

Abolishing the Doctrine of Consideration - The Story of the Arra- Part 1

Graham McBain^{1,2}

¹ Peterhouse, Cambridge, UK

² Harvard Law School, USA

Correspondence: Graham McBain, 21 Millmead Terrace, Guildford, Surrey GU2 4AT, UK. E-mail: gsmcbain@aol.com

Received: December 26, 2017 Accepted: January 16, 2018 Online Published: February 10, 2018

doi:10.5539/ilr.v7n1p1

URL: <https://doi.org/10.5539/ilr.v7n1p1>

1. INTRODUCTION

Consideration is a doctrine peculiar to the English common law. One unknown to other legal systems, save for those that have adopted English law.¹ As Baker has pointed out, it has no competitor in terms of the diversity and complexity of historical explanations for it.² Indeed, it is a playground of academics³ - including academic spats.⁴ This is a pity since - for the professional lawyer (and, one suspects, not a few judges) - this pre-requisite for a contract ('doctrine' is too grand a word) is as clear as mud and full of anomalies. *Is it needed?*

- Modern legal historians have (generally) concluded that this pre-requisite was a common law development. That is, one that was 'home grown' and not deriving from Roman or canon law or the Court of Chancery. It is also (generally) perceived as having originated in the civil form of action of *assumpsit* in Elizabethan times;
- Further, one can (perhaps) locate it more precisely. In *Sharlington v Strotton* (1565),⁵ the word 'consideration' was used in many different senses - without emphasis on any technical legal meaning. However, in 1567, the humble earnest (*arra*) used for hundreds of years to evidence that parties had entered into a contract - became a legal fiction.⁶ Then, in 1571 and in 1584 legislation - the Fraudulent Conveyances Acts 1571 and 1584 - referred to the need for 'good consideration' (interpreted to mean 'valuable consideration').⁷ And, in 1577, there was mention of 'consideration' in connection with a detriment or a benefit.⁸ Thus, the origin of the doctrine (probably) lies in *assumpsit* in the period 1567-77 and, by the 1580's, the word 'consideration' in pleadings was common.

¹ AKR Kiralfy, *Potter's Outlines of English Legal History* (5th ed, 1958), p 177 'Consideration is a peculiar doctrine of the common law, unknown to other systems.' The first edition of this work was published in 1923 (by H Potter).

² J Baker, *Collected Papers on English Legal History* (Cambridge UP, 2013), vol 3, pp 1176-1201, *Origins of the 'Doctrine' of Consideration 1535-1585* (1981) ('**Baker Doctrine**'), p 1176 'No other doctrine in English law can compete with 'consideration' for the greatest diversity and complexity of historical explanations.'

³ CHS Fifoot, *History and Sources of the Common Law* (1949), p 398 'Any expectation that the doctrine may be approached through the medium of a preconceived, or even of a coherent, theory is doomed to disappointment. It is the congenital weakness of legal historians to pursue the mirage of continuity, and in the present contest their perspective has too often been distorted by peering into the past through nineteenth - century spectacles. Consideration has come to be regarded, not only as technical in the sense of an individual element in the action of *assumpsit*, but as inherently artificial and as inviting, therefore, the attention of professional inquirers.'

⁴ AWB Simpson, *A History of the Common Law of Contract* (2nd ed, 1978), p 317 'the history of consideration has given rise to an extensive literature, some of it unfortunately produced as ammunition with which to mow down writers on the modern law whose views are supposed to exhibit dangerous and heretical tendencies, and some written without the least regard for contemporary evidence.'

⁵ (1565) 1 Plowd 298 (75 ER 454).

⁶ *Lord Grey's Case* (1567), see 21. The *arra* was usually a coin (or other token) handed by one party to another in the presence of witnesses. Although it could be worthless itself, it symbolically represented (evidenced) 'consensus' and, when handed over, delivery - two pre-requisites laid down for a valid contract by Bracton (c.1250).

⁷ A prior Act, the Statute of Enrolments 1536 (dealing with the recording of bargains and sales), did not expressly refer to 'valuable consideration' but was interpreted as so requiring.

⁸ *Webb's Case* (1577) 'not...the profit which redounds to the [D, promisor], as the labour of [the cost to] the [P, promisee]'. Cf. the more modern formulation in *Stone v Withpole* (1589) where Coke argued 'The consideration is the ground of every action on the case, and it ought to be either a charge [loss] to [P, promisee] or a benefit [profit] to [D, promisor]'. See 23.

However, despite the increasing complexity of the doctrine - and what seems to be a never ending spate of writing dedicated to analysing the modern caselaw - little attention has been devoted in *English* legal writing⁹ as to whether the doctrine is still of worth in the context of regulating, and helping, trade and commerce.¹⁰ After all, this is the point of commercial law. Its purpose is to *help* trade - not to be a legal museum piece or a *via crucis*.

- This article reviews the history of the doctrine - including material neglected by earlier writers, such as the law merchant, Anglo-Saxon law and the nature, and need, for tokens - including the *arra*. It concludes that the doctrine of consideration was connected to evidence required for the actionability (enforceability) of a contract in the king's court (but not the lesser courts). *In essence, it was a pleading point. An evidential matter - which - by a sideward - became a pre-requisite.* This, mainly, as a result of legal writers¹¹ and not the courts. More particularly, the requirement reflected a transition stage in the development of our modern law of evidence especially in relation to pleading.¹² One which has lingered on, without need.

As to *why* the doctrine of consideration arose, it was closely connected to two matters:

- ***Bracton's Pre-requisites for a Contract.*** The first was that Bracton (c. 1250) had established certain pre-requisites (vestments) for a valid contract.¹³ These included: (a) *consensus* (union of minds) and (b) *delivery*.¹⁴ As to the first, the parties had to intend to contract (not to make a gift). And, they had to come to agreement on the matter. Further, in the case of (b), they had to hand over (that is, deliver, exchange) the subject matter in the case of an immediate conclusion of the business transaction. For example, money for goods.¹⁵ There had to be '*this for that*' (*quid pro quo*). And, a party who had not delivered his '*this*' would be unable to persuade a court to require the other party to provide his '*that*'. However, *consensus* and delivery were closely connected, in that delivery was good evidence of *consensus* since - in a commercial context - a person would hardly hand over his goods (or money) if he did not believe that a prior agreement had been reached;
- ***The Arra.*** If there was delayed payment or exchange in a business transaction, the *arra* was used. Today, we would call it a nominal deposit or down-payment. It was (usually) a token or coin. However, a piece of leather or lead or a jetton (an accounting or gaming counter) was, also, often used. The *arra* could have no value because it was not part of the contract, only evidence of it (unless it was included as part of the purchase price). However, it symbolised value. The use of an *arra* to '*seal the bargain*' was age old. It was employed in Anglo-Saxon and Biblical times and it was also extensively employed in England until Elizabethan times and beyond.¹⁶ Thus, for a sale - in the presence of (transaction) witnesses - the buyer would hand over a penny (often called a 'God's Penny' since it had church sanction) or other small token to the seller, to bind them. The *arra*, then, satisfied Bracton's requirement of *consensus* and, when delivered, of *delivery*. Simple and wonderfully effective. Further, the *arra* did not have to be a coin. Following Biblical and imported Scandinavian practice (Vikings settled in England after AD 866) the *arra* could be a handshake (they called it a handsale/handseal) or a drink to seal the bargain. A seal was

⁹ There has been a vast amount of foreign commentary on the English doctrine. However, much of the Victorian legal writing (and quite a few modern pieces of legal writing) simply '*cherry picked*' certain English cases and ignored relevant early legal texts (possibly, because they were more difficult to access). The result was a mis-leading picture, *vis-a-vis* the history of the doctrine.

¹⁰ The exception is an article by Lord Wright, see 39. A formidable commercial lawyer and House of Lords judge, in 1936, he wrote an excellent article advocating abolition of the doctrine.

¹¹ Culprits are probably legal writers such as West (his *Symboleography* was published from 1590-1647), Fulbecke (his *Parallele* was published in 1601-2 and in 1618) and Cowell (his law dictionary, *The Interpreter*, was published from 1607-1727). Fulbecke and Cowell were both civilians and Cowell's dictionary was influential on later English dictionaries - such as the long-lasting, and popular, *Law Dictionary* of Jacob (published from 1729-1835).

¹² Simpson, n 4, p 485 'The doctrine of consideration developed piecemeal in the typical manner of common law doctrines, and the evolution of succinct statements of the requirement was retrospective; furthermore there were, during our period, no institutional works of any quality dealing with the doctrine, so that the orthodox learning was never tidied up, and had to be gleaned from what was recorded in the disorderly law reports of the sixteenth and seventeenth centuries.'

¹³ Other legal writers such as Britton (c.1290) and Fleta (c.1290) followed Bracton closely on this, see 13.

