatises devoted to the law of personal property” at para 1316).

4 See especially Hyland, supra note 3 (concluding that "since gift giving and the market are in many ways opposites, the contractual characterization can never fully accommodate gift giving” at para 1317).

5 See Baron, supra note 1 at 192; John P Dawson, Gifts and Promises: Continental and American Law Compared (New Haven, Conn: Yale University Press, 1980) at 1.
corresponding to agreements that generate future obligations, and the second to agreements that immediately transfer property rights. Whereas Quebec civil law in particular does not truly distinguish between the two as a matter of practice or theory, I suggest that the concept of contract adopted in common law jurisdictions can be understood to correspond to the first class of agreement, as one that serves to generate future obligations. Meanwhile, it is the correspondence of the common law gift to the second type of agreement—to an agreement that is immediately performed, and that serves to transfer property rights at the moment of its conclusion—that I further suggest provides us with the most compelling explanation, or at least the most complete doctrinal explanation, for its exclusion from contract as the common law understands the term.

My argument proceeds in three parts. Parts I and II begin by examining the meaning given to “gift” and “contract”, respectively, in Quebec civil law and Canadian and English common law sources. Part III then applies the conclusions drawn in the first

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6 In making this argument, I am aware that certain classes of contract are often said to transfer property rights in common law jurisdictions. See e.g. Sale of Goods Act, RSO 1990, c S.1, s 18 [Sale of Goods Act RSO]; Sale of Goods Act 1979 (UK), 1979, s 17 [Sale of Goods Act UK]; Sale of Goods Act 1893 (UK), 56 & 57 Vict, c 71, s 17. However, these transactions are exceptions to the general principles of the common law, which have at least historically required a separate act of performance to complete a transfer of property rights. See Cochrane v Moore (1890), 25 QBD 57 at 72–73, [1886–90] All ER Rep 731 (CA (Eng)) [Cochrane].

7 For existing comparative accounts focusing on Quebec gift law, see John EC Brierley & Roderick A MacDonald, Quebec Civil Law: An Introduction to Quebec Private Law (Toronto: Emond Montgomery, 1993) at 532–34; Department of Justice Canada, The Concept of a Gift/Don: Comparative Study—Civil Law—Common Law—Tax Law, by Joseph Sirois (27 June 2017), online: <www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/siroi/gift3-don.html#edn60>. While my choice of Quebec civil law as a specific point of comparison reflects the intended audience of this article, I note that its approach to gifts still owes much to its French heritage, and can be taken to largely reflect the approach of modern French civil law as well. By contrast, my focus on English as well as Canadian sources reflects the fact that English jurisprudence continues to play a significant role in this area of the common law in Canada and elsewhere.
two parts of this article to the effects generated by or ascribed to the gift in each set of jurisdictions. By focusing on these effects, I argue that the version of the gift enshrined in the CCQ serves both as a source of obligation on the part of the donor and as a means of potentially transferring property rights to the donee at the moment of its conclusion, without any clear difference between the two types of arrangement. I then suggest that the common law gift amounts instead to a transaction in which the transfer of the gift property is necessarily performed at the very same moment in which the donor and donee reach an agreement, meaning that the agreement can be understood to effectively pertain to the performance of the transfer in question.

As will hopefully become apparent below, and is perhaps already implicit in my rejection of the approach found in most existing comparative accounts of gift law, each part of my argument largely assumes the rationality of the distinctions typically drawn by writers and judges in relation to their own respective legal systems. I accordingly do not challenge the non-contractual classification of gifts in common law jurisdictions or the contractual classification these transactions receive in Quebec or elsewhere, but rather attempt to better understand these choices in their own terms. At the same time, this article does not attempt to provide a complete theory of contract or conveyancing in either set of jurisdictions either. While my arguments address theoretical issues, particularly in Part II, they are aimed primarily at understanding the divergent attitudes taken towards the contract/gift relationship in Canadian common law and in Quebec civil law, rather than directly at the construction of an ideal account of contract or of its relationship with property law.

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9 I note that I have already dealt with the broader relationship between contract and conveyancing directly and at some length elsewhere. See
I. THE SCOPE OF GIFT

As with many comparative studies, the first issue raised by this article pertains to whether its object—in this case, the transactions or agreements called “gifts”—corresponds to the same idea or concept in each set of jurisdictions under consideration. There are two main reasons for addressing this problem from the outset. The first is that any differences in the scope of gift law present a challenge to the very possibility of mounting a comparative analysis, and should thus at least be tacitly understood before proceeding further. The second reason, and perhaps the most important one for present purposes, is that any differences that do exist are both deserving of an explanation in their own right and may even go some way towards explaining the divergent classifications that gifts receive in common law and civil law sources.

As I argue below, it is precisely the differences in the scope granted to the term “gift” in each set of legal systems that should first alert us to a possible explanation for its association with contract in Quebec civil law, on the one hand, and its exclusion from the contractual domain in Canadian and other common law jurisdictions on the other. Whereas the former legal system adopts a wide view of the gift, encompassing agreements concluded using at least three different formalities—the notarial act, delivery, and the use of a disguised form—the common law instead tends to reserve the label of “gift” only for the agreement that has been completed or “executed” by means of delivery. The common law’s closest equivalents to the other two formalities recognized by


As Catherine Valcke has put it, the different meanings ascribed to legal categories in different legal systems means that they serve as “notoriously poor entry points” for comparative analysis: Comparing Law: Comparative Law as Reconstruction of Collective Commitments (Cambridge: Cambridge University Press, 2018) at 15. See also Hyland, supra note 3 at para 210 (“the notion of gift varies so fundamentally that it is tempting to . . . give it a different name in each system—gift in one, gaft in another, and geft in a third”: ibid [emphasis in original]).
Quebec civil law, meanwhile, are generally understood as means of concluding contracts within that legal tradition, meaning that these agreements are at least implicitly excluded from its version of gift law entirely.

A. THE CONTRACT OF GIFT IN QUEBEC CIVIL LAW

Perhaps the easiest place to begin my argument as to the differing meanings given to the term “gift” at common law and in Quebec civil law is to turn to the CCQ, which replaced Quebec’s previous civil code, the Civil Code of Lower Canada (the “CCLC”), in 1994. As the relevant provision sets out:

Gift is a contract by which a person, the donor, transfers ownership of the property by gratuitous title to another person, the donee; a dismemberment of the right of ownership, or any other right held by a person, may also be transferred by gift.\(^\text{11}\)

There are at least three aspects of the above definition that are potentially relevant to the present study. The first, and perhaps the most obvious, is that the gift is clearly understood as a species of contract in Quebec civil law. Save and except for the requirements applicable only to that particular transaction, it is accordingly subject to the same general rules that apply to all contracts under the CCQ, including the rules pertaining to contract formation—that is, to the rules of offer and acceptance—as well as those requiring a valid cause and object as essential conditions of contractual validity.\(^\text{12}\)

\(^{11}\) Art 1806, para 1 CCQ.

\(^{12}\) See especially arts 1377, 1385 CCQ. See also art 1371 CCQ. Both “object” and “cause” are notoriously nebulous and susceptible to numerous meanings that are not strictly relevant for the purpose of this article. See Didier Lluelles & Benoît Moore, Droit des obligations, 2nd ed (Montreal: Thémis, 2012) at paras 1049, 1061; Pierre-Gabriel Jobin & Nathalie Vézina, Beaudouin et Jobin: Les Obligations, 7th ed (Cowansville, Que: Yvon Blais, 2013) at paras 352, 357. See also Henri Mazeaud et al, Leçons de droit civil, t 2, vol 1, 8th ed by François Chabas (Paris: Montchrestien, 1991) at paras 231, 255. I note for the sake of completeness that the continued relevance of “cause” has presented a persistent controversy in French law, and that all express references to that notion were (controversially) eliminated from the French Code civil during the 2016 reforms of that enactment.
Understood in these terms, the version of the gift enshrined in the CCQ requires that the donor make an offer to gift particular property to the donee, who must accept that offer—which is to say that the transaction rests first and foremost on the bilateral consent of the parties involved. While the requirements of cause and object may appear to complicate matters at first glance, they too are consistent with the existence of bilateral consent: the object corresponds to the conclusion of the transaction as a gift, while cause is supplied by the intention of the parties to give and accept the property gratuitously—i.e., to complete the transaction as a liberality. Each of these elements relates back to the existence of an agreement between two or more parties, such that a gift is considered to be binding as a contract even if the operation it contemplates remains fundamentally gratuitous in nature.\footnote{See art 1381 CCQ (possibility is implicitly confirmed by defining “onerous” and “gratuitous” contracts).}

This conclusion brings us to the second important feature of the definition of gift in the CCQ, which pertains instead to the relatively narrow sets of conditions that must be met for a contract to qualify \textit{qua} gift in Quebec. As the definition given above suggests, in order to qualify as a gift, a contract must not only be gratuitous but must also relate to the transfer of property rights.\footnote{See also Lluelles & Moore, \textit{supra} note 12 at para 223; Baudouin, Jobin & Vézina, \textit{supra} note 12 at para 67; Jean Pineau & Serge Gaudet, \textit{Pineau, Burman & Gaudet: Théorie des Obligations}, 4th ed (Montréal: Thémis, 2001) at para 29; Mazeaud et al, \textit{supra} note 12 at para 101.} The mere fact that a contract is gratuitous does not suffice to make it into a gift, especially since the CCQ also recognizes a number of other gratuitous or potentially gratuitous transactions under different contractual labels. The gratuitous loan and deposit—categories that likely correspond to instances of bailment at common law—are prime examples of this kind of qualification.\footnote{See art 2280 CCQ (providing the contractual classification of “deposit” in modern Quebec civil law). See also arts 2312–15 CCQ (providing the contractual classification of “loan”).} What sets the gift apart from these arrangements is the aforementioned intention to transfer gratuitously, such that the transferee is intended to gain ownership or some lesser
property right over the gift property, and, at least generally, assumes no obligation to return it at a later time.

That said, the classification of a contract as a gift is also not something that its parties—or at least a potential donee—will desire in most cases. Although gifts are understood as contracts and are thus theoretically enforceable on the basis of consent alone, like all contracts in Quebec civil law, the CCQ also follows both its predecessor and the French Code civil by imposing a number of relatively burdensome formalities as a condition of their validity. The most basic of these, and the only one the Code civil expressly recognizes as a means of validly concluding a gift, is to have the agreement completed before a notary, by means of a notarial act en minute.16 The two main alternatives, which the CCQ presents as exceptions to the general rule requiring notarization, are the completion of manual delivery where the gift concerns movable property—a don manuel, as it is sometimes called in French—and the use of recital consideration to “disguise” the gift as a sale, in a manner that is largely reminiscent of the common law’s nominal consideration rule.17

While the version of the gift found in the CCQ does indeed correspond to a contract, it also serves in this sense as an exception to the general principle of consensualism that is otherwise embraced by Quebec’s civilian private law. The three

16 Art 1824 CCQ (“[t]he gift of movable or immovable property is made, on pain of absolute nullity, by notarial act en minute, and shall be published”: ibid). See also art 931 C civ.

