GROTIUS'S DOCTRINE OF CONTRACT

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Hugo Grotius is generally considered to be the creator of the modern theory of the law of contract.[1] There is hardly any doubt that to a great extent he built on the foundations laid by scholarly tradition in the field of Roman law and by scholastic moral theology; but unlike his predecessors, he adopted a free attitude towards his sources. Grotius could feel bound neither by Roman law as adapted by secular writers in the Middle Ages—a subject, incidentally, with which he was not thoroughly acquainted—nor, being a Protestant, by Canon law or Catholic moral theology. Therefore, he had recourse to a very large extent both to the Stoic authors—Cicero in particular—and to the Old and the New Testament.

I. THE MAKING AND FOUNDATION OF THE CONTRACT

1. *Roman law and moral theology*

The classical Roman law of contract was throughout casuistic and formalistic. The Roman jurists, with their eminent legal sense, had worked out, on the old foundation of formulas, different types of contract: *consensus, verbis, scriptura,* and *re.* All these, *pacta vestita,* were binding under civil law, while all others, *pacta nuda,* involved no legal obligations.[2] In post-classical western vulgar law, a general law of contract[3] gradually gained recognition,

[1] M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen,* 1959; Hugo Grotius, *Drei Bücher über das Recht des Krieges und Friedens von J. H. v. Kirchmann,* I–II (Berlin 1869): 1st vol., 2nd book, ch. XI on promises, ch. XII on contracts; Pringsheim, "L'Origine des contrats consensuels", *Gesammelte Abhandlungen II,* 1961, pp. 179 ff.

[2] M. Kaser, *Das Römische Privatrecht,* 1955–59, §§ 8, 57; *Id., Römisches Privatrecht,* 1965, pp. 32 f.

[3] Levy, *Weströmisches Vulgarrecht,* 1956, pp. 14 f.; Kaser, *Das Römische Privatrecht,* § 200.

but in the high Middle Ages, when the study of the Roman sources and Aristotle's writings had been resumed—from the middle of the 12th century—learned men returned to a stricter approach.[4] In the medieval theory of commutative justice as formulated by Thomas Aquinas, the moral theologian, and Cajetan,[5] the jurist, the Roman doctrine of *causa,* the requirement that the acquisition of a right shall have a reason approved by the legal system, is merged with Aristotle's doctrine of equalizing justice, the requirement of equality between what is given and what is received.

Concurrently with the legal obligation and beyond it, a moral obligation was held to be justified on the strength of the principle of truthfulness, which Plato, Aristotle and the Stoics alike regarded as the foundation of justice.[6] According to canon law, which had the salvation of the soul at heart, all promises were binding in principle; the duty of *fidelitas,* however, was a *debitum morale* enforceable only in the court of conscience. It did not have the character of a *debitum legale* that could be exacted in a civil court. According to Thomas such promises were binding before God if they satisfied the following three conditions:

(1) *ratio* (consideration),
(2) *deliberatio* (definite formation of intention),
(3) *pollicitatio* (declaration to God).

These promises were not subject to the requirement of equalization but, on the other hand, they were not binding in the world of civil law. Molina[7] and Lessius,[8] the moral theologians, however, translated St. Thomas's doctrine of solemn promises to God to the secular world, assuming that certain promises of a gift were binding in law on the same terms and conditions even though there was no equality between giving and receiving or any *stipu-*

[4] Stig Jørgensen, *Vertrag und Recht,* 1968, pp. 47 ff. (*T.f.R.* 1966, pp. 584 ff.).

[5] Thomas v. Aquin, *Opera Omnia,* Tomus 9, Secunda secundae Summae Theologicae a quest. LVII ad quest. CXXII, cum commentariis Thomae de Vio Cajetani. Rome 1897. (Jacobus de Vio Cajetani 1469–1535.)

[6] As early as in Byzantine times an ethicization of legal life set in under the influence of a Stoic-Christian doctrine, cf. M. Kaser, *Das Römische Privatrecht,* § 200.

[7] Luis de Molina (1535–1600), *De Justitia et Jure,* Tomus secundus: De Contractibus. Mainz 1614.

[8] Leonhardus Lessius (1554–1623), *De Justitia et de Jure ceterisque Virtutibus cardinalibus Libri quattuor.* Ad 2.2 D. Thomae a quest. 47 usque ad quest. 171. Louvain 1605.

latio: the mere promise was sufficient. However, Connanus,[9] the jurist whose work constitutes the immediate starting point of Grotius's legal thinking, was opposed to the theory of ethical law propounded by the moral theologians, who searched after the socio-ethical core of ancient casuistry, and he based his reasoning upon a traditional doctrine which, in agreement with Aristotle, accentuated the typical factor of objectivity in the ancient rules of contract.