¹⁴ Bracton also referred to two other pre-requisites still with us: (c) capacity; and (d) subject matter. As to others, see 12.

¹⁵ In early times, delivery of *seisin* (possession) was essential to prevent fraud. Thus, in Anglo-Saxon times, virtually every contract was exchange. That is, goods for goods (barter) or goods for money (sale). There was also the exchange or sale of land - the land usually being symbolically represented by a sod of earth (or a twig or a knife). This was also immediate - the parties handing over the goods for money in a designated market place (or, in the case of land on the land) in the presence of witnesses. And, where there was no immediate exchange, an *arra* was used to evidence that the parties were bound (if valuable - such as a gold ring - it could also comprise part of the purchase price). Delivery was a vital component to help prevent fraud. As it was, by 1845, even delivery in the case of the transfer of freehold land was abolished (see 34). Thus, delivery as a pre-requisite for any form of contract ended. In the case of chattels (and incorporeal hereditaments) it could be achieved by the delivery of a deed by the 14th century (see Pt 2, n 353) and, even in the case of freehold land, it was avoided by using devices such as uses, bargain and sale *etc.*

¹⁶ For merchants, the *arra* was also a good way of doing deals without carrying money and being at risk of being robbed. Also, it enabled multiple trades in a market or fair - the merchant only paying the balance on the '*nail*' (the market pillar or table where the reeve or the clerk of the market presided) at the end of the day.

also an *arra*. This is why consideration is not required for a deed¹⁷ and why the courts were prepared to accept the evidential worth of a tally (a stick of wood to record a debt) it, also, being an *arra*.¹⁸

However, by 1567,¹⁹ it was unnecessary in the king's court to plead - in *evidence* - that a person had handed over a nominal sum (an *arra*), such as a penny, to bind the parties. In essence, all the parties had to plead was '*value given*' (valuable consideration).²⁰ Thus, the *arra* became a legal fiction. As a result - in considerable part - it gave birth to the doctrine of consideration. Further, the proof that the doctrine originates (in large part) from the *arra* is that, both the *arra* and consideration:

- (a) could be nominal - indeed, of no actual value but of symbolic value;²¹
- (b) could not be past - because *present* intentions for both were required, to secure *consensus*;²²
- (c) existed only in a business context - not for a gift (where no consideration was required);²³
- (d) existed only in a business context - evidencing a mutual intention to effect a *legal act*;²⁴
- (e) evidenced delivery (exchange, *quid pro quo*, '*this for that*') - by physical delivery (in the case of the *arra*) and fictional delivery in the case of consideration;²⁵
- (f) represented money ('*value*');²⁶
- (g) evidenced '*detriment*', '*benefit*' and '*forbearance*';²⁷
- (h) evidenced benefit to the promisor;²⁸
- (i) could be couched in terms of a promise and counter-promise²⁹ - these also being evidential.³⁰

¹⁷ This point has been lost because legal writers invariably refer to Plowden's argument in *Sharlington v Strotton* (1565) where he emphasised the *solemnity* of the deed. However, the solemnity derives not from the paper or parchment (which would have been used for any writing) but from the *seal*. The seal was (is) an *arra*. And, delivery of the seal (contained in the deed) satisfied Bracton's requirement of delivery, as a pre-requisite.

¹⁸ That said, the king's court were not prepared to treat it the same as a deed (even if with writing), because (it was said) it was more easy to erase, see n 594 (Bereford CJ in 1313).

¹⁹ See *Lord Grey's Case* (1567), see 21. Doubtless, Dyer CJ was happy to accede to this since he would have been aware that a deed did not require it (the seal being the *arra*). Further, in any case, a person was estopped if the deed declared that value had been given.

²⁰ Of course, people could still physically hand over an *arra*, but it was not necessary to plead actual delivery of value in the king's court. In lesser courts (and daily practice in fairs and markets) they would still have handed over an *arra* (including shaking hands or drinking to seal the bargain). Such ancient commercial practices died slowly.

²¹ As noted later, the word '*nominal*' has changed meaning in English. Today, we associate it with - not the actual value - but *some* value. However, in times past, it included purely *symbolic* value (a twig, a clod of earth, a broken knife, a fragment of coin *etc*).

²² The *arra* had to be handed over in the immediate presence of the transaction witnesses because it *symbolised* the immediate payment of the price or the delivery of the goods (although, obviously, they had, in fact, yet to be paid or delivered). Since the *arra* was given by the buyer (and since barter diminished greatly), the *arra* tended to be linked to the buyer and his payment of the price by way of making a tiny (symbolical) deposit (pre-payment). However, the *arra* could also represent goods and delivery of the *arra* symbolically represent delivery of those goods, in the case of barter.

²³ Since ancient times, the *arra* had been associated with commercial transactions (sales and exchange) not in gift giving ceremonies (which, in Anglo-Saxon times would not have been held in designated market places). However, the fact that consideration is given, today, does not necessarily preclude it being a gift, see Pt 2, n 76.

²⁴ In the case of consideration, marriage was held to be good consideration since it was, in earlier times, treated much the same as a business (money) transaction, with the payment of dowry (by the father of the bride or relations) and/or dower (by the husband). This was extended to moral considerations by Mansfield CJ in *Hawkes v Saunders* (1782) but this was rejected in *Eastwood v Kenyon* (1840), see 30(c) (such seems appropriate since moral obligations are not intended to be legal ones).

²⁵ The *arra* was used in sales and barter. Its delivery symbolically represented delivery of the money (or goods). However, with the decline of barter (and an increase of coinage) it (increasingly) represented money (i.e. value, '*valuable consideration*').

²⁶ See also n 24. In the case of certain pieces of legislation, marriage was treated as (valuable) '*consideration*' - not inappropriate since the engagement/marriage ring is an *arra* and (since church weddings were not legally required) the *ring* was, usually, given up-front (even, today, in church weddings the declaration '*I now pronounce you man and wife*' is given after delivery of the ring(s) and comprised an up-front purchase of the bride). The vicar (like a clerk of the market) declared the (business) transaction, complete. The guests were the transaction witnesses and (like Anglo-Saxons sales) the marriage had to be in public. The ring is the '*wed*' (*arra*), the '*ding*' is the assembly of guests.

²⁷ Delivery of the *arra* represented a (tiny) money benefit to the recipient and, a (tiny) money loss to the deliverer (the buyer). It also represented forbearance - the recipient forbearing to receive the full price (or goods, in the case of barter). While the delivery of the *arra* was a physical '*act*', consideration is a fictional '*act*' (i.e. the law presumes it).

²⁸ The one who handed over the *arra* was the one who promised to deliver the remainder of the money/goods (i.e. the promisor) and, thus, secured a benefit. However, necessarily, this meant detriment/forbearance in the promisee.

²⁹ The promise of the buyer when he gave the *arra* (to pay the rest of the price) and the promise of the seller (to forbear). The seller suffered a detriment (the buyer a benefit) in the late payment. However, even in early times, this tended to be equalised in practice - since the seller, often, received a discount or a disguised interest payment (for example, tallies were often discounted or reflected a hidden interest element). PS Atiyah, *Promises, Morals, and Law* (1981) ('*Atiyah Promises*'), p 3 'As a matter of positive law, the doctrine of consideration crystallized in the reign of Elizabeth I [1558-1603] into a number of rules which are still clearly recognizable by the modern common lawyer...thirdly, if two parties exchanged mutual promises, each promise was sufficient consideration for the other promise...'. Ibid, p 37 'The promises are themselves regarded as consideration for each other...'.
³⁰

However, this is not to say that the doctrine of consideration is wholly the child of the transmutation of the *arra* into a pleading fiction. The word '*consideration*' was a loose (amorphous) expression in Elizabethan times and it remained so for long after.

- **Elizabethan Legislation.** Thus, the word was used in the context of various pieces of Elizabethan legislation where evidence was required of '*valuable consideration*' having been given;³¹
- **Sales - Fixed Price.** It was also connected to the need for a sale to be at a '*fixed*' (or, by Elizabethan times, an ascertainable) price³² - this to satisfy Bracton's pre-requisite that a sale required a '*fixed price*' (the requirement, likely, being because - if the parties had not agreed the price - this was good evidence that they had not concluded a contract but were still in negotiations). The '*price*' (the sum in money) was the consideration. Thus, pleading that '*consideration*' had been given in a sale evidenced *consensus, delivery* and agreement on the *price*;³³
- **Selling Services - Agreed Payment.** Further, since '*selling*' a service (such as inn-keeping, carting, building a house for another *etc*) was treated as analogous to a sale, '*consideration*' was extrapolated to cover any '*payment*' or '*reward*' or '*recompense*' that was agreed on (expressly or impliedly).³⁴

So much for the past. *Is it needed now* ? Manifestly, if the doctrine was evidential, then to preserve it is unwise. Indeed, disastrous - as has been proved - primarily for the following reasons:

- **Civil Evidence Act 1968.** Unlike times past, when the production of evidence in civil actions was very restricted, pursuant to the Civil Evidence Act 1968, parties can (basically) submit whatever evidence is reasonable to support their case. And, there is no longer a rigid hierarchy of evidence in terms of probative importance as there was from medieval times onwards³⁵ - albeit, this hierarchy, anyway, had its own anomalies.³⁶ In short, all that is currently covered by the doctrine can, without any problem (assuming abolition), be pleaded as *evidence* of the parties having reached *consensus*;
- **Legal Cul-de-Sac.** The doctrine has changed little from its inception - save for being extended in *Currie v Misa* (1875). At base, it still reflects the Elizabethan *arra* - as '*fictionalised*'. However, if the doctrine was just a pleading point - *viz.* evidence of *consensus* - to convert it into a separate pre-requisite is unproductive since the courts are simply - in case after case - stating as a pre-requisite all the acts which can provide good evidence that the parties have reached *consensus*, which are multitudinous. In short, a legal *cul-de-sac*. Indeed, the fact that - after 400 years - no one can satisfactorily define consideration seems good proof that it was evidential and best treated as such.