17 Arts 1811, 1824 CCQ. Nearly identical rules have long been recognized by French jurisprudence, along with a fourth category that is likewise recognized by Quebec civil law under the heading of “indirect gift”. See art 1811 CCQ. Indirect gifts can be equated for present purposes with disguised gifts, since they are gifts that are valid because they appear at first glance to correspond to a transaction other than a gift, such as a bank transfer that may or may not be made with gratuitous intent. See Germain Brière, Donations, substitutions et fiducie (Montréal: Wilson & Lafleur, 1988) at para 156. It should also be noted that the CCQ provides for the enforcement of a “promise of gift” (i.e. a preliminary promise or “contract” to enter into a proper contract of gift at a later date) under circumstances that parallel the “sword” variant of the equitable doctrine of promissory estoppel. See art 1812 CCQ. See also art 1396 CCQ.
ways of concluding a valid *inter vivos* gift—the use of a notarial act, delivery, and disguised form—effectively produce a result that is not dissimilar in practice from the common law requirement of consideration and its own apparent exceptions—that is, delivery, the seal, and nominal consideration, respectively. As in the common law, and contrary to the assumptions that are likely still held by many common law-trained lawyers, we can thus conclude that the enforcement of gratuitous agreements is limited in Quebec insofar as they pertain to the transfer of property rights; in such a case, the agreement will amount to a gift and is unenforceable unless it complies with at least one of these alternative formalities.\(^{18}\)

Finally, the third observation that can be made about the definition of gift enshrined in the CCQ pertains to the relationship it suggests between these transactions and the concept of obligation, understood in the technical civil law sense as a legal bond that obligates one person, the debtor, to perform or refrain from performing a particular act, a *prestation*, for the benefit of another person, the creditor.\(^{19}\) While the wording of the definition strongly suggests that a gift should immediately vest ownership in the donee—because it presents the gift as a contract by which the donor transfers property, in the present tense—this wording does not foreclose the possibility of concluding a gift in a manner that merely obligates the donor to transfer the gift property at a later time either. The example of the contract of sale illustrates this possibility quite well; it, too, is similarly framed as an arrangement by which the seller transfers property, in the present tense, even as it is clear that a sale can also be concluded in a way that only binds the seller to transfer the property at issue at a later time.\(^{20}\)

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\(^{18}\) *Cf* e.g. Baron, *supra* note 1 at 192.

\(^{19}\) See arts 1371, 1373 CCQ.

\(^{20}\) See art 1708 CCQ ("[s]ale is a contract by which a person, the seller, transfers ownership of property to another person, the buyer, for a price in money which the latter obligates himself to pay": *ibid*). *Cf* e.g. arts 1378, 1851 CCQ (using expressions such as "obligate" and "undertakes" in the present tense to refer to the generation of an obligation).
Confirmation that the version of the gift enshrined in the CCQ includes arrangements that generate obligations to transfer property in the future, rather than being limited to immediately completed transfers of property rights, can be found by looking past the definition of gift proper and at the other provisions that govern the operation of these transactions. In particular, the CCQ provides that gifts must be concluded in a manner that at minimum immediately subjects the donor to an obligation to convey the gift property, or else the transaction at issue will either be void outright or deemed a *donatio mortis causa*—a gift that only takes effect upon the donor’s death—and likely be void in accordance with the CCQ’s general prohibition of non-testamentary dispositions of property upon death. Implicitly, these provisions thus suggest that the undertaking to transfer property gratuitously—that is, what the common law would call a “promise of gift”—amounts to a valid *inter vivos* gift, provided that it complies with the same formalities applicable to gifts generally, as well as the additional requirement that the obligation in question be immediately binding upon the donor at the moment of the gift’s conclusion.

I will have more to say about this last feature of the Quebec gift below, in Part III. For now, it is likely sufficient to note that the CCQ recognizes the possibility that an *inter vivos* gift can be concluded in a manner that merely obligates the donor to gratuitously transfer property in the future. When combined with the first two features outlined above, we can conclude that the gift amounts in this jurisdiction to an agreement by which one party, the donor, gratuitously conveys or at least undertakes to gratuitously convey property to another, the donee, without any clear distinction made between the two types of arrangement. The question that now

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21 See arts 1807, 1808 CCQ (definitions of gift *inter vivos* and *mortis causa*). Various provisions expressly impose nullity upon gifts where the donor does not immediately undertake an obligation. See arts 1816, 1818, 1819 CCQ.

22 I note that the gift completed by manual delivery may be exceptional in this regard, as it appears to require that the ownership of the gift property vest immediately in the donee and may not properly generate any kind of obligation at all. I will return to this issue in Part III, below.
arises, and on which I want to focus more directly in the remainder of this part, is the extent to which this version of the gift differs from the transactions recognized under the same label in common law jurisdictions, including most notably in the other Canadian provinces and territories.

B. GIFTS AND GRATUITOUS CONTRACTS AT COMMON LAW

By contrast to the legislated definition given in the CCQ or even in the Code civil, there is, of course, no single source to which we can turn for a comparable definition of the gift in common law jurisdictions. Nonetheless, a logical, or at least useful, starting point is the decision of the English Court of Appeal in Cochrane v Moore, which is still considered to provide a leading statement on the law of gifts in Canada and across much of the common law world. While the majority in that case does not expressly define the term, Lord Escher's concurring judgment does to a certain extent:

The proposition before the Court on a question of gift or not is—that the one gave and the other accepted. The transaction described in the proposition is a transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do.

This view of the gift does not differ significantly from that implicitly applied by the majority in Cochrane, nor with those accounts found in both historical and more contemporary

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24 Cochrane, supra note 6 at 75–76.
It posits at least two separate requirements: the first being the giving of the gift property, the second its acceptance. Modern Canadian jurisprudence and commentary expand these requirements to three: an intention to give, delivery, and acceptance of the gift—which is to say that they effectively divide the first requirement into two parts.26

While this definition does not provide any indication that the gift constitutes a “contract” at common law, it does affirm that the gift corresponds to an agreement (or at least a transaction) that requires something approaching an offer and an acceptance on the part of its respective parties.27 The first requirement applicable to the donor—the requirement of intention, the *animus donandi*—is, in fact, relatively easy to equate with that of an offer. It also appears to serve as the common law’s equivalent to the *causa* of liberality, since it allows for a distinction to be made between the gift and other classes of transaction, like the bailment, that are likewise typically concluded through the physical delivery of a particular thing.28 That a donor has delivered the gift property to the donee is thus not generally understood to be conclusive of a gift on its own; the donor must also have intended—which is to

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25 See e.g. William Blackstone, *Commentaries on the Laws of England*, vol 2, 19th ed by J E Hovenden (London: S Sweet, 1836) (“[a] true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately” at 441); Halsbury’s Laws of England (online), Gifts, “Gifts Made Between Living Persons: Introduction: Forms of Gifts Inter Vivos” at 201 (Vol 52 (2020)) (“[a] gift made between living persons . . . is an act whereby something is voluntarily transferred from the true owner in possession to another person with the full intention that the thing shall not return to the donor”: ibid [citations omitted]).


27 *Cochrane, supra* note 6 at 75–76.

28 Following longstanding rules of the common law, a bailment is also enforceable without consideration so long as the bailor has delivered the bailed thing to the bailee. See *Wheatley v Low* (1622), Cro Jac 668, 79 ER 578 (KB); *Whitehead v Greetham* (1825), 2 Bing 464 at 468, 130 ER 385 (Exch); *Shillibeer v Glyn* (1836), 2 M & W 143, 150 ER 704 (Exch of Pleas).
say for all practical purposes, truly offered—to give the gift property qua gift property.29

That the common law gift must also be accepted by the donee further supports the conclusion that it amounts, like its Quebec analogue, to a form of bilateral agreement between two or more parties. The only significant difficulty here is the manner in which the common law applies this requirement by presuming the donee’s acceptance of the gift upon her physical acceptance of the gift property.30 Even here, however, a relatively easy solution can be found by drawing on the common law’s “objective”—and in this respect, ostensibly divergent—approach to intention or consent in general.31 Applied to contracts, it is by now trite law that this view of intention admits exceptions to the requirement of an expressly-communicated acceptance where it might be reasonable to infer that such an acceptance has occurred in any event.32 A similar rationale is at least arguably applicable in the case of the

29 See e.g. In Re Cole, A Bankrupt [1964] 1 Ch 175, [1963] 3 All ER 433 (CA) [Cole].

30 See e.g. Standing v Bowring, [1885] 31 Ch D 284 at 286, [1881-5] All ER Rep 702 (CA). Cf Felthouse v Bindley, [1862] EWHC CP 1 35, 142 ER 1037 (Comm). Cf art 932, al 1 C civ (“[a]n inter vivos gift will only bind the donor, and will only produce effects of any kind, as and from the day in which it is expressly accepted”: ibid [translated by author]). At least one author has taken this approach to acceptance to mean that the common law gift does not, in fact, amount to a true bilateral agreement, but rather to a unilaterally intended act that is subject to the donee’s right of repudiation. See Martin A Hogg, “Promises and Donation in Louisiana and Comparative Law” (2011) 26 Tul Eur & Civ LF 171 at 172. See also Mossman & Girard, supra note 23 at 447.