2. *Grotius*

a. The principle of will

As mentioned above, Grotius used the works of his predecessors, but he also drew upon the classical authors as well as the Bible. Grotius laid down a general rule of the binding force of informal promises. His reasoning in this matter was peculiar in several respects: it was both radically new and related to medieval moral theology. Grotius was not primarily a scholar; he was first and foremost a bold and imaginative thinker in the field of legal policy, who often misunderstood his sources and was also quite capable of taking liberties with them if it suited him to do so.

He misunderstood both the Roman doctrine of *causa*, in that he considered the form of *stipulatio* as constituting only a piece of evidence concerning the intention to be legally bound, and the Aristotelian doctrine of equalization, as interpreted in the Middle Ages, in so far as he identified this doctrine with the doctrine of unjust enrichment. Thus Grotius held the erroneous opinion of the doctrine of Connanus that the transfer of a thing together with an informal promise always involved a legal obligation in the sense that the thing could not be claimed back. It is therefore easy to understand Grotius's doctrine that a promise always contains a transfer either of a thing or an "action". This pattern caused Grotius to apply the model of transfer.

Inter-state treaties are referred to by Grotius as another important argument that all kinds of contracts are binding, since states cannot be limited in their acts by the principle that there are only certain types of contracts. In further support of this point of view Grotius mistakenly cites Aristotle for the idea that the state itself is founded upon a common contract between its citizens. In Aristotle's view the *polis* was a community between free and equal citizens, and it is true that this polity was

[9] Franciscus Connanus (1508–1551), *Commentariorum Juris civilis Libri decem*. Basel 1557.

"natural" to man as a rational being and as a *zoon politicon* (political animal), but Aristotle did not say anything about an agreement between citizens. If anything, the "state", as Aristotle understood it, was conceived of as a self-evident institution and as a realization of what is natural and common and positively laid down by the legislators.[1]

The religious basis for Grotius's doctrine of promise can be found in his peculiar dualistic views: (1) a Stoic-rational theology (Greek-Stoic rationalism) and (2) the Christian doctrine of man created in the image of God (Judaeo-Christian voluntarism). The idea derived from the first view is that man can obtain an insight into unalterable justice, inasmuch as the reason of man is part of divine universal reason. The idea derived from the second view is that on earth man creates law through his own law-making, which aspires after the divine ideal. God, who is not bound by any law, acts in contravention of his nature if he breaks his promises.[2] The logical conclusion of this would be that man must abide by his promises. In particular, Grotius referred to Numbers xxx. 2: "If a man vow a vow unto the Lord, or swear on oath to bind his soul with a bond; he shall not break his word, he shall do according to all that proceedeth out of his mouth."[3] In his doctrine of contract Grotius gave the voluntaristic component a dominant position, especially in the chapters on error and interpretation. In these respects, it is always the "rational will" which is decisive for the validity and content of the promise. When Grotius conceives the Judaeo-Christian doctrine of the freedom of will as the power to give voluntary gifts to one's neightbour it is a misinterpretation of St. Paul, who regarded liberty as a means of delivering man from sin, death and the slavery of the flesh.[4] However, Grotius also relied on Cicero, Horace, and the Platonists who, as mentioned above, considered trustworthiness the basis of justice.

[1] Joachim Ritter, *"Naturrecht" bei Aristoteles*, 1961, pp. 28 ff.; P. Shuchman, "Aristotle's Conception of Contract", *Journal of the History of Ideas*, vol. 23, 1962, pp. 257 ff.

[2] Grotius referred to the Ark of the Covenant, the Lord's covenant with his people, Nehemiah ix.8, cf. Genesis xii.7, Hebrews vi.18, x.23, I Corinthians i.9, x.13, I Thessalonians v.24, II Thessalonians iii.3 and II Timothy ii.13.

[3] Cf. Deuteronomy xxiii.21 and xxiii.3, Leviticus xxvii.2, Ecclesiastes v.4, Proverbs vi.1–3 ("My son, if thou be surety for thy friend, if thou hast stricken thy hand with a stranger,/Thou art snared with the words of thy mouth, thou art taken with the words of thy mouth./ Do this, my son, and deliver thyself, when thou art come into the hand of thy friend; go, humble thyself, and make sure thy friend").

[4] Erik Wolff, *Grosse Rechtsdenker*, 1963, pp. 268, 251, 300.

By consistently applying his version of the Stoic-Christian doctrine of the autonomy of personality Grotius arrived at the following results:

(1) he rejected Connanus's traditional "socio-typical casuistry"; he taught that an obligation could only arise if it could be traced back to a person's act of self-binding,

(2) he held that any autonomous act which has a certain quality creates a legal obligation irrespective of the socio-typical circumstances.