However, if the doctrine is abolished, will the fear of that great legal luminary, Vitalstatistix, be realised ?

³⁰ Ibid, p 184 'wherever an express promise coexists with some other ground of obligation it is arguable that the primary function of the promise is - in legal language - *evidentiary*'. Ibid, p 188 'the promise has this *evidentiary* character...the purpose of solemn and ritual promises may still be thought to be largely *evidentiary*.' Ibid, p 189 'a promise may have the character of being largely *evidentiary*.' Ibid, p 202 '*evidentiary* nature of promises.' (*italics supplied*).

³¹ e.g. the Statute of Enrolments 1536, the Fraudulent Conveyances Acts 1571 & 1584 and, later, various sections of the Statute of Frauds 1677. Why the word '*good*' was used in the 1571 and 1584 Acts may be because marriage was included.

³² It could be satisfied if ascertainable, at least by 1522, see *Southwall v Huddelston* (1522), see Pt 2, n 111.

³³ This is now regulated by the Sale of Goods Act 1971, s 2(1) 'A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.' The word '*consideration*' here is being used in the sense of exchange ('in return for'). It is, actually, otiose.

³⁴ As to an implied payment, in the case of common callings (such as common innkeepers, common carriers, common farriers and common tailors) since they had to provide a public service, a price was not always agreed consensually. Thus, the courts imputed (implied) a *quantum meruit*. The only common calling still existing is the common innkeeper. See generally, GS McBain, *Abolishing the Strict Liability of Hotelkeepers* [2006] JBL, Oct 705-55, p 736 ('**McBain Innkeepers**') and GS McBain, *Time to Abolish the Common Carrier* [2005] JBL, Sept, p 545 ('**McBain Carriers**').

³⁵ Thus, the hierarchy by Blackstone's time (1776) was: (a) royal charters; (b) instruments of record; (c) deeds not of record; (d) instruments under seal; (e) instruments under hand (i.e. simple contracts); (f) parol (oral). However, Blackstone was to conflate (e) and (f) and this may have influenced the court in *Rann v Hughes* (see n 36 below). See GS McBain, *Abolishing Deeds, Specialties and Seals. Part 1* (2006) March-May, Commercial Law Quarterly (an Australian journal) 15, at pp 18-9 ('**McBain Deeds**').

³⁶ '*Parol*' was used as a '*catch all*' expression to cover any instrument other than a deed - so that it embraced sealed instruments which were not deeds as well as all writings under hand. This anomaly arose from a statement of Skynner LCB in *Rann v Hughes* (1778) 7 TR 350n (101 ER 1014n) where he stated 'All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol: nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing.' Cf. RA Dixon, *Practical Treatise on the law relative to Title Deeds and other Documents* (1826), p 572 'By a strange inaccuracy, however, the word *parol* does, even to this day, continue to be applied to every kind of contract whether written or verbal, which is not by deed; at least I am not aware of any other technical term which has been given to a contract, not sealed and delivered.'

Vitalstatistix, the chief of the tribe....has only one fear, he is afraid the sky may fall on his head tomorrow. But as he always says, tomorrow never comes.³⁷

In the law, even greater things have been abolished without the sky falling. Thus, it is likely that some brave judge will conclude that this legal fiction is (long) past its sell by date. Further, abolition will have no effect on many things.³⁸ However, to ease the trauma, the law on deeds and specialties which has become exceedingly difficult (and silly)³⁹ should also be abolished - removing an anomalous distinction between different forms of writing. Also, the pre-requisites for a *gift* should be put in legislation. Finally, the pre-requisites for a *contract* should be put in legislation. None of this is particularly difficult and it will help everyone by modernising the law. We live in the 21st century - not in Elizabethan times.

2. SOURCES

The English doctrine of consideration emerged in the 16th century. However, concepts which had connection with it (or were said to have connection with it) were present in Roman and Anglo-Saxon law as well as in Chancery practice. Reference may also be made to early texts. These include the following:

(a) General Texts

- LJ Downer, *Leges Henrici Primi* (c.1113);⁴⁰
- Glanvill, *The Treatise on the Laws and Customs of the Realm of England* (c. 1189);⁴¹
- H Bracton, *On the Law and Customs of England* (c. 1250);⁴²
- Britton (c. 1290);⁴³
- Fleta (c. 1290);⁴⁴
- Mirror of Justices (c. 1290);⁴⁵
- F Bacon, *Reading on the Statute of Uses* (1600);⁴⁶
- E Coke, *Institutes of the Laws of England* (1628-44);⁴⁷
- M Hale, *Analysis of the Law* (1713);⁴⁸
- W Blackstone, *Commentaries on the Laws of England* (1765-9).⁴⁹

Reference may be also made to various Abridgments, both major and minor, viz.

- N Statham, *Abridgment of the Law* (c. 1490);⁵⁰

³⁷ R Goscinny and A Uderzo, *Asterix and the Normans* (1967), p 2.

³⁸ Abolition will have no effect on things that do not require consideration such as - deeds, specialties (common law and statutory), bills of exchange ('BOE') and promissory notes. Nor, where legislation covers the matter (Sale of Goods Act 1979 *etc*). Nor, where the parties use an *arra* (still possible today). Nor will it affect *estoppel* since this is, in part, a remedy far older than consideration (by record, by deed *etc*) and even more modern forms (promissory, proprietary) are not linked to consideration as such - *estoppel* being a *remedy*, not attached to, or part of the pre-requisite of consideration. Nor will abolition of the doctrine affect the law of gift or, suddenly, mean that gratuitous promises become enforceable. See 49.

³⁹ 'Silly' because, for example, the Law of Property (Miscellaneous Provisions) Act 1989 provided that: (i) the requirement for an individual to seal a document in order to make it a deed was abolished. However, this does not prevent an individual from sealing a document and creating a specialty instead; (ii) The effect of the act is that the only difference, now, between a document and a deed is that the latter declares that it is such on its face (for example, by saying '*Deed*'). So much for the added formality and deliberation of a deed (in the case of an individual the document must also be attested. However, the courts have (sensibly) ignored this requirement, see *Shah v Shah* [2002] QB 35 *per* Pill LJ).

⁴⁰ LJ Downer, *Leges Henrici Primi* (Oxford, 1972)(c.1113).

⁴¹ Glanvill (ed. GDG Hall), *The Treatise on the Laws and Customs of the Realm of England* (Nelson, 1965)(c. 1189).

⁴² H Bracton (c. 1250, trans Thorne), *On the Law and Customs of England* c.1250 (Cambridge UP, 1968-76). Bracton is now online, see bracton.law.harvard.edu.

⁴³ Britton (c.1290)(trans FM Nichols, pub John Byrne, 1901).

⁴⁴ Fleta, see Selden Society ('SS'), vols 72, 89 & 99.

⁴⁵ *The Mirror of Justices*, Selden Society ('SS'), vol 7.

⁴⁶ *The Works of Francis Bacon* (1826), vol 4, *Reading on the Statute of Uses*. See also F Bacon, *Law Tracts of Francis Bacon* (pub 1737). The reading was delivered when Bacon was a Double Reader at Gray's Inn.

⁴⁷ E Coke, *Institutes of the Laws of England* (W Clarke & Sons, London, last ed, 1824). The second, and following two, parts of the *Institutes* were published after the death of Coke (1552-1634).

⁴⁸ M Hale, *The Analysis of the Law* (1st ed, 1713; 3rd ed 1739). This was published after the death of Hale (1609-76). See also E Heward, *Matthew Hale* (1972), pp 147-8.

⁴⁹ W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1st ed, 1765-9, University of Chicago Press rep 1979).

⁵⁰ N Statham, *Abridgment of the Law* (Pynson, c. 1490). This was the only edition. For a translation, see MC Klingelsmith, *Statham's Abridgment of the Law* (Boston Book Company, 1915).