31 At least some comparative accounts of contract treat the apparent requirement of objective intent at common law as a point of demarcation between it and civil law legal systems. See e.g. John Cartwright, Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer, 3rd ed (Oxford: Hart, 2016) at 96. See also Stevenson v McLean, [1880] 5 QBD 346 at 350–52, 49 LJQB 701. This distinction can also be criticized, however, on the basis that both approaches ultimately call on the use of external evidence to determine the mental state of the parties at the moment the contract was formed.

common law gift, where the gratuitous nature of the transaction means that the donor will typically provide a benefit to the donee without a legally binding expectation of return. Even if the donee subjectively believes that delivery has been made for the purpose of concluding another kind of transaction—again, for example, a bailment—her physical acceptance of the gift property will be sufficient provided that she has refrained from expressing an intention contrary to the acceptance of a full and complete transfer of ownership.33

Where the differences between the common law gift and its analogue under the CCQ become more pronounced, by contrast, is at the level of the third and final element required to complete a valid gift at common law: delivery. The differences here are in fact twofold, with the first pertaining to the comparatively broader role that the common law affords to delivery as a means of concluding a valid gift in the first place. Whereas Quebec civil law at least theoretically limits delivery to the physical delivery of the gift property, and thus requires that the donor actually hand the thing over to the donee, the common law instead appears to admit the possibility of symbolic delivery, provided that the donor has done everything within her power, or at least all that was reasonable, to vest title in the donee.34

This difference is not without broader implications, chief among them being that a number of transactions that may not count as manual gifts in Quebec civil law will be understood as gifts completed by delivery at common law. At the same time, this larger role afforded to delivery appears to be offset in common law jurisdictions by a second point of divergence that instead serves to narrow the scope of gift law considerably. It pertains to the common law’s treatment of its closest alternatives to the other two

33 Dewar, supra note 26 at 1538–39.

34 Milroy v Lord (1862), 4 De G F & J 264 at 274–75, 45 ER 1185; Bayoff Estate, Re, 2000 SKQB 23 at paras 14–15. Cf Paré c Paré (Succession de), 2014 QCCA 1138 [Paré]; Brière, supra note 17 at para 145, citing O’Meara v Bennett, [1922] 1 AC 80 (PC). While the same rule has historically applied in France, at least one author has noted a growing trend towards the dematerialisation of material gifts in French law. See Philippe Malaurie, Les Successions, les libéralités, 5th ed (Paris: Delfrénois, 2012) at para 398.
means of concluding a gift in Quebec—that is, to the notarial act and use of a disguised form. Functionally speaking, the common law equivalents to these formalities are probably found in the use of a sealed instrument and nominal consideration, respectively, which both allow for the conclusion of effectively gratuitous transactions in an enforceable manner. Yet these common law formalities are also typically understood as means of concluding contracts, or else some other kind of transaction, rather than as means of concluding gifts in their own right.

The common law's classificatory choice in favour of contract is perhaps most obvious in the case of nominal consideration, which, as mentioned above, strongly parallels the disguised gift recognized by Quebec civil law. As the rule is presented in Canada, and the other common law jurisdictions that continue to recognize it, its operation has little to do with gift law, and appears instead as an extension of the basic structure of the consideration-based contract: a promise made even for consideration in the amount of one dollar is binding and enforceable as a contract, owing to the fact that courts cannot normally assess the adequacy of consideration in any event. Since the promisor has consented to receiving the promisee's consideration in exchange for her own promise, it makes no difference at common law whether the consideration offered for the promise is equal to its fair market value or to a substantially lesser or even nominal sum. The form of the agreement is one that

35 The chief difference between the sealed instrument and the civil law notarial act is that the former does not require recourse to a third-party such as a notary, meaning that it amounts in civil law terms to a form of acte sous seign privé. See art 2826 CCQ. There is, of course, no true equivalent to the civil law notary in most if not all common law jurisdictions.

36 Thomas v Thomas, [1842] QB 85, 114 ER 330 [Thomas]; Loranger v Haines (1921), 64 DLR 364 at 366–67, 372, 50 OLR 268, Meredith CJCP & Lennox J (CA). By contrast, it is the classification of these transactions as gifts that likely appears aberrant to common law-trained lawyers. See e.g. Dawson, supra note 5 at 74.
the common law recognizes as corresponding to a contract, so it amounts to a contract and is enforceable as such.37

By contrast, the contractual classification of the common law’s closest equivalent to the civil law notarial act—that is, the sealed instrument—is comparatively more difficult to sustain. Part of the problem is that the rule conferring effects to agreements concluded in this form is not generally understood as an extension of consideration, as is the case with the nominal consideration rule, but rather as an exception to its application.38 This state of affairs has led at least some authors to argue that the seal does not, in fact, amount to a means of concluding a contract at all, but rather to a means of concluding some other type of transaction—including perhaps a form of gift in its own right.39 Certainly, the actual operation of the sealed instrument rule lends itself to this conclusion in at least some respect; to paraphrase Lon Fuller, it corresponds to a formalized document that serves to make virtually any unilateral (and ostensibly gratuitous) agreement fully enforceable, on the condition that the instrument-maker sign, seal, and deliver it to its intended recipient.40

Adding to an already complex situation, the role of the sealed instrument as a blanket formality also allows it to serve as both a means of concluding binding gratuitous promises, and to immediately complete a conveyance of property, including real

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38 But see Chilliback v Pawliuk (1956), 1 DLR (2d) 611, 17 WWR 534 (Alta SC) (“[a]s is stated in most textbooks and in many ancient authorities, a seal was said to ‘import’ consideration, so that a document under seal might be enforced even though no consideration appeared on the face of the instrument” at 615).


40 Fuller, “Consideration”, supra note 37 at 823. See also Restatement (Second) of the Law of Contracts, §95(1) (1981); Friedmann Equity Developments Inc v Final Note Ltd, 2000 SCC 34 at para 36 [Friedmann Equity Developments].
property in particular.\textsuperscript{41} It is in this last respect, perhaps more than any other, that it mirrors the CCQ's recognition of the notarial act as a means of both concluding an immediate gift and creating an obligation to gratuitously transfer property at a later time. Tellingly, however, these dual functions of the sealed instrument are not usually given the same treatment in contemporary common law sources. In the case of the sealed instrument used for the purpose of immediately transferring property rights, it is usually dealt with as a part of property law alongside, and in limited cases as a part of, the law of gifts.\textsuperscript{42} The promise made under seal—the use of a sealed instrument to generate a form of voluntarily assumed obligation—is by contrast almost universally associated with the form of a contract.\textsuperscript{43}

Whether this perspective on the classification of agreements concluded under seal is ultimately correct depends, of course, on the view we take of the common law contract itself—an issue that I address further below, in Part II. That said, the answer to this question may not ultimately matter that much for the purpose of my broader thesis, particularly if the promise under seal is excluded from the domain of contract law and assimilated to the form of a gift as the common law understands the term. Alan Brudner's arguments in support of the latter classificatory choice illustrate why this might be the case:

In fact, gratuitous promises under seal are enforced not as executory contracts but as executed gifts. A gift does not pass title to the donee until delivered, but the delivery of a sealed deed of gift counts as symbolic delivery of the object. In the same way, a promise signed, sealed, and delivered transfers possessory title to the donee, and the court enforces that title. Thus, the seal is not an alternative to consideration in triggering the enforcement of a

\textsuperscript{41} Friedmann Equity Developments, supra note 40 at para 50.

\textsuperscript{42} See e.g. Ziff, supra note 23 at 162; Mossman & Girard, supra note 23 at 430.

promise; rather it is something that (along with delivery) transforms a promise into an executed transfer—a conveyance.44

If we assume the perspective outlined in the beginning of this paper, according to which my objective is to explain the use of labels like "gift" and "contract" in the way they are generally understood in Canadian common law and Quebec civil law sources, then it would appear that general usage alone allows us to discount the arguments advanced by Brudner and others insofar as they point to a non-contractual classification for promises under seal.45 Nonetheless, Brudner's argument does not really contradict the broader thesis advanced in this article, and may even support it. On his view, promises under seal are excluded from the ambit of contract not because they lack consideration per se, but rather because they amount to an immediately performed transfer of something approaching a property right. What this means, in other words, is that Brudner ends up affirming the existence of two kinds of broadly consensual arrangements recognized by the common law. The only question his account raises is whether the enforcement of one specific class of transaction—promises under seal—really amounts to the enforcement of a promise or "contract", or to some other class of agreement, and specifically to an executed agreement of the type that he associates with the form of the gift.

What we can conclude from the foregoing account of the common law gift, then, is that it appears to correspond to a type of bilateral agreement between donor and donee. There is little difference at this level between it and the version of the gift enshrined in the CCQ. Where important differences between the two do emerge, however, is at the level of the formalities that are

44 Brudner & Nadler, supra note 8 at 199.
admitted in each set of jurisdictions as means of concluding valid agreements qua gifts. Setting aside the perspectives offered by authors such as Alan Brudner, only the use of delivery is universally or even typically recognized as a means of concluding a gift at common law, whereas its closest equivalents to the two alternatives recognized by Quebec civil law—the use of a notarial act and the disguised form—are instead usually understood as means of concluding valid contracts, even though these transactions are also perfectly valid and enforceable without proper, valuable consideration.

This assessment of the scope granted to gift law in common law jurisdictions has at least two further implications. The first, and most obvious, is that it refutes any suggestion that gratuitous agreements are excluded entirely from the ambit of contract at common law. The second, and probably the more important of the two for present purposes, is that the exclusion of “gifts” from the ambit of contract at common law means the exclusion of only one particular class of gratuitous transaction recognized as such by the CCQ—that is, the exclusion of the gift that has been completed or “executed” by means of delivery. Taken together, these conclusions provide us with a good starting point to understand the true boundaries between gifts and contracts in Canadian and other common law jurisdictions, on the one hand, and to understand the extent of their divergence with Quebec civil law on the classification of gifts, on the other. A truly complete picture of the relationship between gifts and contracts in each set of jurisdictions, however, requires that we turn our attention to the other concept under study—that is, away from gift law, and towards contract itself.

II. THE MEANING OF CONTRACT

So far, I have argued that the conclusion of a gift in Canadian and other common law jurisdictions and in Quebec civil law can be understood to require an agreement in the form of offer and acceptance. It is the approach taken towards the applicable formalities that instead presents the most important difference between these respective sets of legal systems; whereas the CCQ admits at least three ways of concluding a gift, the common law
instead recognizes *qua* gift only the gratuitous agreement to transfer property rights that is completed by means of delivery. The common law equivalents of the other two main formalities that Quebec civil law admits as means of giving effect to gifts—nominal consideration and the seal—are by contrast typically associated with contract law within that legal tradition, particularly where they are used for the purpose of creating binding promissory obligations.