Thus, going back beyond Connanus and also, to a great extent, beyond Thomistic late-medieval scholasticism, Grotius returned to the "pure" ancient sources. The rudimentary application of the Roman law of contract, the adoption of the idea that the promise is a legal transfer, and the rejection of the doctrine of *causa* as well as the accentuation of the community in *societas humana* in the ethico-religious state of dependence, all these elements in Grotius's thinking prove the use he made of scholastic moral theology. The relationship is particularly evident in his basic doctrine of the three kinds of promises:

(1) declaration of a present serious intention to perform a future act,

(2) declaration of an intention regarding a future act,

(3) manifestation of the intention to transfer a right.

The Thomistic *deliberatio* is found in the first kind, and both *propositum* and *pollicitatio* are found in the second kind. The first two kinds thus comprise the conditions which the Scholastics considered necessary and sufficient for a binding promise—only founding, however, a duty of faithfulness, i.e. a duty of constancy. The third kind contains Grotius's analogy with the transfer of property; by virtue of the promise, a "particle of freedom" is transferred and a legal obligation is undertaken to give or perform something in the future.

These four basic elements of a binding promise can be found in later Romanistic theory, where the basis of the doctrine of will is more strongly emphasized through the adoption of the wider term "declaration of intention". These basic elements can also be found in later Scandinavian law of contract, even after the swing-over in views in the 1870s from the doctrine of intention to the so-called doctrine of reliance. According to the modern Danish writer Ussing the following are the fundamental conditions of a

promise: it must (1) be definite and in earnest, (2) be the result of a decision, (3) be made with a view to a legal obligation and (4) be given as a volition.[5]

b. The principle of agreement

On the basis of the post-classical doctrine of "consensus" as accordant wills (cf. II below) and on the strength of *Dig.* 2.14.1., a general doctrine of the agreement as a fact on which a right is based was advocated up to the end of the Middle Ages. The conclusion drawn from this was that in order to be legally binding also a promise of a gift had to be accepted by the donee.[6] Without further discussion Grotius subscribed to this traditional doctrine, though his conception of the individual's will as an autonomous law-making power should rather have led him to the opposite result. The model of the transfer of a right played an important part in Grotius's reasoning; he assumed that the transfer of property required an agreement, and from this he concluded that promises transferring "freedom of action" also had to be accepted in order to become irrevocable.

II. ERROR

As mentioned above, the voluntaristic basis of Grotius's reasoning had far-reaching consequences for his attitude to the problem of error.

1. Classical Roman law

The Roman law of contract[7] was limited to formal agreements or agreements standardized as to content. When the conditions as to content and form had been fulfilled, the contracts were in prin-

[5] Henry Ussing, *Aftaler paa Formuerettens Omraade,* 3rd ed. 1950, pp. 31 ff.

[6] Diesselhorst, *op. cit.,* pp. 106 ff. On the grounds for the principle of agreement, see Stig Jørgensen, *Fire obligationsretlige afhandlinger* (Four papers on the law of contracts and torts), 1965, p. 86.

[7] J. G. Wolf, *Error im Römischen Vertragsrecht,* 1961; Jörs-Kunkel-Wenger, *Römisches Privatrecht,* 1949; pp. 107 ff.; Max Kaser, *Das Römische Privatrecht,* §§ 58, 59 and 201, and *Römisches Privatrecht,* pp. 43 ff., seem to attach somewhat greater importance to the element of will already in the consensual contracts of classical Roman law. See also Fritz Schulz, *Principles of Roman Law,* 1936, pp. 524, 528; Thøger Nielsen, *Studier over ældre dansk Formueretspraksis,* pp. 246 ff. The Greek law of contract attached no importance to either *formal* or *consensual* elements, but paid heed only to *real* elements (e.g. *Arrha*); cf. H. J. Wolff, "Die Rechtshistoriker und die Privatrechtsdogmatik", in *Festschrift für Fritz von Hippel zum 70. Geburtstag,* 1967, p. 695; also see I. C. A. Thomas, "Form and Substance in Roman Law", in *Current Legal Problems* 1966, pp. 145 ff.

ciple valid irrespective of the will of the parties. Even in the so-called consensual contracts it was not the accordant will that constituted the obligation. Consequently the problem of dissent, in the modern sense of lack of correspondence between the declarations of intention of the two parties, did not exist as a legal problem, though the Roman lawyers did not fail to appreciate the psychological phenomenon. The examples of invalidity because of *error* found in the Roman authorities did not, therefore, refer to mistake but to a faulty identification of the contractual obligations or the object of the contract. The designations still call to mind this classification according to the object of the error: *error in negotio, error in pretio, error in persona, error in corpore* and *error in substantia.* In classical Roman law *error in materia (in qualitate)*, on the other hand, was irrelevant, as the properties of the object itself were of no importance for the identification of the object of the contract. But it is evident that *error in corpore* was relevant, because the physical unity of the object was necessary for the purpose of identification. *Error in substantia* presents a peculiar transitional case which was considered relevant in late classical times, although it was not recognized in the early stages of legal development. Recent writers on legal history assume that *error in substantia* was not incorporated into the law until at a later date, no doubt as a result of the late-classical Aristotelian renaissance (*c.* A.D. 300). In Aristotle's metaphysics substance (*ousia*) meant "*essential*" quality, i.e. the properties causing something to be what it is and not something else. On the other hand, other properties were accidental, i.e. properties whose non-existence did not neutralize the identity of the object.[8]