- A Fitzherbert, *La Graunde Abridgment* (3rd ed, 1577);⁵¹
- R Brooke, *La Graunde Abridgement* (1586).⁵²
- W Hughes, *Grand Abridgment of the Law* (1660-3);⁵³
- H Rolle, *Abridgment des plusieurs Cases et Resolutions del Common Ley* (1668);⁵⁴
- W Sheppard, *Grand Abridgment of the Common and Statute Law of England* (1675);⁵⁵
- W Nelson, *Abridgment of the Common Law* (1725-6);⁵⁶
- E Viner, *A General Abridgment of the Law and Equity* (1st ed, 1741-57);⁵⁷
- M Bacon, *New Abridgment of the Law* (5th ed, 1798);⁵⁸
- J Comyns, *Digest of the Laws of England* (last ed, 1822).⁵⁹

(b) Texts on Commercial Law

While the first text on commercial law is, sometimes, alleged to be Malynes, *Consuetudo vel Lex Mercatoria or the Antient Law Merchant* (1622),⁶⁰ he was a merchant and not a lawyer. Thus, the first legal text on commercial law was (probably) Williams, *Laws of Trade and Commerce* (1812), since it covered a range of commercial matters.⁶¹ Up to 1900, there were a *plethora* of texts on commercial law⁶² which continued to 1990.⁶³ There are also modern texts on commercial law.⁶⁴

(c) Texts on Contract

The first text dedicated to contract was, probably, Powell, *Essay upon the Law of Contracts and Agreements* (1790).⁶⁵ This is not to say that there was no reference to matters of contract in earlier texts such as Finch (1613),⁶⁶ Coke (1628-41),⁶⁷ Ballow (Bellewe)(1737)⁶⁸ and Blackstone (1765-9)⁶⁹ as well as in other, more

⁵¹ A Fitzherbert, *La Graunde Abridgment* (Tottell, 3rd ed 1577). The first edition was in 1516.

⁵² R Brooke, *La Graunde Abridgement* (Tottell, 1586). The first edition was in 1573.

⁵³ W Hughes, *Grand Abridgment of the Law* (Henry Twyford et al, 1660-3). This was an only edition.

⁵⁴ H Rolle, *Abridgment des plusieurs Cases et Resolutions del Common Ley* (A Crooke et al, 1668). This was an only edition.

⁵⁵ W Sheppard, *Grand Abridgment of the Common and Statute Law of England* (sold by George Sawbridge et al, 1675). This was an only edition.

⁵⁶ W Nelson, *Abridgment of the Common Law* (E & R Gosling, 1725-6). This was an only edition.

⁵⁷ E Viner, *A General Abridgment of the Law and Equity* (GCJ & J Robinson, 1st ed, 1741-57; 2nd ed 1791-5).

⁵⁸ M Bacon, *New Abridgment of the Law* (H Gwillim (ed), 5th ed, 1798). The first edition was in 1736 (vols 1 & 2), vol 3 (1740), vol 4 (1759) and vol 5 (1766).

⁵⁹ J Comyns, *Digest of the Laws of England* (A Hammond, last ed, 1822). The first edition was in 1762-7 (5 vols). See also J Lilly, *Practical Register* (1st ed, 1719).

⁶⁰ G Malynes, *Consuetudo vel Lex Mercatoria or the Antient Law Merchant* (1st ed, 1622; 3rd ed, 1686). See also, in the period 1622-1813, the following: (a) W Beawes, *Lex Mercatoria Rediviva or the Merchant's Directory* (1st ed, 1752, 6th ed, 1813); (b) G Jacob, *Lex Mercatoria or the Merchant's Companion* (1st ed, 1718; 2nd ed, 1729); (c) C Molloy, *De Jure Maritimo et Navali or a Treatise of Affairs Maritime and of Commerce* (1st ed, 1676; 10th ed, 1778); (d) T Mortimer, *Elements of Commerce, Politics and Finances* (London, 1772)(directory); (e) M Postlethwayt, *Universal Dictionary of Trade and Commerce* (1st ed, 1751; 4th ed, 1774)(directory); (f) R Rolt, *A New Dictionary of Trade and Commerce* (London, 1756)(directory).

⁶¹ J Williams, *Laws of Trade and Commerce* (1st ed, 1812).

⁶² See generally for a chronological list of texts on commercial law, WH Maxwell & LF Maxwell, *A Legal Bibliography of the British Commonwealth of Nations* (1955-7), vol 1 (*English Law to 1800*), vol 2 (*English Law from 1801 to 1954*). See, in particular, in the period 1800-50, the following: (a) S Clarke & J Williams, *The Cyclopaedia of Commerce* (1819); (b) E Chitty, *The Commercial and General Lawyer* (1st ed, 1834-6; 2nd ed, 1840); (c) JW Smith, *Compendium of Mercantile Law* (1st ed, 1834; 13th ed, 1931); (d) HW Woolrych, *Commercial and Mercantile Law of England* (1829).

⁶³ These included: (a) G Borrie, *Commercial Law* (1st ed, 1967; 7th ed, 2001); (b) EW Chance, *Principles of Mercantile Law* (1st ed 1922; 13th ed, 1980); (c) J Charlesworth, *Principles of Mercantile Law* (1st ed 1929; 17th ed, 1997); (d) TL Davies, *Banking and Commercial Law* (1st ed, 1920); (e) MR Emanuel, *Lectures on Mercantile Law* (1st ed, 1933); (f) R Goode, *Some Concepts of English Commercial Law* (1982); (g) ERH Ivamy, *Reflections on Commercial Law* (1961); (h) TS Kerr, *Commercial Law* (1st ed, 1939); (i) R Lowe, *Commercial Law* (1st ed, 1964; 6th ed, 1983); (j) A Nixon & RW Holland, *Commercial Law* (1st ed, 1907); (k) DF Ranking et al, *Mercantile Law* (1st ed, 1911; 14th ed, 1975); (l) FJ Wright, *Commercial Law* (1st ed, 1948-50).

⁶⁴ These include: (a) K Abbott et al, *Business Law* (9th ed, 2013); (b) E Baskind, *Commercial Law* (2013); (c) J Benjamin, *Financial Law* (1st ed, 2007); (d) R Bradgate & F White, *Commercial Law* (2012); (e) I Brown, *Commercial Law* (2001); (f) P Dobson, *Commercial Law* (8th ed, 2012); (g) D Keenan, *Law for Business* (1st ed, 1965; 13th ed, 2006); (h) J Lowry, *Commercial Law: Perspectives and Practice* (2006); (i) E MacIntyre, *Business Law* (1st ed, 2001; 7th ed, 2006); (j) E McKendrick, *Goode on Commercial Law* (1st ed, 1982; 4th ed, 2010); (k) LS Sealy & RJA Hooley, *Commercial Law, Text, Cases and Materials* (1st ed, 1994; 4th ed, 2009).

⁶⁵ JJ Powell, *Essay upon the Law of Contracts and Agreements* (1st ed, 1790, last ed, 1802). See also AWB Simpson, *Innovation in Nineteenth Century Law* (1975) 91 LQR 247 ('Simpson Innovation'), pp 250-1.

⁶⁶ H Finch, *Law or a Discourse thereof* (1st ed, 1613; last ed 1759).

⁶⁷ Coke, see n 47.

minor, works. However, the subject of contract was dealt with in, relatively, scant terms up to 1790. Texts which dealt with the law of contract *post* 1790 include the following:

- **Texts 1790-1850**. There were texts by Comyn (1807),⁷⁰ Chitty (1826)⁷¹ and Addison (1845)⁷² as well as other works.⁷³
- **Texts 1850-1900**. There were texts by Stephen (1853),⁷⁴ Pollock (1876)⁷⁵ and Anson (1879)⁷⁶ as well as other works.⁷⁷
- **Texts 1900-1975**. There were texts by Salmond and Williams (1927)⁷⁸ and Cheshire & Fifoot (1946)⁷⁹ as well as other works.⁸⁰

There are also many modern texts on contract law, including Chitty,⁸¹ Atiyah (2005),⁸² Furmston (2012),⁸³ McKendrick (2014)⁸⁴ and Treitel (2015)⁸⁵ as well as other works.⁸⁶

(d) Texts & Articles on Consideration

There were a number of texts, written from Victorian times, which discuss in detail the doctrine of consideration. These include those by:

- Holmes (1881),⁸⁷

⁶⁸ Ballou (or Bellewe), *A Treatise of Equity* (1st ed, 1737). The 3rd edition was by Gilbert CB (1792). Later editions were by J Fonblanque, *Treatise of Equity* (1st ed, 1793-4; last ed, 5th ed, 1820).

⁶⁹ Blackstone, see n 49. See also T Wood, *An Institute of the Laws of England* (1st ed, 1720, last ed, 1772).