In the second part of this article, I now want to turn to the other aspect of the contract/gift relationship under study, namely the concept of “contract” adopted in Canadian common law and in Quebec civil law, respectively. As previously mentioned, my objective here is not to weigh in directly on issues of contract theory, so I will attempt to limit myself to outlining the major differences between the two sets of jurisdictions as they pertain to the inclusion or exclusion of “gifts” from the ambit of “contract” as each understands the term. In the case of Quebec civil law, I will thus focus my attention on its equation of contract with what Quebec doctrine calls a “bilateral juridical act”—a bilateral agreement that can be used to generate virtually any kind of legal consequence, including future obligations and the transfer of property rights. By contrast, I will suggest that at least the *ideal* of contract at common law corresponds more narrowly to that of an arrangement that generates—or is perhaps synonymous with—the existence of a promissory obligation, understood here simply to mean an obligation arising out of or imposed as a consequence of promising and requiring that the promisor perform or refrain from performing some act in the future.46

A. CONTRACT IN QUEBEC CIVIL LAW: A BILATERAL JURIDICAL ACT

To begin again with Quebec civil law, the CCQ defines a contract as “an agreement of wills by which one or several persons obligate

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46 As will hopefully become apparent below, the distinction between “voluntary” and “promissory” is not strictly important for present purposes. Whether the obligation assumed by contract is truly voluntary or not, it remains tied to some form of promise of future performance even for those authors who understand it to be implied by law.
themselves to one or several other persons to perform a prestation.” This provision presents a largely uncontroversial definition of contract, at least from a traditional civil law perspective. Indeed, it is identical in most if not all important respects to the definition of contract first enshrined in the French Code civil in 1804. On this view, a contract remains tied to the intention or “will” of the contracting parties, which serves as the basis of their respective rights and obligations. To paraphrase the now-classic formula enshrined by the Code civil, a contract amounts in this sense to a “law” fashioned and enacted by the parties themselves.

At the same time, and by contrast to the original version of the Code civil, both the CCLC and now the CCQ are also explicit in their recognition of the other effects that can be generated using the contractual form, besides an obligation to render the performance of a particular act or prestation. In the case of the CCQ in particular, it recognizes that a contract also “creates obligations and, in certain cases, modifies or extinguishes them”, in addition to the possibility that contracts might have “the effect of creating, transferring, modifying or extinguishing real [i.e. property] rights” in certain cases. The latter set of effects is, of course, particularly relevant to the gift, which, as mentioned above, corresponds in Quebec civil law to a contract by which one party gratuitously transfers particular property, or else undertakes to transfer particular property, to the other. The property-transferring effect of contracts under the CCQ is also essential to the broader

47 Art 1378 CCQ.
48 See art 1101 CcF (1804) (“[c]ontract is an agreement [convention] by which one or more persons undertakes an obligation, towards one or more other persons, to give, do or to refrain from doing something”: ibid) [author’s translation].
49 Art 1134, al 1 CcF (1804). While this view of contract is not without its critics even in Quebec civil law, doctrinal commentary has focused primarily on the status of unilateral juridical acts vis-à-vis the classification scheme established by art 1372 CCQ. See e.g. Baudouin, Jobin & Vézina, supra note 12 at para 45; Lluelles & Moore, supra note 12 at paras 73–74.
50 Art 1433 CCQ. See also art 1022 CCLC.
51 Art 1806 CCQ.
argument I advance in this article, according to which the specific feature of the Quebec gift is that it serves both as a means of generating future obligations to transfer property and as a way of completing such a transfer without clearly distinguishing between the two operations.

While the version of contract recognized by Quebec civil law may remain tied primarily to the generation of obligations, understood again in the technical civil law sense of a legal bond requiring the performance of a prestation, the compatibility between it and the additional effects ascribed to it by the CCQ becomes all the more apparent when we move away from the CCQ proper and towards the definition of “contract” offered by Quebec’s contemporary doctrinal scholarship. Echoing once again the dominant French position, these authors have tended on the whole to cast the concept in even more abstract and arguably more expansive terms, as an instance of—if not the sole instance of—what they label simply as a “bilateral juridical act”. This expression reflects the idea, consistent with the codified definition outlined above, that a contract is anchored in the intention or will of at least two parties who have come to an agreement on a particular legal operation. The focus of this definition of contract, however, is squarely on the specifically bilateral intention required to create a binding agreement, and less on the kinds of operations that can be carried out by contractual means. In this respect, the contract is contrasted primarily with the unilateral juridical act, which requires only the intention of one party, and with the juridical fact, which is a fact (i.e. a legally relevant state of affairs) to which the law ascribes effects irrespective of the parties’ intentions.

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52 Lluelles & Moore, supra note 12 at paras 53–54; Baudouin, Jobin & Vézina, supra note 12 at para 47. See also Mazeaud et al, supra note 12 at para 45.

53 This slippage away from the use of the term “contract” to designate only those bilateral acts that serve to create obligations had already occurred at the beginning of the twentieth century and was partly criticized. See e.g. Marcel Planiol, Georges Ripert with the collaboration of André Trasbot, Traité pratique de droit civil français, t 5 (Paris: Librairie générale de droit & de jurisprudence, 1933) at para 13.

54 See art 1372 CCQ.
So defined as a bilateral juridical act, there appears to be little reason to exclude gifts from the ambit of contract.\textsuperscript{55} There is also little reason to think that the gift concluded in a way that merely obligates the donor to transfer the gift property at a later time should be treated any differently from the gift that immediately constitutes the donee as the owner of the thing in question, or even to insist that the second type of arrangement serve to generate an obligation in order to be properly deserving of the contractual label.\textsuperscript{56} Both types of gift require the existence of bilateral intention as embodied most notably in the requirements of offer and acceptance, and in this sense conform to the basic structure of a contract as contemplated by the CCQ. So long as the parties have intended to generate particular effects, and provided that the law does not impose any limitations on the possibility that these outcomes be achieved, then it would seem to follow that these effects should simply proceed on the basis of the parties' intentions alone.

We can, however, take this view of contract as a bilateral juridical act one step further still. Beyond the fact that this expression implies a general association between contract and virtually any kind of agreement, it is also apparent that the CCQ, in particular, tends to outright equate the obligation to transfer property rights with the completed transfer of property. By contrast to other types of obligation that require a separate act of performance, the CCQ tells us that "[t]he transfer of a real right in certain and determinate property ... vests the acquirer with the

\textsuperscript{55} There is, moreover, little reason to exclude other types of transactions which are also typically cast into distinct categories at common law. These include the aforementioned case of "bailment" (i.e. in the case of a loan and deposit of movable property), but also potentially the trust. See art 1260 CCQ. Cf John H Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105:3 Yale LJ 625.

\textsuperscript{56} Cf Pineau & Gaudet, supra note 14 at para 21 (remarking that the term "contract" should strictly speaking be reserved for bilateral juridical acts that serve to generate obligations, but also noting that this distinction is not consistently applied by the CCQ).
right upon the formation of the contract, even though the property is not delivered immediately”.57

Quebec doctrine and jurisprudence have consistently interpreted this provision in a manner that confirms the approach to the transfer of property rights that had appeared in the Code civil, according to which the obligation to give or transfer property rights (an obligatio dare or obligation de donner) was “perfected” (parfaite) by the sole consent of the parties, without the need for them to perform any additional action.58 As at least some contemporary authors have argued, the effect of this rule is to deny the existence of a true obligation to give in most cases, both as a matter of practice and perhaps also as a matter of theory.59 Indeed, this approach to the transfer of property rights means that a transfer normally occurs automatically at the same moment where a contract is concluded in a manner that binds one party to complete the transfer at issue. The same rule, it should be added, remains applicable even where the parties have intended to delay that transfer, or when the transfer is delayed owing to circumstances outside of their control; in those cases, the transfer again occurs automatically, in accordance with the parties’ initial agreement, while the moment of transfer is simply delayed by the term or the subsistence of the external source of impossibility. No additional action is required on the part of the transferor or transferee in either case, beyond the notification requirement applicable where the transfer pertains to property that is yet to be ascertained.60

57 Art 1453 CCQ.
58 See art 1138 CcF (1804). See also art 1138 CcF (1804) (adding that an obligation to give “makes the creditor an owner and places the thing at his risk from the moment where it ought to have been delivered, even if delivery has not yet been made”: ibid [author’s translation]). This approach has been maintained in respect of the transfer of property rights under the CCQ. See Gestion JP Brousseau inc c Drummond Mobile Québec inc, 2014 QCCA 152; Luelles & Moore, supra note 12 at para 88.
59 Baudouin, Jobin & Vézina, supra note 12 at para 32; Pineau & Gaudet, supra note 14 at para 10. See also Mazeaud et al, supra note 12 at para 19.
60 Art 1453 CCQ. Cf Luelles & Moore, supra note 12 at para 93.1.
Applied to the case of a sale, for example, we can thus affirm that the seller’s obligation to transfer the thing being sold should by default be performed at the very same moment the contract of sale is concluded, without her needing to accomplish any additional action.\(^{61}\) Where the parties instead agree to defer the transfer until some later time, or where the transfer is not possible because the specific thing to be sold has yet to be ascertained or acquired by the seller, then that transfer will still occur automatically, though only once the stipulated delay or condition has been met or the source of the impossibility has been resolved. Aside from the requirement of notification that is applicable to property that is yet to be ascertained, the seller is not required to do anything further once the obligation becomes due, and the purchaser will become the owner of the thing as soon as the moment of performance arrives.\(^{62}\)

If the concept of contract recognized by Quebec civil law generally corresponds to an agreement that can generate virtually any kind of legally-recognized effect, we can thus further conclude that at least two of these effects—the generation of an obligation and its performance—are broadly equated with each other where they pertain to the transfer of property rights. The initial agreement, even if it is taken to create a mere obligation to transfer, is sufficient on its own in all cases to complete that transfer once the requisite conditions are met. This state of affairs appears to further explain why the CCQ does not properly

\(^{61}\) There is an apparent exception. See art 1785 CCQ ("[t]he sale of an existing or planned residential immovable by the builder or a developer to a natural person who acquires it to occupy it shall be preceded by a preliminary contract by which a person promises to buy the immovable, whether or not the sale includes the transfer to him of the seller’s rights over the land": \textit{ibid}). However, the Quebec Court of Appeal has interpreted this “preliminary contract” to mean only a bilateral promise to enter into the contract of sale at a later date: see \textit{Ly c Construction Sainte Gabrielle inc}, 2018 QCCA 1438 at para 7. Moreover, the only sanction for failing to comply with this requirement is the annulment of an eventual sale if the purchaser “suffers serious injury therefrom”: art 1793 CCQ.