2. *Post-classical Roman law and medieval theory*

In the post-classical[9] Byzantine period the basis of the law of contract shifted from form to voluntarism, no doubt as a result of influences from both Christianity and the Stoic philosophy; the development was probably also influenced by the increased internationalization and urbanization of the community. In later western vulgar law the notion of will developed into the principal element of a general doctrine of contract, which, on many points, anticipated later European theories of natural law. This development should, however, be considered in the light of the decay

[8] J. G. Wolf, *op. cit.*, pp. 139 ff.

[9] Kaser, *Das Römische Recht,* § 197; Levy, *op. cit.*, pp. 14 ff.; Pringsheim, *op. cit.* I, pp. 300 ff., Stig Jørgensen, *Vertrag und Recht,* 1968, p. 16.

caused by the inadequate training and education of jurists. In Byzantine law the classical rule was maintained in principle, but it was re-interpreted in accordance with the new doctrine of will. The constituting element of a right was now the will, and therefore it was decisive for the making of consensual contracts that a "consensus", i.e. a concordance of wills, could be found. This, in turn, was due to the fact that legal theory now recognized the possibility and importance of *error* in the contracting parties, i.e. an error of ideas and lack of intention. As mentioned above, the problem of dissent in this sense did not arise in classical times, just as there was no regard paid to the unilateral error apart from that caused by fraud. In classical times *interpretation* was the basic notion, and it was attempted to get the best possible sense out of the contract; in post-classical times the key notion was lack of intention and *dissent*. Dissent is the corallary of lack of intention.

The doctrines of interpretation and of error evolved in *Romanistic* jurisprudence have developed on this basis.[1] The starting point, from a conceptual point of view, was the *declaration of intention*. The contract consisted of two intentions dependent on the psychic and external circumstances of the parties. First it was endeavoured through interpretation to state the "objective content of intention" of each of the two declarational intentions, the next step was to find out whether they corresponded to one another. If this was not the case, there was a matter of "open dissent", and the contract was invalid. If *ambiguous* intentions corresponded to one another, the contract was valid provided the parties had the same subjective intentions; if, on the other hand, their intentions differed, it was a case of "hidden dissent", and the contract was invalid. If the intentions were *unambiguous and concordant,* it had to be examined whether there was error. In the event of error in one or both parties as regards content, so that the party's conception was in conflict with the "objective" content of intention, a relevant error existed. The concept of intention was also of importance in the case of *pro forma contracts* which, in the post-classical period, were construed in accordance with the intention of the parties to the contract. However, a clearly *feigned intention* was already invalid according to classical law, because it did not possess the objective characteristics that were necessary to

[1] Lennart Vahlén, *Avtal och tolkning,* 1961, also bases himself essentially on these doctrines; cf. my review in *U.f.R.* 1961 B, pp. 176 ff.

create an obligation.[2] Not only did the post-classical authors misinterpret the structure of the consensual contract, but they also misinterpreted the concept of the error of substance, which they regarded as comprising all properties, *inter alia materia* (*qualitate*), which according to Aristotelian metaphysics did not constitute an *essentiale* but only an *accidentale* of an object. This misunderstanding gave rise to very great difficulties for later jurists, who would conceive error of quality in general as a factor impeding consensus. It therefore became necessary to make a distinction between material and immaterial qualities.[3]

3. Medieval moral theology

Medieval jurists and moral theologists started from Byzantine law.[4] Both the doctrine of will and the established doctrine of error recurred in Molina and Lessius. Molina in particular adhered to the post-classical doctrine and regarded *error in negotio, in persona, in pretio, in corpore* and *in substantia* as relevant, whereas he considered *error in nomine* and *in materia* to be irrelevant. In this respect both Molina and Lessius, who were conversant with Aristotle's metaphysics, distinguished in the same way as the classical jurists. There was no question of a consistent distinction between *error in motivis* and lack of intention, but in Lessius we find a distinction between such error in substance as, in contracts creating mutual obligations for the parties, caused invalidity only if it was insurmountable and such error as was a *conditio sine qua non* for the making of the contract. Further concurring in the view of Thomas Aquinas, Lessius thought that *materially altered circumstances* would also give a right to withdrawal from the contract.[5]

The medieval moral theology based upon Thomas Aquinas's theories proceeded in other fields and supplemented the rule of fraud with a duty to give information of latent defects and with the doctrine of the "proper consideration" (*justum pretium*) and *laesio enormis*.[6] The contract was invalid if the decrease in value

[2] Jörs-Kunkel-Wenger, *Römisches Privatrecht,* 1949, pp. 106 f.