⁷⁰ S Comyn, *A Treatise of the Law relative to Law of Contracts and Agreements not under Seal* (1st ed, 1807; 2nd ed, 1824).

⁷¹ J Chitty (jun), *Law of Contracts* (1st ed, 1826; 32nd ed, 2015).

⁷² CG Addison, *Law of Contracts* (1st ed, 1845-7; 11th ed, 1911).

⁷³ Such as: (a) HT Colebrooke, *Treatise on Obligations and Contracts*. Pt 1 (1818); (b) W Fox, *A Treatise on Simple Contracts and the Action of Assumpsit* (1842); (c) J Newland, *A Treatise on Contracts within the Jurisdiction of Courts of Equity* (1806); (d) JW Smith, *Law of Contracts* (1st ed, 1847; 8th ed, 1885).

⁷⁴ G Stephen, *The Principles of Commerce and Commercial Law* (1st ed, 1853).

⁷⁵ F Pollock, *Principles of Contract* (1st ed, 1876; 13th ed, 1950). See also N Duxbury, *Frederick Pollock and the English Juristic Tradition* (OUP, 2004).

⁷⁶ W Anson, *Principles of the Law of Contracts* (1st ed, 1879; 30th ed, 2016).

⁷⁷ These included: (a) SL Levi, *Manual of the Mercantile Law of Great Britain and Ireland* (1st ed, 1854); (b) G Willmore & E Bedell, *Mercantile and Maritime Guide* (1st ed, 1856); (c) CCM Plumptre, *Law of Simple Contracts* (1st ed, 1879); (d) A Shearwood, *Law of Contract* (1st ed, 1879); (e) WE Ball, *Principles of Torts and Contracts* (1st ed, 1880); (f) JA Slater, *Principles of Mercantile Law* (1st ed, 1884; 17th ed, 1977); (g) JD Wood, *Mercantile Agreements* (1886); (h) RV Campbell, *Principles of Mercantile Law* (1st ed, 1890); (i) M Stevens, *Elements of Mercantile Law* (1st ed, 1890; 17th ed (JK Macleod (ed), Stevens & Borrie, 1978); (j) J Hurst & R Cecil, *Principles of Commercial Law* (1st ed, 1891); (k) TE Scrutton, *The Elements of Mercantile Law* (1891); (l) MM Ullah & JG Colclough, *Manual of Contract* (1st ed, 1895). See also CC Langdell, *A Summary of the Law of Contracts* (2nd ed, 1880).

⁷⁸ JW Salmond & J Williams, *Law of Contracts* (1st ed, 1927; 2nd ed, 1945).

⁷⁹ GC Cheshire & CHS Fifoot, *Law of Contract* (1st ed, 1946).

⁸⁰ These include: (a) AT Carter, *Elements of the Law of Contract* (1st ed, 1902; 7th ed, 1931); (b) WGH Cook & JW Baggally, *Elements of the Law of Contract* (1st ed, 1931); (c) MR Emanuel, *Contracts* (2nd ed, 1906, for the first edition see Ullah); (d) RM Jackson, *History of Quasi Contract in English Law* (1936); (e) AB Keith, *Elements of the Law of Contracts* (1st ed, 1931); (f) AJ Kerr, *The Principles of the Law of Contract* (1967); (g) CE Odgers, *Introduction to the Law of Contracts* (1948); (h) JG Pease & AM Latter, *Law of Contract* (1st ed, 1909; 3rd ed, 1925); (i) TR Potts, *Analysis of the Principles of Contract* (1913); (j) G Roberts, *Principles of the Law of Contracts* (1923).

⁸¹ See n 71.

⁸² PS Atiyah, *Introduction to the Law of Contract* (1st ed, 1995; 6th ed, 2005 (by Stephen Smith)). See also PS Atiyah, *The Rise and Fall of Freedom of Contract* (OUP, 1979) ('Atiyah 1979').

⁸³ MP Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (16th ed, 2012). For the first edition, see n 79.

⁸⁴ E McKendrick, *Contract Law* (6th ed, 2014).

⁸⁵ GH Treitel, *The Law of Contract* (1st ed, 1962; 14th ed, 2015). See also GH Treitel, *An Outline of the Law of Contract* (1st ed, 1979; 6th ed, 2004) and GH Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford, 2002), ch 1 ('Treitel Landmarks').

⁸⁶ These include: (a) R Brownsword, *Contract Law* (2nd ed, 2006); (b) D Campbell (ed), *The Relational Theory of Contract* (2001); (c) J Cartwright, *The Formation and Variation of Contracts* (2014); (d) M Chen-Wishart, *Contract Law* (1st ed, 2005; 5th ed, 2015); (e) H Collins, *The Law of Contract* (4th ed, 2003); (f) R Halson, *Contract Law* (1st ed, 2001; 2nd ed, 2013); (g) J Poole, *Textbook on Contract Law* (5th ed, 2014).

- Scrutton (1885);⁸⁸
- Salmond (1887);⁸⁹
- Ames (1888);⁹⁰
- Jenks (1891);⁹¹
- Brown (1909);⁹²
- Barbour (1914);⁹³
- Daruvala (1915);⁹⁴
- Holdsworth (1925);⁹⁵
- Fifoot (1949);⁹⁶
- Kiralfy (1958);⁹⁷
- Gilmore (1974);⁹⁸
- Sutton (1974);⁹⁹
- Simpson (1975);¹⁰⁰
- Stoljar (1978);¹⁰¹
- Swain (2015);¹⁰²
- Burrows (2016).¹⁰³

Finally, there are a number of articles which deal with the doctrine - including those advocating its abolition or reform. These include those by:

- Ashley (1913);¹⁰⁴
- Lorenzen (1919);¹⁰⁵
- Lord Wright (1936);¹⁰⁶
- Hamson (1938);¹⁰⁷
- Llewellyn (1941);¹⁰⁸

⁸⁷ OW Holmes, *The Common Law* (1881, Little Brown, 1945 ed) ('**Holmes Common Law**'), ch 7. See also OW Holmes, *Early English Equity* (1885) 1 LQR, vol 1, p162 also published in *Selected Essays in Anglo-American Legal History* ('**AALH**'), vol 2, pp 705-21 ('**Holmes Equity**').

⁸⁸ TE Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge UP, 1885).

⁸⁹ JW Salmond, *The History of Contract* published in AALH, see n 87, vol 3 ('**Salmond History**'), p 320. See also JW Salmond, *Essays in Jurisprudence and Legal History* (1891) ('**Salmond Essays**').

⁹⁰ JB Ames, *The History of Assumpsit* published in AALH, see n 87, vol 3, p 259 ('**Ames History**'). See also *The History of Parol Contracts prior to Assumpsit*, Ibid, pp 304-19 ('**Ames Contracts**'). See also JB Ames, *Lectures on Legal History* (1913), *Two Theories of Consideration*, Ibid, pp 323-53 ('**Ames Lectures**').

⁹¹ E Jenks, *The History of the Doctrine of Consideration in English Law* (Yorke Prize Essay for 1891).

⁹² R Brown, *The English Doctrine of Consideration in Contract* (1909).

⁹³ WT Barbour, *The History of Contract in Early English Equity* (1914) republished in Oxford Studies in Social and Legal History (Octagon Books, NY, 1974).

⁹⁴ PN Daruvala, *Doctrine of Consideration in English Law* (1915).

⁹⁵ W Holdsworth, *A History of English Law* (1925, Sweet & Maxwell, 2009 rep), vol 8.

⁹⁶ Fifoot, n 3.

⁹⁷ See n 1. See also AK Kiralfy, *The Action on the Case* (1951) ('**Kiralfy Action**').

⁹⁸ G Gilmore, *The Death of Contract* (Ohio State University Press, 1974).

⁹⁹ KCT Sutton, *Consideration Reconsidered* (University of Queensland Press, 1974). See also MP Ellinghaus, *Comment. Consideration Reconsidered* (1975) Melbourne University LR 266.

¹⁰⁰ See n 4. See also Simpson Innovation, n 65. Also, AWB Simpson, *The Equitable Doctrine of Consideration and the Law of Uses* (1965) 16 University of Toronto Law Journal 1 ('**Simpson Equitable**').

¹⁰¹ SJ Stoljar, *A History of Contract at Common Law* (1975) ('**Stoljar Contract**'). See also SJ Stoljar, *The Consideration of Forbearance* (1965-1967) 5 Melbourne University LR 34.

¹⁰² W Swain, *The Law of Contract 1670-1870* (Cambridge UP, 2015).

¹⁰³ A Burrows, *A Restatement of the English Law of Contract* (Oxford UP, 2016). See also A Burrows, *Understanding the Law of Obligations. Essays on Contract, Tort and Restitution* (1998) ('**Burrows Obligations**').