\(^{62}\) See e.g. \textit{Veisto-Rakente Rautio Ky c Skeena Equipment Sales & Leasing Ltd}, [1995] RDJ 432 at para 35, JE 95-908, Baudouin].
distinguish between a contract as a source of obligation and a completed transfer of property rights—or, for that matter, between what the common law would recognize as a promise of gift and an executed gift that serves to convey such rights to the donee. Whether the agreement is completed immediately or merely concluded in a form that gives rise to an obligation to transfer the gift property at a later time, there appears to be “nothing more to be done” under the CCQ’s version of the gift as far as the transfer of property rights is concerned, since this transfer will occur automatically once the time for performance has arrived.63

B. CONTRACT AT COMMON LAW: THREE THEORIES OF PROMISSORY OBLIGATION

By contrast to the version of contract enshrined in the CCQ and recognized by Quebec’s doctrinal scholarship, there are perhaps only two conclusions we can safely draw about the equivalent notion found in Canadian and other common law legal systems. The first, and no doubt the least controversial of the two, is that the common law version of contract does not correspond simply to the existence of an agreement. Something more is required for a contract to properly count as a contract, and not simply as a requirement of its enforcement.64 In Blackstone’s definition, that something is the supply of consideration; a contract is thus “[a]n agreement, upon sufficient consideration, to do or not to do a particular thing”.65 For the authors of the American Restatement, who also recognized alternative means of concluding a contract such as the use of a seal, it is simply “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”.66

63 Cochrane, supra note 6 at 75–76.


65 Blackstone, supra note 25 at 441–42.

The second conclusion we can draw about the common law version of contract pertains by contrast to its relationship with the transfer of property rights. This relationship is a complex one, to say the least. There are different rules that appear to apply to the transfer of real and personal property, as well as at common law and in equity. As a general matter, however, it is fairly clear that not all types of contract serve to transfer property rights at common law, just as it is likely that the common law does not generally endorse the approach of Quebec civil law towards the automatic performance of the obligation to transfer such rights.\(^{67}\) The main exception may be the approach taken under sale of goods legislation in Canada and elsewhere, according to which a transfer of goods appears to be possible without the need for delivery or the performance of some other act.\(^{68}\)

Taken together, these observations provide us with a good starting point for understanding what the common law contract excludes. They do not, however, tell us precisely what it is—nor is it my intention to resolve this thorny issue in the few pages that follow. There is, of course, an inherent difficulty in this exercise, just as there was with the common law’s definition of the gift: case law still serves as the primary source of authority on this subject, and it is exceedingly rare that judges will comment directly on a conceptual issue of this kind.\(^{69}\) Still, some further insights can also

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67 For example, the transfer of real property rights appears to remain subordinated to the conclusion of a separate deed of transfer, even as equity may regard the seller as a constructive trustee for the purchaser from the moment the initial contract of sale is concluded. See Cochrane, supra note 6 at 65–66; Lysaght v Edwards (1876), 2 Ch D 499, 24 WR 778; Simcoe Vacant Land Condominium Corporation No 272 v Blue Shores Developments Ltd, 2015 ONCA 378 at paras 46–49.


69 Exceptional examples are the definitions of "unilateral" and "synallagmatic" contract proposed by Lord Diplock. See United Dominions Trust (Commercial)
be gleaned by examining what secondary sources, and particularly theoretical accounts, have assumed about the nature of their object of study. Such is the case, for instance, if we draw upon Stephen Smith’s influential classification of contract theories according to what he calls the “analytic question”:

With respect to the answer given to the analytic question, most contract theories can be placed into one of three broad categories. Promissory theories regard contractual obligations as obligations created by the parties through promises or a related kind of self-imposed obligation, such as an agreement. Reliance theories regard contractual obligations as being imposed by the law in order to ensure that those whom we induce to rely upon us are not made worse off as a consequence. Finally, transfer theories regard contractual obligations as obligations to respect property-like rights that have been intentionally transferred between contracting parties.70

Each of these proposed sets of theories appears quite distinct from the other two at first glance. Nonetheless, all three can be taken to reflect an ideal of contract as a kind of “promissory obligation”—which is to say, simply, that each views the notion of “contract” as pertaining in some way to an obligation that arises out of or is imposed as a consequence of the act of promising. This obligation, in turn, requires that at least one party perform or refrain from performing a particular action at some point in the future, meaning that a contract must be at least partially executory at the moment of its formation in order to properly qualify as such.

70 See Smith, supra note 64 at 54. There are, of course, other ways in which we can classify theories of contract. See e.g. Peter Benson, “The Unity of Contract Law” in Peter Benson, ed, The Theory of Contract Law: New Essays (Cambridge: Cambridge University Press, 2001) 118.
This characterization of contract is particularly compatible with Smith’s view of promise theories, which on his account see contract as self-imposed or voluntary obligations. Indeed, Smith himself goes so far as to suggest that an immediately completed transaction may not amount to a contract at all from his own promise-centred perspective. This characterization is also compatible in a fairly straightforward manner with Smith’s account of reliance theories; as with promise theories, these are presented, and would appear to be presented by actual proponents of such theories, as essentially promise-focused obligations. The difference here is that the obligation does not arise, or at least should not be enforceable, until the promisee has actually relied upon the promise to her detriment. Even as Smith’s reliance theories favour a view of contract according to which obligations are imposed by law, rather than being created by the intention of the parties, they are thus likewise concerned with the question of when a promisor becomes bound to fulfil a promise she has not yet performed.

By contrast, the equation of the common law contract with the ideal of a promissory obligation becomes more difficult when we turn to Smith’s third class of theories of contract—those theories that view contract as an immediate transfer of rights. Again, the promissory ideal implies that a contract should correspond to a means of generating future obligations, meaning that it should be at least partially executory from the outset rather than amounting to an agreement that is fully performed at the same moment it is concluded. Transfer theories present a challenge to this view because they present the initial conclusion of a contract as effecting an immediate transfer of rights from promisor to promisee. Most versions of transfer theory also appear to be premised on a view of the transfer of property rights in particular.

71 Smith, *supra* note 64 at 62–63.

72 The focus of reliance theories on the act of promising is not lost on Smith, who takes the opportunity to criticize them on this basis (“if the aim of contract law is to protect the reliance interest, there seems to be no good reason why reliance that is induced without a promise should be ignored”: *ibid* at 80).
that is reminiscent of the approach to this issue enshrined in the CCQ, and thus can be taken to similarly flatten the distinction between the obligation to transfer property rights and the completed transfer of property.\(^73\)

That said, it is also apparent that most, if not all, contemporary proponents of transfer theories remain concerned primarily with the question of why contracts are binding into the future—which is to say, with the same question that animates the other two approaches to contract that Smith identifies. Indeed, it is precisely because they seek to answer the question of why contracts are enforceable in this way that transfer theorists propose to explain the operation of contracts as an immediate transfer of rights.\(^74\)

Moreover, it is also apparent that many, if not all, of these same authors also take the view of contract as an at least partially executory agreement or promise as the starting point for their own respective analyses. This much is particularly clear in Peter Benson’s work; in his recent book, he confirms that the common law contract will at least “standardly . . . involve promises or communicated assurances of some kind”, and further posits the “promise-for-consideration” relationship as the foundation of this whole area of law.\(^75\) This position is also evident in Brudner’s analysis of the gift in the excerpt reproduced above, and appears to be generally assumed by Randy Barnett, another prominent theorist whom Smith explicitly associates with transfer theory.\(^76\)

These statements on the ideal form of contract are not surprising, particularly for Benson and Brudner. Aside from being rooted in the idea of a transfer, their theories are also specifically

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\(^74\) Benson, “Transfer of Ownership”, supra note 73 at 1703; Brudner & Nadler, supra note 8 at 190–91.


\(^76\) Brudner & Nadler, supra note 8 at 198–99; Barnett, supra note 73 at 287.
intended to provide a defence for consideration as an essential feature of the contractual form. 77 Since the requirement of consideration is only applicable in the case of a partially executory arrangement or “promise”, as a condition of its enforcement before a court of competent jurisdiction, it seems to follow that their own view of contract should be one that aims primarily to explain why these types of obligations arise in the first place, and should be far less concerned with agreements that are fully performed from the outset. And this is, in fact, the approach that both authors ultimately adopt: for Benson and Brudner, the gift completed by means of delivery can be distinguished from their understanding of contract on precisely these grounds—because it corresponds to an agreement that is immediately completed between its parties—and is thus enforceable for reasons other than those that underlie the requirement of consideration applicable to the enforcement of proper promissory arrangements. 78

What we can conclude from the above, then, is that even those authors who defend a transfer-based view of the common law contract remain tied to a promissory ideal of contract, in the sense that the common law contract amounts in their view to an at least partially executory arrangement. This conclusion, it should further be noted, is generally consistent not only with promise and reliance theories as Smith describes them, but also with the material that is typically included in the standard common law contract textbook or treatise. As with the theoretical accounts just discussed, these volumes will almost universally and exclusively focus on the question of when a promissory obligation becomes binding or enforceable, as well as the interpretation of its scope and the remedies that might be granted for its breach. It is for this reason that these volumes will typically include not just an account of consideration, but also of the promise under seal and of another type of arrangement that has been largely overlooked in this article, namely the promise that has been relied upon by the

77 Benson, Transactions, supra note 75 at 40–41; Brudner & Nadler, supra note 8 at 199.

78 Benson, Transactions, supra note 75 at 60; Brudner & Nadler, supra note 8 at 127–28.
promisee to her detriment.\textsuperscript{79} Very rarely, by contrast, will a common law contract treatise even consider the possibility that contracts might transfer property rights, let alone provide any discussion of how such a transfer might operate.\textsuperscript{80}

When combined with the observations made in Part I as to the role of consideration to the contract/gift distinction within the common law tradition, these conclusions as to the focus of theoretical accounts of the common law contract also appear to suggest that the true difference between it and the common law gift lies in the gift’s status as a necessarily-executed agreement, enforceable not as a promise but rather as an agreement that is fully performed at the very same moment at which it is concluded. We have seen that Quebec civil law effectively rejects this same distinction between executory and executed agreements, at least where the agreement pertains to the transfer of property rights. The final question that now arises is whether the operation of the gift in each respective set of legal systems, and perhaps particularly in the common law, can be taken to actually fit within these alternative accounts of its relationship with contract.

III. THE ROLE OF PERFORMANCE

In Part I of this article, I began by comparing the scope given to the term “gift” in Quebec civil law with its analogue in the common law tradition. I concluded that at least two kinds of transactions that fit within that category under the CCQ are typically viewed as forms of contract in common law sources, while only the agreement that is immediately performed by means of physical or symbolic delivery can universally be taken to amount to a gift

\textsuperscript{79} See e.g. Waddams, supra note 37 at paras 167–217; Fridman, supra note 43 at 81–120. Cf Beale et al, supra note 43 at paras 3–137 to 3–199 (mentioning proprietary estoppel and other “special cases”, including gratuitous bailments, as exceptions to the consideration rule).