[3] J. G. Wolf, *op. cit.,* p. 171

[4] After its revival in the 11th century, see Stig Jørgensen, *Vertrag und Recht,* 1968, pp. 47 ff. (*T.f.R.* 1966, pp. 584 ff.).

[5] Diesselhorst, *op. cit.,* pp. 82 ff.

[6] H. Bartholomeyczik, "Aequivalenz, Waffengleichheit und Gerechtigkeitsprinzip", *Archiv für die civilistische Praxis* 166, pp. 30 ff. (1966); cf. Dando B. Cellini & Barry L. Wertz, "Unconscionable Contract Provisions: A History of Unforeseeability from Roman Law to the UCC", 42 *Tulane Law Review* 193 (1967).

arose as a consequence of a defect and the excess price were greater than one half of the true value; otherwise repayment of the excess amount had to be made. This peculiar rule must be viewed as an objectification of the underlying distinction between those circumstances which are the *causa* of the entire contract and those which are only modalities.

4. Grotius and later natural law

To a large extent Grotius followed his predecessors, but he had recourse to *Cicero* to find the grounds for a general radical rule to the effect that any error causes invalidity. Promises being an action of rational law-making, whereby the promisor lays down a law for himself, which law is based upon the assumption that certain facts exist, the logical conclusion is that just as the *foundation* of law ceases to exist so does the foundation of a promise if the assumed facts do not exist or have ceased to exist. Here it should be borne in mind that both as regards the making and the interpretation Grotius treated promises as equal to laws. Here—as with Lessius—it is decisive whether, under a rational analysis, the promisor would have made the assumption a condition.

Moreover Grotius distinguished between several different types of error. There was (1) error concerning *materia,* the object of the contract; by this he understood all circumstances referring to the kind and extent of the contract, its object, and its parties. In these cases the contract was invalid if an essential error existed. In subsequent chapters on contracts some obscurity appeared because here, subscribing to the (post-classical) Stoic (and medieval) doctrine of moral theology, Grotius assumed that defects and unjust consideration independent of the condition of essentiality involved a demand for equalization, but not invalidity. Error could also relate to (2) *the wording* and (3) *other circumstances*; here, too, the demand for essentiality was made. As to the doctrine of fraud, he again based himself upon Lessius, in so far as he attached importance to fraud only when the opposite party was involved in the fraud. Probably a rule of liability to pay damages for inadvertently provoked error was also adopted from Lessius.

In later natural-law theory a return was made from Grotius's doctrine of error to a more moderate form. Pufendorf[7] and subse-

[7] Pufendorf, *Et Menniskes og en Borgers Pligter efter Naturens Lov* (The duties of an individual and a citizen according to natural law), translated into French by Jean Barbeyrac and translated into Danish (Copenhagen 1742), 1st book 9th ch., particularly §§ 12, 16–17, and 15th ch., particularly §§ 6–7. On the importance of natural law for the doctrine of error, see Hans Thieme,

quent authors applied the distinction between essential error and other forms of error. Only in the case of unilateral promises could all conditions be asserted.[8] But "essential" now came to mean something different; it came to signify, as it normally does today, "decisive", i.e. causative. Moreover, such an essential error was normally relevant only as long as the contract had not been performed. Thus the concept of essentiality no longer had any connection with the concept of substance; in Pufendorf, too, any error of quality (defect) was relevant and gave rise to a demand for equalization. The Romanist authors of the 19th century developed this doctrine of error. According to Savigny, who suggested the distinction between "unreal" and "real" error, only the unreal error (disagreement between intention and declaration) was relevant as a principal rule, while the real error (*error in motivis*) was irrelevant. Moreover, Savigny revived the Canon doctrine of *clausula rebus sic stantibus*. Later Windscheid developed his general doctrine of assumption, which on the whole corresponded to Grotius's doctrine. While the German civil code mainly subscribed to Savigny's doctrine, the doctrine of assumption began to be adopted in Scandinavian literature, in which both Lassen and—later—Ussing accepted the doctrine with the modifications that followed from the additional recognition of the principle of reliance and, as far as Ussing was concerned, also in an "objective" sense. The Scandinavian Contracts Acts from the beginning of the 20th century, however, reflect an attitude of caution; they give only an express rule on lack of intention (sec. 32) and otherwise leave the question of *error in motivis* to the courts. Moreover, the problem of defects is dealt with both in German law and in the Scandinavian Sales of Goods Acts without reference to the doctrine of error; the legislators have mainly adopted the natural-law doctrine on the relevance of any defect that gives rise to a right of equalization or reduction.[9]

III. INTERPRETATION

In his doctrine of interpretation Grotius almost invariably drew upon earlier writers in the field of rhetoric, Cicero in particular. The reason for this must be sought in the fact that neither the

"Der Beitrag des Naturrechts zum positiven Recht". *Deutsche Landesreferate zum VII. Internationalen Kongress für Rechtsvergleichung*, 1966, p. 84.