¹⁰⁴ CD Ashley, *The Doctrine of Consideration* (1913) Harvard LR, vol 26, no 5, 429. Cf. HW Ballantine, *Is the Doctrine of Consideration Senseless and Illogical ?* (1913) Michigan LR 423.

¹⁰⁵ EG Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 Yale LJ 621. See also other US articles such as S Williston, *Consideration in Bilateral Contracts* (1913-1914) 27 Harvard LR 503 and A Shiller, *The Counterpart of Consideration in Foreign Legal Systems*. NY State Law Revision Commission, 2nd Annual Report (1936) 10. See also Swain, n 102, p 220.

¹⁰⁶ Lord Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law ?* (1936) 49 Harvard LR, no 8, 1225. See also Lord Wright of Durley, *Legal Essays and Addresses* (Cambridge UP, 1939) ('**Wright Essays**').

¹⁰⁷ CJ Hamson, *The Reform of Consideration* (1938) 54 LQR 233. See also MS Mason, *The Utility of Consideration - A Comparative View* (1941) 41 Colombia LR 825.

- Shatwell (1954)¹⁰⁹
- Patterson (1958);¹¹⁰
- Von Mehren (1959);¹¹¹
- Chloros (1968);¹¹²
- Barton (1969);¹¹³
- Atiyah (1971-86);¹¹⁴
- Treitel (1976);¹¹⁵
- Reiter (1977);¹¹⁶
- Markesinis (1978);¹¹⁷
- Baker (1981);¹¹⁸
- Dalton (1985);¹¹⁹
- Benke (1987);¹²⁰
- Ibbetson (1990);¹²¹
- Hooley (1991);¹²²
- Phang (1991);¹²³
- Kreitner (2001);¹²⁴
- Chen-Wishart (2013).¹²⁵

3. CONFUSION OVER MEANINGS - 'CONSIDERATION' & 'NOMINAL'

In few areas of law is there such confusion as in legal writings relating to the doctrine of consideration. Much of this writing is at cross-purposes since a number of the words employed do not have a commonly agreed referent. The writers - like Humpty Dumpty in Alice in Wonderland¹²⁶ - have used them according to their subjective definition. Thus, little is achieved. Indeed, the doctrine of consideration might be summarised with what Stone once observed on a number of exceptions to the rule against hearsay. The doctrine is:

¹⁰⁸ KN Llewellyn, *On the Complexity of Consideration* (1941) 41 Columbia LR 777. See also LL Fuller, *Consideration and Form* (1941) Columbia LR 799 and MR Cohen, *The Basis of Contract* (1933) 46 Harvard LR 553.

¹⁰⁹ KO Shatwell, *The Doctrine of Consideration in the Modern Law* (1954) 1 Sydney LR, vol 1, no 3, 289.

¹¹⁰ EW Patterson, *An Apology for Consideration* (1958) 58 Columbia LR 938.

¹¹¹ AT von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis* (1959) 72 Harvard LR, p 1009. See Ibid, p 1009, fn 2 for other relevant US articles.

¹¹² AG Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract* (1968) 17 ICLQ 137.

¹¹³ JL Barton, *The Early History of Consideration* (1969) 85 LQR 372.

¹¹⁴ PS Atiyah, 'When is an Enforceable Agreement not a Contract? Answer: When it is an Equity.' (1976) 92 LQR 174 ('**Atiyah 1976**'). PS Atiyah, *Consideration: A Restatement in Essays on Contract* (1986), ch 8 in PS Atiyah, *Essays on Contract* (Clarendon Press, 1986) ('**Atiyah 1986**').

¹¹⁵ GH Treitel, *Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement* (1976) 50 Australian LJ 439. See also FMB Reynolds & GH Treitel, *Consideration for the Modification of Contracts* (1965) 7 Malaya LR 1.

¹¹⁶ BJ Reiter, *Courts, Consideration, and Common Sense* (1977) 27 University of Toronto LJ 439.

¹¹⁷ BS Markesinis, *Cause and Consideration: A Study in Parallel* (1978) 37 CLJ 53.

¹¹⁸ Baker Doctrine, n 2. See also: (a) *The History of the Common Law of Contract ('Baker History')*, Ibid, pp 1099-1106; (b) New Light on Slade's Case ('**Baker Slade**'), Ibid, pp 1129- 75; (c) *Covenants and the Law of Proof 1290-1321* (1981), pp 1107-28 ('**Baker Covenants**'). Also, JH Baker, *The Oxford History of the Laws of England*, vol 6, 1483-1558 (OUP, 2003), pp 862-8 ('**Baker Oxford**') and JH Baker & SFC Milsom, *Sources of English Legal History. Private Law to 1750* (Butterworths, 1986) ('**Baker & Milsom**'). See also JH Baker (ed), *The Reports of Sir John Spelman*, SS, vol 94, pp, 286-97 ('**Baker Spelman**').

¹¹⁹ C Dalton, *An Essay in the Deconstruction of Contract Doctrine* (1985) 94 Yale LJ 1066.

¹²⁰ N Benke, *No Inefficacy arises merely from the Naked Promise* (1987) 14 Ius Commune p 1.

¹²¹ D Ibbetson, *Consideration and the Theory of Contract in the Sixteenth in Sixteenth Century Common Law*, in J Barton (ed), *Towards a General Theory of Contract* (1990), pp 67-123. See also D Ibbetson, *Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count* (1982) 41 CLJ 142 ('**Ibbetson Assumpsit**'); D Ibbetson, *Sixteenth Century Contract Law: Slade's Case in Context* (1984) 4 Oxford J of Legal Studies 295 ('**Ibbetson Slade**') and D Ibbetson, *Words and Deeds: The Action of Covenant in the Reign of Edward I* (1986) 4 Law and History Review 71 ('**Ibbetson Words and Deeds**').

¹²² R Hooley, *Consideration and the Existing Duty* [1991] JBL 19.

¹²³ A Phang, *Consideration at the Crossroads* (1991) 107 LQR 21.

¹²⁴ R Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration* (2001) 101 Columbia LR 1876.

¹²⁵ M Chen-Wishart, *In Defence of Consideration* (2013) 13 OULJ 209. See also Chen-Wishart, 'A Bird in the Hand: Consideration and Promissory Estoppel in Burrows & Peel (eds), *Contract Formation and the Parties* (OUP 2010) 89. Also, M Chen-Wishart, *Consideration: Practical Benefit and the Emperor's New Clothes* in J Beatson & D Friedmann, *Good Faith and Fault in Contract Law* (OUP, 1995) 123.

¹²⁶ M Gardner, *The Annotated Alice* (Penguin, 1960), p 269 "When I use a word," Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master - that's all.'

the lurking place of a motley crowd of conceptions in mutual conflict and reciprocating chaos.¹²⁷

In particular - when reviewing the large volume of writings on the doctrine - it is obvious that the words '*consideration*' and '*nominal*' have been used - at one time or another - in a wide variety of senses. Thus:

- '*Consideration*'. In early caselaw and legal texts, this word was, sometimes, used to refer to:

- (a) the '*reason*' or '*basis*' for something; or
- (b) the '*purpose*' or '*motive*' for something; or
- (c) a '*price*', '*payment*', '*value*', '*recompense*', '*reward*'.

These are not synonyms, but alternatives, however. Thus, the meaning of the word '*consideration*' in *legal* use was both wide and nebulous. It was - similarly - nebulous when employed in *ordinary* use. This was so in earlier times¹²⁸ and it still is today.¹²⁹ As a result, '*consideration*' was and is - in legal and ordinary use - a word without a commonly agreed referent. Thus, it is (and was) - naturally - conducive to mis-understanding and confusion, with people using it in different senses without adverting to the fact;

- '*Nominal*'. This word is, often, used in the discussion of consideration. It is, also, (often) mis-used. '*Nominal*' is usually taken as the opposite of '*actual*' (real).¹³⁰ Thus, it *represents* (or declares) something¹³¹ as opposed to *is* something.¹³² For example, actual and nominal value. '*Nominal value*' can mean two things, however: (a) of *some*, but not the actual, value - thus, it is used in a declarative (titular) or representational sense; or (b) of *symbolical* value. The latter sense has, invariably, been overlooked in legal writing on consideration. This is important, though, since the *arra* which - this article asserts - is closely connected to the concept of consideration, did not have to be of any worth at all. It *symbolised* value but it did not have to be of any value - not least because it was not part of the transaction, simply evidencing it.

In conclusion, much of the analysis on the doctrine of consideration is mis-placed since legal writers have (often) used the same terms - but in a different sense.

4. LEGAL ANALYSIS IS SELECTIVE & INCOMPLETE

Much earlier legal writing on the doctrine of consideration is also of dubious merit since it '*missed out*' whole chunks of relevant legal history. In particular:

- ***Anglo-Saxon Law, Medieval Law, Law Merchant***. Many legal writers - when analysing the doctrine of consideration - referred to Roman law but ignored the position under Anglo-Saxon and early medieval law, as

¹²⁷ J Stone, *Res Gestae Reagitata* (1939) 55 LQR 66 at p 67.