\textsuperscript{80} For example, Waddams only briefly discusses the impact of a sealed instrument that is used to replace (or perhaps more accurately, perform) an existing contractual undertaking to transfer real property. See Waddams, supra note 37 at para 327. See also Beale et al, supra note 43 at para 1–106 (acknowledging that a deed can be used to transfer an “interest, right or property” in addition to creating an obligation).
within that legal tradition. In Part II, I then turned to the corresponding notions of contract adopted by Quebec civil law and by the common law, respectively. I argued here that the version of contract enshrined in the CCQ and developed by Quebec doctrinal scholarship encompasses both the agreement that generates an obligation to transfer property in the future and the agreement that immediately completes such a transfer, without clearly distinguishing between the two. By contrast, I suggested that the ideal of contract at common law corresponds to a form of promissory obligation, even from the perspective of those contemporary Anglo-American theorists who view contract as an immediate transfer of rights.

In the last part of this article, I now want to complete my argument by showing how the version of the gift recognized in Quebec civil law corresponds to its own understanding of the term “contract”, as an arrangement that does not truly distinguish between the obligation to transfer property rights and its performance. I will then argue that the common law gift amounts instead to an agreement that is not only necessarily executed at the moment of its formation, but is further enforceable because it is executed and performs a transfer of property rights at the very moment the parties reach an agreement. Rather than amounting to a source of obligation, it is the status of the common law gift as an agreement to perform or respecting performance—as an agreement that pertains to one party's tendering of performance and the other's acceptance of it—that serves both as the basis for its enforcement and most defensible reason for its exclusion from the ambit of contract as the common law appears to understand that term.

A. GIFT IN QUEBEC CIVIL LAW: A SOURCE OF OBLIGATION (AND MEANS OF CONVEYANCE)

Like almost all other contracts, the provisions that govern the operation of the gift in Quebec are found in Book V of the CCQ, which is simply titled “Obligations”.81 This placement is the first

81 By contrast, both gifts and contracts are included in the French Code civil, Book III, entitled “Des différentes manières dont on acquiert la propriété” —
sign that the transaction amounts to a source of obligation in its own right, and not just a means of conveying property rights. More importantly, the provisions themselves also support such a reading by outlining a number of relatively precise obligations that a gift imposes upon a donor and, to a lesser extent, upon a donee as well. The donor thus "delivers the property by putting the donee in possession of it or allowing him to take possession of it, all hindrances being removed" and is "bound to transfer only the rights he holds in the property given." The donee, meanwhile, is typically "only liable for debts of the donor connected with a universality of assets and liabilities he receives", though where a charge is stipulated the donee is also "personally liable for charges on the property given." In some cases, the donee is also required to "pay debts or charges other than those existing at the time of the gift" provided that "the nature and amount of those other debts or charges are specified in the contract."

If nothing else, these provisions tell us that the version of the gift recognized in Quebec civil law — the agreement that pertains to the gratuitous transfer of property, and can be concluded by means of notarial act, delivery, or disguised form — will normally be concluded in an at least partially executory manner. This is particularly true of the notarial or disguised gift, where there may necessarily remain something to be done insofar as the donor has yet to actually deliver the gift property in question, even though the gift has become binding and ownership of the gift property may have already vested in the donee. In principle, the donor's obligation to deliver may moreover be supplemented by other obligations that she or the donee have validly agreed to undertake,

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that is, "Of the different ways in which one acquires ownership". They were likewise included in Book III of the CCLC, similarly titled "Of the Acquisition and Exercise of Rights of Property".

82 Arts 1825, 1826 CCQ. Cf art 796 CCLC.
83 Arts 1830, 1833 CCQ. Cf art 799 CCLC; art 945 CcF (1804).
84 Art 1821 CCQ. See also art 800 CCLC.
and which may likewise require an additional act of performance at some point following the gift’s conclusion in a binding form. \(^{85}\)

At the same time, the CCQ also goes further than simply recognizing the gift as a means of creating an obligation to deliver gift property or other, optional obligations of this sort. Consistent with its own broad view of contract, it also admits the possibility that a gift might be concluded in such a manner that even the principal obligation to transfer the gift property remains outstanding at the moment of its formation:

A gift *inter vivos* is one whereby there is actual divesting of the donor, in the sense that the donor actually becomes the debtor of the donee.

The divesting of the donor is not prevented from being actual by the fact that the transfer or delivery of the property is subject to a term or that the transfer is with respect to certain and determinate property which the donor undertakes to acquire or property determinate only as to kind which the donor undertakes to deliver. \(^{86}\)

The word “debtor” in the first paragraph of the above provision is key, as it confirms that a gift will be concluded so long as the donor immediately undertakes an obligation—i.e., becomes a debtor—towards the creditor who is the donee. The particular scenarios outlined in the second paragraph, meanwhile, pertain to the very same situations already mentioned above, in which the transfer of property rights is either delayed intentionally—that is, “subject to a term”—or made impossible for reasons outside of the parties’ control. While the donor may not be able to transfer the gift property to the donee immediately in such cases, the gift will be valid as an *inter vivos* transaction provided the donor has at least undertaken an obligation to complete that transfer at some future point in time. \(^{87}\)

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\(^{85}\) See e.g. *St-Pierre c St-Pierre*, [1992] JQ no 1040, [1993] RL 201 (CA) (involving an application to determine the extent of the obligations imposed upon a donor under an *inter vivos* gift).

\(^{86}\) Art 1807 CCQ.

\(^{87}\) See also art 1816 CCQ (“[t]he gift of property by a person who does not own it or who is not charged with giving it or authorized to give it is null, unless the
The possibility of concluding a gift in this way—that is, by undertaking an obligation to transfer the gift property at a later time—is entirely in keeping with the rationale that underlies the CCQ's approach to the contractual transfer of property rights. Since any obligation to transfer property is performed immediately and automatically once its term has elapsed or the impossibility barring its performance has been removed, it does not really matter that the donor has already completed the transfer or simply undertaken to transfer the gift property at a later time. By agreeing to transfer the property in one way or another, the donor has already lost her ability to withhold the performance of that transfer, and can further be taken to have already parted with the gift property in a manner that amounts to an actual divesting, even where the transfer has not yet been completed.88

This understanding of actual divesting presents other consequences for the version of the gift enshrined in the CCQ. The most striking of these is its effect on the types of gift that qualify as donationes mortis causa and are thus potentially void pursuant to the CCQ's general prohibition of non-testamentary dispositions of property upon death.89 As in the common law, this category of gift corresponds in theory to one in which the "divesting of the donor remains conditional upon his death and takes place only at that time."90 That said, since an actual divesting can occur where the donor has expressly undertaken to acquire the property": ibid); Droit de la famille—504, [1989] JQ no 2240, [1990] RJQ 302 (CA) (holding that a gift of $100,000.00 is not void simply because the donor did not have that amount in his patrimony at the time the gift was made).

88 This view of the transfer effected by means of a gift is thus essentially identical to that of a transfer made by sale in Quebec civil law, as was explicitly recognized under the CCLC. See art 795 CCLC ("[g]ifts inter vivos of present property, when they are accepted, divest the donor of and vest the donee with the ownership of the thing given, as in sale, without any delivery being necessary": ibid).

89 I note that this rule has two exceptions. See art 1819 CCQ (["a] gift mortis causa is null unless it is made by marriage or civil union contract or unless it may be upheld as a legacy [i.e. as a valid testamentary disposition]": ibid).

90 Art 1808 CCQ.
donor has merely obligated herself to transfer the gift property, it appears that even the gift that is made conditional upon death can avoid being qualified as a *donatio mortis causa* provided that it is also concluded in the manner just described—i.e., one that immediately obligates the donor to transfer the gift property, even if the *performance* of that obligation is made conditional on the donor's death. This much was already recognized by Quebec courts under the CCLC, ostensibly on the basis of French precedent, despite the absence of any express legislative enactment that allowed for a gift to be completed in this way.91

Stated differently, and as the Quebec Court of Appeal has now affirmed under the CCQ, the general prohibition against *donationes mortis causa* is inapplicable where the donor has obligated herself to give on the condition that she passes away, provided that the existence of the obligation itself precedes her death. In such a case, the gift imposes a binding undertaking to transfer the gift property and is sufficient to immediately divest the donor even if the *performance* of this obligation is suspended until the occurrence of the donor's death.92 The resulting gift thus amounts to a form of *inter vivos* transaction, rather than to a *donatio mortis causa* in the proper sense of the term. To conclude a true *donatio mortis causa* that is potentially void under the rules of the CCQ, the donor must instead subject both the performance and the initial creation of an obligation to transfer to this type of condition, such that she is not bound in any way to transfer the property rights at issue until the time of her death.93

What emerges from the foregoing, then, is that the version of the gift enshrined in the CCQ amounts not only to a means by which the donor might undertake future obligations—including an obligation to transfer the gift property—but also to a means by which such a transfer can actually be effected without the need for any additional act of performance. While the cases in which the


92 *Desrochers c Succession de Desrochers*, 2018 QCCA 466 at paras 14–15.

transfer of title is delayed are no doubt rare in practice, the manner in which the executory obligation to transfer gift property is treated in these cases also further confirms that Quebec civil law does not truly distinguish between it and the completed transfer—which is to say, between what the common law would call a promise of gift, which is unenforceable in that legal tradition unless concluded in the form of a binding contract, and the executed gift in which the donee is immediately made the owner of the thing at issue. Since the obligation to transfer is performed automatically even where it is made subject to a term or condition, the donor has already lost the power to withhold the transfer in any meaningful way, by contrast to the possibility that she might breach another kind of obligation, including, for example, her obligation to deliver the gift property.

There is, however, one potential qualification that should be made to this conclusion. As I argued in Part I, the common law gift is properly consistent with—and perhaps consistent only with—one particular species of gift recognized in Quebec civil law, namely the gift completed by manual delivery. It is perhaps telling, then, that at least some doubt exists as to the validity of such a gift in Quebec civil law as in French civil law when it is concluded in a way that only obligates the donor to transfer the gift property, rather than immediately vesting ownership or some lesser real right in the donee.94 Implicitly, we might further think that the other types of obligations that are normally incumbent upon the donor, including most notably the obligation of delivery, will likewise be inapplicable in most cases involving a manual gift, given that delivery has already occurred as a condition of the gift’s initial validity, with the result being that the manual gift may not properly amount to a source of obligation at all.