[8] It will be remembered that these were not binding without acceptance; cf. I. 2b. above.

[9] Stig Jørgensen, *Fire obligationsretlige Afhandlinger*, pp. 45 ff.

Corpus iuris nor Grotius's other sources made any material contribution to the doctrine of interpretation. Grotius's basis, naturally, had to be the promisor's intention to incur an obligation himself, but for practical reasons he modified this principle.[1]

1. Roman law and rhetoric

The *original* method of interpretation was of a linguistic-formal nature. Since a right is created by the observance of certain typical forms, it is a matter of course that interpretation is based on an investigation of whether the words and forms prescribed have been observed.[2]

Already at an early stage, rhetoric had assumed importance in *Greek* procedural law, which did not regulate courts composed of lawyers but "people's courts" composed of elected laymen. Rhetoric was the art of styling one's statement in such a way as to render one's view plausible through arguments which partly emphasized individual features and partly put these into relation to the whole; the language and its proper use came to occupy a prominent position. This "art of persuasion" was made the object of scholarly treatment in the *Rhetoric* of Aristotle, who by the way disapproved of this designation. Unlike logic, the task of rhetoric was not—in his opinion—to find what is true but to find what is probable. Therefore the implements for this purpose could not be induction and apodictic (analytical) syllogism, but *example* and *enthymeme,* which are based on probable premises. The dialectic syllogism as further developed by Aristotle in the *Topics* was also of great importance to later rhetoric.[3] An important element of the rhetorical method consisted in distinguishing between what was material and what was immaterial, in seeing the general in the particular, in defining the theme or themes to be debated, and in finding arguments which would make the chosen thesis probable. Gradually an advanced technique and a

[1] Salvatore Riccobono, in J. Stroux, *Römische Rechtswissenschaft und Rhetorik,* 1949, p. 104; Diesselhorst, *op. cit.,* pp. 55 ff.

[2] H. Coing, *Die Juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik,* 1959, pp. 4 ff.; Jörs-Kunkel-Wenger, *op. cit.,* pp. 82 ff. and 107 f.; Meyer-Laurin, *Gesetz und Billigkeit im attischen Prozess,* 1963, pp. 34 ff.; Stroux, *op. cit.,* pp. 13 ff.

[3] Ernst Kapp, *Der Ursprung der Logik bei den Griechen,* 1965. In the apodictic syllogism a conclusion is drawn from two given premises; in the dialectic syllogism the point is to find a premise when the other premise and the conclusion are known.

major device were created and collected in so-called *topoi* catalogues which served as an armoury for practitioners of the art.[4]

The rhetorical method acquired great importance for Roman law in several stages.[5] In this connection it is sufficient to draw attention to the influence acquired by rhetoric in the interpretation of laws and of contracts. As early as about 100 B.C. a grammatico-philological method of interpretation was formed on the basis of the sciences of grammar and etymology as developed by the post-Aristotelian philosophers. This method was particularly applied to the formation of legal concepts, which began to take place at this time.[6] Already by Cicero's time a somewhat more liberal interpretation had been put on the law of the Twelve Tables, which was then about 400 years old; among other things the true purpose of legal rules could be taken into consideration.[7] In Cicero's own days, and through him, rhetoric came to exercise a certain influence on Roman law. In particular the rhetorical doctrine of the relations between *verba* and *voluntas,* between word and meaning, gained a certain recognition together with the idea of equity. However, not until the post-classical period did *voluntas,* with the general doctrine of will (cf. II above), become of central importance in interpretation, concurrently with the growth of the idea of equity.[8] It was a characteristic feature that in this respect rhetoric did not distinguish between laws and contracts, but considered the subjective meaning of legislator and promisor in the same light (as opposed to the objective purpose of law, *ratio*).

Rhetoric,[9] however, also transferred part of its general tech-

[4] See also Stig Jørgensen, *Vertrag und Recht,* 1968, p. 58 with note 24 a and p. 94 (*T.f.R.* 1966, p. 592 with note 25).