¹²⁸ e.g. JH Baxter & C Johnson, *Medieval Latin Word-List* (OUP, 1934)(*consideratio*) 'purpose c 1192; deliberation, decision (leg) 1130, c 1404; regard, consideration c 1200, 1569; consideration for a contract c 1215, 1588; - o, to give judgement (leg) 1201, 1575; to award damages (leg) 1318.'

¹²⁹ Oxford English Dictionary ('OED')(*consideration*). '1. The action of looking at or surveying with the bodily or mental eyes; beholding, contemplation. 2. The keeping of a subject before the mind; attentive thought, reflection, meditation. 3. The action of taking into account, or fact of being taken into account: regard, account. 4. The taking into account of anything as a motive or reason; a fact or circumstance taken or to be taken into account; a reason considered. 5. Something given in payment; a reward, remuneration; a compensation, equivalent. 6. Law. Anything regarded as a recompense or equivalent for what one does or undertakes for another's benefit; especially, in the law of contracts, 'the thing given or done by the promisee in exchange for the promise...It may itself be a promise. No promise is enforceable without consideration, unless made by deed. 7. Regard for the circumstances, feelings, comfort, *etc* of another; thoughtfulness for another; thoughtful kindness. 8. Estimation; regard among men, esteem; importance, consequence.' CT Onions (ed), *The Oxford Dictionary of English Etymology* (OUP 1966)(*OED*)(*consideration*) 'contemplation, survey XIV[14th century] Ch[aucer]; attentive thought XIV[14th century](Wycl[iffe] Bible); taking into account; thoughtfulness XV [15th century]; estimation; recompense, equivalent XVI [16th century]. (O)F [Old French]. - L[atin]. See also S Johnson, *Dictionary* (1st ed, 1755); N Bailey, *An Universal Etymological English Dictionary* (25th ed, 1790) and Chambers, *English Dictionary* (1876)(*consideration*).

¹³⁰ OED, n 129 (*nominal*) '3. Of the nature of, consisting in, pertaining or relating to, a name or names (in distinction to things)...4. Existing in name only, in distinction to real or actual; merely named, stated, or expressed, without reference to reality or fact.' Bailey, n 129 (*nominal*) 'belonging to a name, only in name, not real.' CT Lewis & C Short, *A Latin Dictionary* (Oxford, 1890) (*nominalis*) 'of or belonging to a name, nominal.' Onions, n 129, (*nominal*) 'pert[ains] to a name; existing only in name.'

¹³¹ Johnson, n 129 (*nominal*) '[*nominalis*, Latin]. Referring to names rather than to things; not real; titular.'

¹³² This may be seen in the case of coinage. Earl of Liverpool, *A Treatise on the Coins of the Realm* (1805), pp 132-3 'in very early times silver coins were weights, as well as coins, or, in other words, that a pound in tale of silver coins was equal to a pound weight of standard silver; and that a silver penny, which was probably the only coin then in currency, was the 240th part of a pound in weight, and was intended to contain exactly a pennyweight of standard silver; so that these coins expressed and defined the precise quantity of silver, which they were intended to represent.' The Earl claimed that Edward I (1272-1307) was the first to debase the currency since William I (1066-87). However, it is likely that the silver content - even prior to Edward I - was not as great as the declared value, together with cost of fabrication (minting).

well as the law merchant and local custom. Thus, many writings on the doctrine referred to Roman law and, then, skipped a few hundred years to refer to Glanvill (c. 1189) or to Bracton (c. 1250). Others, simply started in *media res*, in the nineteenth century (often, with an idiosyncratic definition of Pollock in 1876);¹³³

- **Elizabethan Pleading**. Little effort was made to analyse the extent to which the doctrine was a matter of Elizabethan pleading, in an age when pleading was formulaic and closely observed;
- **Ignored Tokens & the Arra (Earnest)**. A large volume of writing on the doctrine was (and is) academic. Little or no mention was (or is) made of the *practical* position. Thus, there was (and is), in much of the writing, no recognition of the part played in commercial transactions of tokens - both as a form of private currency and when used as an earnest (*arra*) to evidence the reaching of a mutual agreement. Nor, the degree to which these tokens were of nominal value or, indeed, of no value in themselves. There has also been a failure to note that all coinage post-1919 is of nominal value whereas in Elizabethan times it was of actual value (albeit, it was often debased). That is, the gold (or silver) content was the same as the declared value;
- **Law on Deeds, Commercial Paper & Tallies**. Much legal writing on consideration failed to discuss the evolution of the law on deeds (and other specialties) as well as that on commercial paper and tallies. This is important since the exceptions to the doctrine were - in practice - extensive;
- **Source of the Nile**. Many pre-20th legal writers on the doctrine of consideration analysed the law in their writings in a fashion different to that employed by legal scholars today. They, (often) had very decided views and their writing was somewhat partisan - dedicated to proving *their* view and discarding (or ignoring) anything to the contrary.¹³⁴ Others, from the 19th century onwards, were only interested in one thing. To prove *how* the doctrine originated. Thus, they sought - akin to searching for the source of the Nile - to pinpoint only one origin, discarding - from the outset - the possibility that the doctrine might have originated from a combination of factors. Or, that it may have been, originally, a matter of pleading and evidential - not substantive.

That said, it is unfair to be unduly harsh on legal writers who wrote on the doctrine prior to the 20th century. It is only from Victorian (or later) times that good translations of Anglo-Saxon law¹³⁵ - and of early London (and other local) customs¹³⁶ - have become available. Also, modern numismatic and para-numismatic studies¹³⁷ evidence how trade was conducted in Anglo-Saxon¹³⁸ and medieval times. This helps explain why consideration was not needed as a pre-requisite in times past.

In conclusion, much of the analysis on the doctrine of consideration is selective and incomplete, paying little regard to wider legal history or to actual commercial practice.

5. NATURE OF THE TOKEN

In Anglo-Saxon times, the word '*token*' was a synonym for the words '*sign*', '*symbol*', '*mark*' and '*evidence*' (the use of the word in the Bible was the same, see 6).¹³⁹

¹³³ See Pt 2, n 404.

¹³⁴ Much writing on the law merchant was of similar ilk. See GS McBain, *The Strange Death of the Law Merchant* [2016] ILR, vol 5, no 1, pp 32-151 ('**McBain Law Merchant**').

¹³⁵ See ns 180 & 315.

¹³⁶ For texts, see McBain Law Merchant, n 134, fns 42-6. This includes the *Liber Albus*, viz. in 1419, John Carpenter made a repertory (that is, a book of remembrances) of existing laws, observances, rights and franchises of the City which is generally referred to as the *Liber Albus*. This was translated by HT Riley in 1861, see HT Riley, *Liber Albus: The White Book of the City of London* (Griffin & Co, 1861).

¹³⁷ See ns 184-9.

¹³⁸ FM Stenton, *Preparatory to Anglo-Saxon England* (Oxford, 1970), p 371 'At every turn in the four or five hundred years before 1066 historical questions arise which are illustrated and sometimes, perhaps, are happily brought nearer solution when they are brought into connection with the numismatic evidence.' Quoted by R Naismith, *Money and Power in Anglo-Saxon England. The Southern English Kingdoms 757-865* (Cambridge UP, 2012), p 1.

¹³⁹ OED, n 129(*token*) '1. Something that serves to indicate a fact, event, object, feeling, etc; a sign, a symbol. *In token of*, as a sign, symbol, or evidence of. 2. A sign or mark indicating some quality, or distinguishing one object from others; a characteristic mark. 3. Something serving as proof of a fact or statement; an evidence.... 11. A stamped piece of metal often having the general appearance of a coin, issued as a medium of exchange by a private person or company, who engage to take it back at its nominal value, giving goods or legal currency for it.' Also, OED, n 129(*token*) '1. To be a token or sign of; to signify, represent, denote, mean, betoken. 2. To be a type, emblem, or symbol of; to typify, symbolise. 3. To mark with a sign or significant mark. 4. To make a sign or signs. 5. To betroth, promise in marriage. 6. *Token up*, to put up in writing, write out. Johnson, n 129 (*token*) '[*taikns*, Gothick; *tacn*, Saxon; *teycken*, Dutch] 1. A sign. 2 A mark. 3. A memorial of friendship; an evidence of remembrance.' Bailey, n 129 (*token*) 'A token (*tacen*, Sax[on] *teeken*, L[ower] S[axon] *zetchen*, Teut[onic] a sign, or mark.' Onions, n 129(*token*) 'sign, symbol, signal OE [Old English]; stamped piece of metal XVI [16th century]; quantity of press work XVII [17th century](Maxon).'