While such a conclusion may appear at odds with the contractual qualification of the manual gift, especially since contracts are still understood primarily as a source of obligations in Quebec civil law, this is not the approach that has been favoured in the CCQ. Clearly, the manual gift is included with the other

94 See Spina c Sauro, JE 90-304, [1990] RL 232 at paras 28–29, per Lebel J (CA); Pard, supra note 34 at paras 58–73; Brière, supra note 17 at para 147.
classes of gift under the heading of “Nominate Contracts”, and it amounts at the very least to a kind of bilateral juridical act by which the donor immediately divests herself of the gift property—in this case, by transferring the property outright. There is further little reason in practice or in theory to distinguish this kind of arrangement from the notarial gift or the disguised gift for the purpose of qualifying each arrangement as a contract as the CCQ understands the term, particularly given that the CCQ treats the obligation to transfer property as one that is performed automatically in any event. Still, the manual gift amounts to a fully or near-fully executed agreement, and so may be properly distinguishable from these other arrangements where “contract” is given another, narrower meaning—including, perhaps, when one adopts the definition that is generally accepted in common law sources.

B. GIFT AT COMMON LAW: AN AGREEMENT RESPECTING PERFORMANCE

Having concluded that the notion of gift enshrined in the CCQ corresponds to both a source of obligation and a means of transferring property rights, without really distinguishing between these two types of operation, I now want to complete the argument begun above by suggesting that the effects of the common law gift are not solely, or perhaps even primarily, attributable to its fundamentally consensual structure. Instead, this type of transaction should be understood to be made enforceable because it is simultaneously and necessarily performed at the same moment the parties reach their underlying agreement. It is for this reason that the executed gift serves to transfer property rights in a manner that is not only enforceable against the donor, but also more broadly against third parties in general. It is also this feature that serves to set the gift apart from

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95 Cf Pineau & Gaudet, supra note 14 at para 21 (concluding that there is little practical utility in distinguishing between “contracts”, understood narrowly as a source of obligation, and other types of bilateral juridical act since the rules applicable to each class of transaction are almost identical under the CCQ).
both the ideal of a contract as it at least appears to be understood within the common law tradition, as well as from alternative sources of obligation recognized in Canadian and other common law jurisdictions.

This way of understanding the gift contrasts with the views of those Anglo-American authors who appear, at least implicitly, to approach this transaction as a consensual act upon which case law has simply chosen to impose the additional requirement of delivery.96 It is, however, also entirely consistent with—and perhaps more consistent with—the manner in which the common law actually approaches the essential elements of this transaction. In the case of donative intention, for instance, common law sources will normally insist that the requisite intention subsist until the moment in which both acceptance and delivery occur in order for a gift to be properly concluded. Rather than intending to do something in the future, the donor must consent to the performance of the gift by means of delivery at the moment when delivery is made, much in the same manner that the common law approaches the intention to provide monetary payment in satisfaction of an existing obligation.97 The same logic applies to the donee’s acceptance, particularly where the donee intends to refuse the gift; it is at the moment in which she comes into physical possession of the gift property that she must normally express such an intention in order to displace her presumed acceptance of the gift.98

96 See especially Fried, supra note 64 at 36. See also Fuller, “Consideration”, supra note 37 at 805, 815, 820–21.

97 See Cochrane, supra note 6 at 75–76; Hardy v Arkinson (1908), 9 WLR 564, 18 Man R 351 at 355–56, Perdue JA (CA). Cf Canmer Investment Inc v UK Mutual Steamship Assurance Association Ltd, [2005] EWHC 1694 at para 53:

Payment is a consensual act and thus requires the accord of both creditor and debtor. Even if a tender by a debtor to his creditor complies fully with the terms of the contract, and the creditor’s refusal to accept the payment thus constitutes a breach of contract, the tender does not discharge the debtor’s obligation, although the creditor may be prevented thereafter from claiming any interest or damages for late payment or for claiming damages for breach of the payment obligation[.]

98 See Dewar, supra note 26 at 1538–39.
On the whole, we can thus affirm that all three requirements of a common law gift—intention, acceptance, and delivery—should normally be met simultaneously, such that the agreement that underlies the gift can effectively be taken to pertain to the performance of the transfer contemplated by its parties.\textsuperscript{99} In addition to the analogy with monetary payment at common law, this type of arrangement is also generally in keeping with what modern German law understands as a real or translative contract or agreement that serves to perform a transfer of property rights even in the presence of a prior executory agreement.\textsuperscript{100} From the common law perspective, it may instead be viewed not as a contract at all, but rather as a conveyance. The underlying idea is that a fresh agreement is required even between the parties to an existing contract at the moment when the performance of their obligations falls due. The promisor, although bound in such cases to tender performance, can also choose to breach that duty, just as the promisee may be bound to accept compliant performance but may nonetheless choose to withhold her acceptance once it is tendered.\textsuperscript{101}

In practical terms, this approach to agreements that specifically serve to perform a transfer of property rights is also more consistent with a desire to ensure the security of transactions than is the case with the model embraced by the CCQ, particularly where the transaction at issue is gratuitous and can at least in

\textsuperscript{99} There are of course exceptions to this rule, such as when the donee is already in possession of the gift property or where delivery is made to a third party. See Cole, supra note 29; Woodard v Woodard, [1995] 3 All ER 980, [1997] 1 FCR 533 (CA); Walker v Foster, [1900] 30 SCR 299 at 302, 1900 CarswellNS 75. These exceptions do not, however, undermine the role of delivery or the need for a present intention to transfer: in the former case, the intention still accompanies the donee’s physical possession of the gift, while in the latter case the donor must nonetheless deliver the gift property to a third party who is not acting as her agent or trustee.


\textsuperscript{101} Such is the case even with the obligation to deliver and the obligation to accept delivery that are imposed upon a seller and purchaser respectively under sale of goods legislation. See Sale of Goods Act RSO, supra note 6, s 26; Sale of Goods Act UK, supra note 6, s 27. Cf arts 1716, 1734 CCQ.
theory be used to defraud creditors with relative ease.  

By associating transfer with delivery, the common law thus ensures that third parties are able to gain notice of this type of presumptive transfer as a condition of its being completed in the first place. By contrast, while Quebec and French civil law both recognize delivery as a precondition for enforcing completed transfers against certain third parties, the donee may nonetheless be considered the owner of the gift property before delivery occurs. This fact may well present problems, for instance, in those cases where the third-party protections are not expressly extended by the relevant legislative enactments.

That said, this reading of the common law gift as an agreement respecting performance—i.e., as a transaction analogous to payment and approaching the German idea of a translative agreement or contract—also presents at least three distinct but related challenges. This is because any attempt at defining the gift in this way appears to require that we dispense with the possibility that it might also serve as a source of further obligations in its own right. To quote again from Lord Escher’s reasons in Cochrane, the gift should simply amount on this view to a “transaction begun and completed at once”, especially from the perspective of the donor, and so there should be nothing left for the donor to do at all once delivery has occurred.

The first issue with this qualification of the gift becomes apparent when we recognize the possibility that symbolic or third-party delivery may suffice to complete a gift in common law jurisdictions, even if physical delivery of the gift property to the donee has not yet occurred. As mentioned above, this possibility contrasts with the more rigid approach to manual gifts that

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102 These specific concerns appear to have animated the decision in Cole. See supra note 29.

103 See especially arts 1454, 1455 CCQ. Cf art 1198 C civ. These provisions extend only to subsequent purchasers and are similar in their scope to the equitable “purchaser for value without notice” rule.

104 Cochrane, supra note 6 at 75–76. This point is in fact debatable: we may be able to affirm that the common law gift amounts to an immediate transaction even if it generates certain types of obligations, provided only that it does not obligate the donor to transfer property rights in the future.
appears to be taken by both Quebec and French civil law, in which the actual, physical delivery of the gift property appears to be required to conclude a gift by delivery.\textsuperscript{105} It also means that the donee may become the owner of the gift property under a common law gift even as it remains in the physical possession of the donor or a third party, and thus can be taken to implicitly suggest that the donor remains subject to an obligation of delivery even after the gift has been concluded.

Such an interpretation of the donor’s duties is not, however, in line with the way that symbolic and third-party delivery cases have typically been understood in Canadian and other common law jurisdictions. Instead, the relevant cases simply tell us that the donor is immediately and completely divested of her ownership over the gift property once such delivery has occurred, just as the donee is immediately constituted as its new owner.\textsuperscript{106} Rarely do we encounter any suggestion that the donor may remain bound to complete delivery of the gift property to the donee, even if we can presume that the donor may be required to do so in light of the donee’s status as the new owner of the thing in question. To the extent that the issue has arisen, it appears to have been understood as a form of bailment, with the donor’s continued physical possession of the gift property being the source of her duty to return it to its new proper owner, the donee, rather than the initial agreement between the parties.\textsuperscript{107} It is thus not the gift itself that appears to generate the obligation, but rather the

\textsuperscript{105} See \textit{supra} note 34 and accompanying text.

\textsuperscript{106} See \textit{Pecore v Pecore}, 2007 SCC 17 at para 48; \textit{McIntyre v Royal Trust Co}, [1946] 1 DLR 655 at 656–57; [1946] 1 WWR 210 (Man CA) [\textit{McIntyre}].

\textsuperscript{107} See e.g. \textit{Read v Rayner}, [1943] 2 DLR 225 at 232, 16 MPR 554 (PEI SC), aff’d \textit{Rayner v Read}, [1943] 4 DLR 803, 1943 CarswellNat 42 (SCC) (the return of gift property by the donee to the donor for safekeeping does not invalidate the gift). \textit{Cf Zwicker v Zwicker}, [1899] 29 SCR 527, 1899 CarswellNS 58 (an agreement concluded by deed can be validly enforced even if the deed is retained by the promisor after execution). But see \textit{Bank of Nova Scotia v Hooper} (1994), 150 NBR (2d) 111, [1994] NB No 261 (QB) (failure to deliver following transfer by deed can found an action for breach of covenant).
change in the respective statuses of the parties that results from the completed gift.

The second issue with my proposed qualification of the common law gift as an immediately performed agreement relates instead to the possibility of concluding this kind of transaction on a conditional basis—which is to say, in a manner that does not serve to immediately vest ownership in the donee at the moment of delivery, or else subjects the donee’s right to a reversionary interest in favour of the donor. There are at least two major categories of conditional gift recognized at common law, corresponding to the gift made in contemplation of marriage and the *donatio mortis causa*, respectively. At least one further class may be recognized in equity, corresponding for its part to the gift that constitutes the donee as resulting trustee in favour of the donor, and thus requires that the donee return the gift property to the donor at a later time. All three cases raise the same question, namely whether the gift concluded in such a way merely imposes an obligation on the donor to transfer the gift property at a later time, or else imposes an obligation on the donee to return it to the donor.