[5] At an early stage it probably influenced Roman procedure, in particular its method of delimiting the object of the issue: *accusatio, intentio-defensio, depulsio;* J. Stroux, *op. cit.,* pp. 23 ff.—H. J. Wolff, "Rechtsexperten in der Griechischen Antike", *Festschrift für den 45. deutschen Juristentag,* 1964. pp. 1 ff. (pp. 16 ff.); on the doctrine of evidence, cf. Carsten Høeg, *T.f.R. 1943,* pp. 247 ff.

[6] H. Coing, *op. cit.,* pp. 4 f.

[7] Georg Eisser, "Zur Deutung von 'Summum ius summa iniuria' im Römischen Recht" (*Summum Ius Summa Iniuria,* 1963), pp. 1 ff.; Coing, *loc. cit.*

[8] Stroux, *loc. cit.*; Jörs-Kunkel-Wenger, *op. cit.,* p. 108; Meyer-Laurin, *op. cit.,* pp. 45 ff.; Eisser, *op. cit.,* pp. 1 ff.; Max Kaser, *Zur Methode der Römischen Rechtsfindung,* 1962, pp. 47 ff., *Das Römische Privatrecht,* §§ 58 and 55, *Römisches Privatrecht,* pp. 41 ff.; Uwe Wesel, *Rhetorische Statuslehre und Gesetzesauslegung der römischen Juristen,* 1967, contests that rhetoric has influenced the relation between *verba* and *voluntas.*

[9] See, on rhetoric in general, Ernst Robert Curtius, *Europäische Literatur und lateinischer Mittelalter,* 4th ed. 1963, pp. 71 ff.; see also Manfred Fuhr-

nique to the doctrines of legal interpretation by laying down different rules of interpretation intended, in particular, to counteract inconsistencies, to maintain unity, and to avoid loopholes in the law. In the case of conflicting and ambiguous laws the rules of argumentation referring to *lex specialis* and *lex posterior* were introduced; in the case of loopholes in the law, various supplementary rules were formed through logical and pragmatic methods of conclusion: analogy, converse conclusion *e contrario,* conclusions from the reasonable *ratio* of the law, and gradually also equity. Various principles of interpretation (*canones*) were formed: strict and free interpretation, restrictive and extensive interpretation, and concepts of interpretation: grammatical, logical, historical, and systematic. It is inherent in the nature of the topic method that there was no method presented for the combination of these various rules of interpretation, rules of argumentation, principles and concepts of interpretation. The final decision depended on a choice, which gave interpretation its character of an *art.*[1]

2. *Grotius and later writers*

Grotius[2] closely followed Cicero's doctrine of rhetoric in so far as he put the interpretation of law and contract on an equal footing. As mentioned above, his fundamental point of departure for the purpose of interpretation was the "rational" will. For practical reasons he assumed, however, that in order to avoid fraud it was necessary to build on external signs: words and other circumstances. The words were therefore taken in their usual meaning, unless circumstances indicated that something different had been intended. In case of contradiction the rhetoric rules of interpretation came into play. Extensive interpretation was admitted only when it was evident that the "rational and general" reason (*ratio*) was expressly or unmistakably the promisor's motive. Restrictive

mann, *Das systematische Lehrbuch,* 1960, on rhetoric as a method of research and technical description.

[1] H. Coing, *loc. cit.*; Max Kaser, *loc. cit.*; Stroux, *loc. cit.*; Meyer-Laurin, *loc. cit.*; see also W. G. Becher, "Rechtsvergleichende Notizen zur Auslegung", *Festschrift für Heinrich Lehmann zum 80. Geburtstag,* 1956, pp. 70 ff.; Viehweg, *Topik und Jurisprudenz,* 2nd ed. 1966; Esser, *Grundsatz und Norm,* 1956, *Wertung, Konstruktion und Argument,* 1965; Raiser, *N.J.W.* 1964, pp. 1201 ff.; Diederichsen, *N.J.W.* 1966, pp. 697 ff.; Eriksson, *F.J.F.T.* 1966, pp. 445 ff.; Dias, "The Value of a Value Study of Law", *Modern Law Review* 1965, pp. 397 ff. See also Ross, *Om Ret og Retfærdighed,* 2nd ed. 1966 (English ed.; *On Law and Justice,* London 1958), Ch. IV; Stig Jørgensen, "Argumentation and Decision", *Festskrift til professor Alf Ross,,* 1969, pp. 261 ff.

[2] Diesselhorst, *op. cit.,* pp. 55 ff.

interpretation could apply (1) when the result would otherwise be absurd, and (2) when the "rational" reason had unmistakably determined the will—interpretation should be according to its *ratio*. It could also apply (3) when the speaker used the word in a wider sense than that unmistakably indicated by his intention; in principle the basis was the speaker's use of the word, not its general use—one of the principles of rhetoric. Incidentally, Grotius based himself entirely on the doctrine of rhetoric—in particular that of Cicero—and adopted in all essentials the above-mentioned principles of interpretation, rules of interpretation, and concepts of interpretation. Only the voluntaristic element was made the fundamental factor: the rational will is the *ratio* of the promise.

Thus Grotius was instrumental in bringing about the rhetorical doctrine of interpretation, which in all essentials has been accepted by posterity. Savigny systematized[3] the doctrine of interpretation in his attempt to create an integrated non-contradictory system of norms. The modern sociologically and pragmatically orientated conception of law implies that such an exhaustive and non-contradictory system of norms does not exist, that the system of law is an open and flexible system, and that "interpretation" therefore cannot be applied according to uniform rules. A more or less objective or subjective method of interpretation can be chosen. The usual method in the interpretation of contract is the objectifying tendency, which attaches the greatest importance to the usual meaning of the words, unless circumstances clearly indicate something else. In the Scandinavian countries, where the "doctrine of reliance" prevails, this is only natural, because the problem of interpretation and error is dealt with according to the same principles. In German law, great difficulties have arisen from the principle laid down in sec. 119 of the Civil Code, according to which the problem of error is to be solved on the doctrine of will in favour of the promisor, while interpretation, according to sec. 157, is in principle to be made on the basis of common usage in accordance with good faith ("Treu und Glauben").[4]

[3] *Römisches Recht*, vol. 1.

[4] Stig Jørgensen, *Fire obligationsretlige Afhandlinger*, pp. 48 ff.; H. Brox, *Die Einschränkung der Irrtumsanfechtung*, 1960; M. Drexelius, *Irrtum und Risiko*, 1964; H. Coing, in *Staudinger's Kommentar zum B. G. B. (Allg. Teil)*, 11th ed. 1954, pp. 495 ff., 532 and 583 ff.; Raiser, *Vertragsfunktion und Vertragsfreiheit*, 1960, pp. 103 f.

IV. CONCLUSION

As mentioned above, Grotius must be regarded as the creator of the modern law of contract, because he was the first to sever consistently the construction of contract from the traditional socio-typical model and to recognize the power of the free and rational will to create without limits rights independent of form and content.[5] This basis of the doctrine of will affected his attitude to the problems of error and interpretation. It is an undoubted fact that in spite of his unresponsive attitude to the traditional law of contract, Grotius was strongly bound by the tradition of Roman law as framed by Romanistic scholars.[6] This is clearly proved by the principle of agreement used by him and also by his doctrine of error. In other respects he built first and foremost on Stoic philosophy and the rhetorical method of which Cicero was the great master; this influence is particularly evident in his doctrine of interpretation. However, it may not be so well known or so obvious to what extent Grotius was influenced by the medieval moral-theological tradition developed by Thomas Aquinas, who in turn to a large extent relied on Aristotle's metaphysics and natural law and on post-classical Byzantine law, which was very much characterized by Stoic-Christian ethics.[7] This influence is particularly evident in the various kinds (or stages) of Grotius's doctrine of promise. In this connection it is strange to note that, in the subsequent development of the theory of natural law, ethics and jurisprudence were dealt with under the same heading. Kant was the first to undertake a distinction in principle between law and ethics.

Grotius was a product of humanism and Protestant rationalism, but he was deeply rooted in medieval Catholic and scholastic moral theology and scholarly tradition. He combined a Greek-Stoic rationalism with a Judaeo-Christian voluntarism and thus contributed much to the conception of law of later times. The contract as a central model based on the autonomous law-

[5] On the practical reasons for this development, see Stig Jørgensen, "Contract as Form", in *Scandinavian Studies in Law*, vol. 10, 1966, pp. 97 ff. (also in *Vertrag und Recht*, 1968, pp. 11 ff., and in *T.f.R.* 1965, pp. 400 ff.).

[6] Stig Jørgensen, *Vertrag und Recht*, 1968, pp. 59 ff. (*T.f.R.* 1966, pp. 593 ff.).

[7] Kaser, *Das Römische Recht*, § 197; Hans Thieme, *op. cit.*, p. 82, and in *Sav. Z. (Germ.)* 70, 1953, pp. 230 ff. and 262 ff.; A. P. d'Entrèves, *Natural Law*, 1951/67, pp. 50 ff.

making of rational wills has survived him by 300 years, though the development of recent years has slightly shaken this foundation. Recent development has been characterized by an increasing objectification of the law of contract, in particular through the application of standard conditions and "contracts of adhesion", which are only to a very small extent (as regards content) covered by the declarations of intention of the parties.[8]

[8] Stig Jørgensen, "Contract as Form", in *Scandinavian Studies in Law*, vol. 10, 1966, pp. 97 ff. (*Vertrag und Recht*, pp. 11 ff., *T.f.R.* 1965, pp. 400 ff.) on standardized contracts and other objectification of the law of contract.