This last question should almost certainly be answered in the negative in respect of those classes of conditional gift recognized at common law. This is because both the agreement between the parties and the additional act of performance—whether physical delivery or otherwise—have already been completed from the outset as an essential condition of the gift’s overall validity. Only the effects of the conditional gift at common law—the divesting and vesting of title—are understood to be delayed past the point of delivery, without the gift generating any kind of obligation in the interim. In this respect, the common law version of the

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109 See e.g. McIntyre, supra note 106 at 656–57; *McDonald v McDonald*, [1903] 33 SCR 145 at 161, 1903 CarswellNS 68 (discussion of the *donatio mortis causa*). *Cf Thompson v Mechan* (1958), 13 DLR (2d) 103, [1958] OR 357 (CA) [Thompson]; *Cain v Moon*, [1896] 2 QBD 283, 65 LJQB 587 [Cain] (suggesting instead that the vesting is immediate but the gift is revoked in the event the donor does not pass away). See also *Schilthuis v Arnold*, 66 ACWS (3d) 1163,
conditional gift appears strikingly similar to the true *donatio mortis causa* as it has been understood by Quebec courts: it is a gift that does not even generate an obligation, and thus does not divest the donor in any way, until the donor’s death has occurred. Both arrangements contrast in turn with the gift in which only the *performance* of a pre-existing obligation to transfer is subject to a condition or term, and which, as previously mentioned, is perfectly valid in Quebec civil law even when that condition or term relates to the donor’s death on the basis that it does not amount to a true *donatio mortis causa* at all.110

By contrast, the answer in the case of the gift made subject to something approaching a condition in the nature of the resulting trust is somewhat more complicated. Clearly, this type of gift is without effect under the CCQ insofar as it implies that the donor may have retained a general power to revoke the gift.111 It should likewise be void at common law to the extent that the gift is understood in that legal tradition as a completed transfer of property rights. There are, however, at least two ways of plausibly resolving this issue. The first is by drawing on the fact that neither approach to the gift—be it that of Quebec civil law or the approach I am proposing in respect of the common law—prohibits the conclusion of a gift subject to at least certain kinds of condition subsequent that are not within the donor’s direct control. The donor’s right to revoke a gift for ingratitude under the CCQ likely constitutes an example of this type of arrangement.112 While this last possibility has no direct parallel within the common law tradition, at least certain types of common law conditional gift are

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95 OAC 196 (Ont CA); *McManus v McCarthy*, 2007 ABQB 783 [*McManus*] (discussion of gift made in contemplation of marriage).

110 See *supra* notes 91–93 and accompanying text.

111 Art 1822 CCQ.

112 See art 1836 CCQ ("[i]ngratitude is a ground of revocation where the donee has behaved in a seriously reprehensible manner towards the donor, having regard to the nature of the gift, the faculties of the parties and the circumstances": *ibid*).
likely to operate according to this type of condition. At least some cases of resulting trust might also be explained on a similar basis.

The second solution, and likely the better one, is to draw instead on the unique nature of equity and its relationship with the completed gift at common law. The possibility of completing a valid gift, yet requiring the donee to return the property by imposing a resulting trust, may, for instance, have its source in the differing approach to intention taken by each set of legal doctrines: whereas the common law proper adopts an "objective" theory of intention, equity's approach is more concerned with the true intention of the parties and is in this sense more reminiscent of the theory of consent adopted in French and Quebec civil law. Alternatively, or perhaps additionally, we may also adopt the view of some authors to the effect that the resulting trust amounts to nothing more than a form of unjust enrichment. Thus, while the transfer completed by means of a gift may be valid at common law, the donee may nonetheless assume an obligation towards the donor on account of the former's imperfect intention to complete the transfer. Finally, and perhaps most simply, this class of condition may also be understood along the same lines as a form of gift made subject to a type of equitable charge or obligation to re-convey the gift property—albeit one made in favour of the donor rather than to a third party.

See e.g. McManus, supra note 109; Thompson, supra note 109; Cain, supra note 109.

This relationship, of course, has no direct parallel in Quebec and French civil law, which, as civil law legal systems, do not know of the historical division between royal and chancery jurisdiction. See Ralph A Newman, Equity and Law: A Comparative Study (New York: Oceana, 1961) at 30.

See e.g. Canada (Attorney General) v Fairmont Hotels Inc, 2016 SCC 56 ("[i]f by mistake a legal instrument does not accord with the true agreement it was intended to record ... a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement" at para 12).

Cf Nishi v Rascal Trucking Ltd, 2013 SCC 33 (refusing to amalgamate the resulting trust with the action for unjust enrichment).
This last explanation of the resulting trust brings us to the third and final issue that should be addressed in order to defend my proposed interpretation of the common law gift as an immediately performed agreement that serves to transfer property rights, rather than as a source of promissory obligation. This issue pertains more broadly to the compatibility between this interpretation and the possibility that a gift might be made subject to a duty incumbent upon the donee, rather than the donor, in a manner that effectively amounts to a charge or encumbrance upon the title she receives. Such a possibility is admitted by the CCQ and is generally admitted by the common law, as well.\footnote{See art 1810 CCQ. It should be noted, however, that the CCQ presents the gift made subject to a charge only as a gift of the excess value received by the donee once the charge is subtracted. To the extent that this type of arrangement is admitted in common law jurisdictions, it is by contrast typical to frame it as a trust. See e.g. Sawdon Estate, 2012 ONSC 4042 at paras 80–83.} It also invites at least two distinct comments of its own, the first being that the gift made subject to an obligation or charge incumbent upon the donee does not necessarily contradict the thesis I am defending in this article. This is because the possibility that the donee might assume an obligation once the gift is completed is separate from the role played by the donor in the typical gift transaction; the thesis defended here is not disturbed so long as she is completely divested of ownership and assumes no further obligation in respect of the gift property, meaning that the transaction can be considered to be complete once delivery has occurred.

The second observation that should be made about the gift made subject to charge, meanwhile, is that even the donee's role in such an arrangement is consistent with that of a "transaction which is begun and completed at once". Indeed, the obligation assumed by a donee under this type of gift cannot, by definition, be undertaken in exchange for the transfer of the gift property in the first place, since this would imply at least nominal consideration and transform the gift into a common law contract of the performance-for-promise kind. As the common law understands it, the gift made subject to an obligation can only refer instead to those classes of agreement in which the donee...
assumes an obligation related to her acquisition of the gift property—which is to say, that she has obligated herself not for the completion of the transfer by the donor but because the transfer has already been completed, in a manner analogous to the donor who has retained possession of the gift property following the completion of a gift.118 Far from contradicting the status of the common law gift as an agreement that immediately transfers property rights, such an obligation can be understood instead to affirm it. Given that the obligation arises as a result of the donee's acquisition of the gift property, it becomes enforceable only because the transfer at issue is completed when delivery occurs.

CONCLUSION

As I have argued in this article, the traditional distinction found in Canadian and other common law jurisdictions between gifts and contracts is not one that should be taken lightly. Drawing on the comparative perspective offered by Quebec civil law, I have suggested that this distinction should not, however, be understood primarily as one between gratuitous and consideration-backed agreements. Instead, it should be viewed through the lens of a broader distinction between agreements that are performed immediately at the moment of their conclusion, and thus serve to immediately transfer property rights, and those that give rise to promissory obligations to render future performance—whether they pertain to a transfer of property rights or otherwise, and whether they are concluded for consideration or not.

The thesis I have defended here has a number of implications not only for the common law gift, but also, perhaps more importantly, for our understanding of contract law. It is, after all, rooted in a particular view of the nature of contract that I have suggested provides us with the best basis for accounting for the contract/gift distinction within the common law tradition. This view of contract contrasts with that outlined in the CCQ—and, as I have at least implicitly suggested above, perhaps also with those

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118 The distinction between the two kinds of arrangements has been discussed. See e.g. Thomas, supra note 36.
other legal systems that still closely follow the approach of the French *Code civil*. It can also perhaps be contrasted even with the other major branch of the civil law family, comprised of those legal systems that have followed the lead of the German civil code, the *Bürgerliches Gesetzbuch*. Although these jurisdictions will generally draw a distinction that is substantially similar to the one I have proposed above between executory contracts and agreements that immediately transfer property rights, they also tend to admit the term “contract” to describe both kinds of arrangements, and further tend to use the label “gift” to refer to both executory and real contracts that involve a gratuitous transfer of title.\(^{119}\)

At the same time, there are a number of points that remain underdeveloped in the foregoing analysis, and that may well have implications beyond both gift and contract law. One of these relates to the category of agreement to which the common law gift appears to correspond, and which might conceivably be taken to include other types of transactions typically associated with the domain of property law rather than contract within that legal tradition.\(^ {120}\) Another is the relationship between common law notions and those traditionally associated with equity, including the resulting trust and other types of equitable obligation that might be assumed upon a disposition of property rights in common law jurisdictions. If my brief account of the relationship between this mechanism and gift law is correct, then what do my arguments above mean for the application of equitable doctrines more broadly?

\(^{119}\) See Hyland, *supra* note 3 at para 654; Zimmermann, *supra* note 3 at 478. But see arts 873(1), 929 Civil Code (Germany) (official English translation) (only requiring a second “agreement” to complete a transfer of property rights, rather than a second “contract”); Helge Dedek, “A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract” (2012) 25 Can J L & Juris 313 (noting that the German concept of Vertrag has “denotations closer to the Latin pactum... than to contractus” and therefore “does not have the necessary implication of an obligation pro futuro” at 338).

\(^{120}\) Such might be the case, for instance, with the aforementioned examples of the deed used to convey property rights, the bailment, the trust and even the payment made in satisfaction of an existing obligation.
Finally, if I have sketched out the differences in the approach taken towards the gift in Canadian and other common law jurisdictions and in Quebec civil law, respectively, there remains a deeper account that should be given both in terms of the properly normative rationales that support them. If nothing else, however, what the apparent status of the common law gift as a simultaneously performed agreement suggests is that there is something fundamentally distinct about a properly contractual relationship—in the sense of a bilateral relationship between two or more parties, in which at least one is bound to the other to perform or to refrain from performing some act—and an agreement that pertains to present performance. While a contract may still largely amount to a “law” enacted by its parties in modern Quebec civil law, as it did under the version of the French Code civil first enacted in 1804, we may also be able to say, at least from the perspective of the common law tradition, that a bird in the hand is worth two in the bush—or that “Un Tien vaut, ce dit-on, mieux que deux tu l’auras”.121

121 Jean de La Fontaine, “Le Petit Poisson et le Pêcheur” in Fables, t 5 (1668) (literally “one yours is worth more, so they say, than two you will have it”).