- Further, the word, '*sign*',¹⁴⁰ itself, embraced - among other things - a '*sign[ature]*'¹⁴¹ as well as a '*seal*'.¹⁴² Also, the word '*signature*' (and the means of effecting it) is relatively late. Prior to it - the word '*mark*'¹⁴³ or '*sign*' would have been used. The word '*mark*' was also a reference to money;¹⁴⁴
- The words '*token*' and '*mark*' were Anglo-Saxon,¹⁴⁵ with older Germanic roots. Tokens included tallies and coins. The word '*token*' also meant (as does a sign) a representation or symbol and, thus, *proof* or *evidence* of something. Indeed, the Anglo-Saxon verb, *tacen*, was employed in ordinary speech to mean, to '*show, demonstrate, declare or prove*'.¹⁴⁶ In modern English, the word '*token*' has a similar generic import.¹⁴⁷

In short, the words token, sign, signature, mark and evidence were (and still are) closely linked - especially in the legal sphere. As to certain forms of token employed in commercial translations in England:

- **Tally.** This form of token was a means of counting (reckoning). Initially, it was closely connected to writing.¹⁴⁸ A stick (often, of hazel) was employed to record a debt¹⁴⁹ - although stones (including jettons, see below) were also used to record debt. Deriving from the Anglo-Norman, *tailler* (to cut) and the Latin *talea* (a stick or slip of wood),¹⁵⁰ the tally was a piece of wood, notched to reflect a debt and the quantum. Split in two, one piece was held by the debtor, the other by the creditor. When placed together, they '*tallied*'. Thus, the tally was a record (that is,

¹⁴⁰ Ibid (*sign*) '2. 'A mark or device having some special meaning or import attached to it, or serving to distinguish the thing on which it is put...7. A token or indication...of some fact, quality *etc.*...' Also (*sign*) '3. to put a seal upon (something)... 4. To attest or confirm by adding one's signature...5 To affix one's signature.' ODEE, n 129(*sign*) 'gesture to convey a meaning; mark having a meaning, token XIII [13th century], division of the zodiac XIV [century], device for a shop or inn XV[century]...L[atin] *signum*, mark, token....So sign vb. [verb] mark with a sign XIV [14th century]; affix one's mark or name (to) XV [century].' Lewis & Short, n 130, (*signum*) 'In gen[eral] a mark, token, sign, indication (very frequent in all styles and periods...). 1. The distinctive sign of a division of an army...2. a sign, signal; a watchword, password... [including] D An image or device on a seal-ring; a seal, signet.' Bailey, n 129(*sign*) '[*signe*, F *signum*, L] a mark or token; footstep; representation...'

¹⁴¹ Ibid, (*signature*) '2 'The name (or special mark) of a person written with his or her own hand as an authentication of some document or writing.' ODEE, n 129(*signature*) 'person's name as authentication of a document XVI [16th century]; character...stem of L[atin] *signare*.' Bailey, n 129 (*signature*) '[signature, L] one's hand or mark set to a writing.'

¹⁴² Ibid, (*seal*) '1. A device...impressed on a piece of wax or other plastic material adhering or attached by cords or parchment slips to a document as evidence of authenticity or attestation; also, the piece of wax *etc.*, bearing this impressed device... 1b fig. A token or symbol of a covenant...'. ODEE, n 129 (*seal*) '(piece of wax for impressing) a device used in attesting a document.' G Jacob, *Dictionary* (1st ed, 1729)(*seal*) '(*Sigillum*) 'Is a little image graven or molten, or signet made use of in sealing of deeds *etc.*' Bailey, n 129 (*seal*)[*Sael*, Sax[on] *siegal*, Teut[onic], Seele, F[rench]. *Sigillum*, L[atin] the print of a coat of arms, or some other device made in wax, and set to any deed or writing; the piece of metal, *etc.*, on which the figure is engraven.' See also Baxter & Johnson, n 128(*sigillum*).

¹⁴³ Such as we still say today (especially for people who cannot write their name) '*make your mark*'. Today, the vast majority of people in the UK can, at least, sign their name. Thus, having to mark is (very) rare.

¹⁴⁴ Ibid (*mark*) 'A denomination of weight formerly employed (chiefly for gold and silver) throughout Western Europe... 2 A money of account, originally representing the value of a mark weight of pure silver...' Bailey, n 129(*mark*) 'a note, character, *etc* set upon a thing, a sign or token...'. Also, (*mark*) a silver coin anciently valued at 30s...' ODEE, n 129(*mark*, in first sense) 'A. (hist)[historical] boundary...orig [originally] as a sign OE...' (*mark*, in second sense) 'weight of gold or silver; money of account.'

¹⁴⁵ J Bosworth, *Anglo-Saxon and English Dictionary* (London, 1868)(*tacen*) 'A sign, token...' (*tacon*) 'A token, sign, inscription.' (*marc*) 'a piece of money.'

¹⁴⁶ Ibid (*tacen*) '1. 2. To draw, delineate, point out. 2. To show, demonstrate, betoken, declare, prove, predict.'

¹⁴⁷ See n 139.

¹⁴⁸ G Davies, *A History of Money* (University of Wales Press, 2002), p 50 'handwriting from its very beginnings was closely associated with...accounts. The earliest Sumerian numerical accounts consisted of a stroke for units and a simple circular depression for tens. The economic origins of writing are unequivocally confirmed by expert archaeologists. Thus Dr Oates asserts that 'Writing was invented in Mesopotamia as a method of book-keeping. The earliest known texts are lists of livestock and agricultural equipment. They come from the city of Uruk c. 3,100 BC.' Also, 'the invention of writing represented at first merely a technical advance in economic administration'. Neighbouring tribes such as the Akkadians borrowed the Sumerian system of handwriting and gradually this picture-writing or pictographic script developed into various cuneiform standards that lasted for three thousand years, and especially for certain economic documents, well into the first century AD. Numerous records exist in this script describing the activities of a number of banking houses and of prosperous merchants in Babylon and Nippur after the region became part of the Persian empire.'. The quotations are from J Oates, *Babylon* (London, 1979).

¹⁴⁹ OED, n 129(*tally*) '1. A stick or rod of wood, usually squared, marked on one side with transverse notches representing the amount of debt or payment. The rod being cleft lengthwise across the notches, the debtor and creditor each retained one of the halves, the agreement or tallying of which constituted legal proof of the debt *etc.* 2. The record of an amount due; a score or shot, an account. 3. Reckoning, score, account...6. A mark (such as the notch of a tally) representing a unit quantity or a series or set of units....' Bailey, n 129(*tally*) 'of *tailler*, F[rench] to cut or notch q.d. *bois taile*, i.e. a cleft wood] a cleft piece of wood, to score an account upon by notches, such as is given by the exchequer, to those that pay money there upon loans.' ODEE, n 129 (*tally*) 'rod of wood marked with notches recording payments XV [15th century]; reckoning, score XVI [16th century]; counterpart XVII [17th century].' Johnson, n 129 (*tally*) '1. A stick notched or cut in conformity to another stick, and used to keep accounts by.' Tallies were age old, see E Fletcher, *Tokens and Tallies through the Ages* (Greenlight Publishing, 2003) ('Fletcher'). See generally, LF Salzman, *English Trade in the Middle Ages* (Oxford, Clarendon Press, 1931), pp 25-8; RL Henry, *Contracts in the Local Courts of Medieval England* (1926), ch 5 and Davies, n 148, pp 148-51.

¹⁵⁰ R Kelham, *A Dictionary of the Norman or Old French language* (1st ed 1779 rep 1843)(*tailler*) 'to cut'. See also Davies, n 148, p 148.

evidence) of debt - although the stick, in itself, did not have any value. In medieval times, tallies were negotiated.¹⁵¹ They also comprised a form of cash and they were redeemable at the Exchequer.¹⁵² Both of these uses of the tally were helpful when coinage was scant or of dubious import. They were also a means of avoiding the sin of usury¹⁵³ - since tallies were, often, purchased for a discount on their nominal value (hiding the interest element).¹⁵⁴ Finally, they were a means for merchants to avoid carrying with them a large quantity of coins and, thus, be prey to theft. To a thief, a tally was worthless since he did not know who the holder of the other part of the tally was. Tallies could also (easily) avoid the problem of double payment.¹⁵⁵ They continued to be used generally until 1834.¹⁵⁶

- **Coin.** These are a form of token (or sign).¹⁵⁷ While the invention of coinage is very old,¹⁵⁸ coinage used in Anglo-Saxon times (at first) had an earlier basis in the Roman occupation of Britain. In England, the words 'coin' and 'coinage' were used to refer to money minted by the Crown (or under its licence) as well as to foreign currency treated as legal tender in England pursuant to a proclamation.¹⁵⁹ It was high treason to counterfeit coins of the realm (legal tender) but not to counterfeit private coins (tokens).¹⁶⁰ This was also reflected in terms of enforceability. Thus, in Elizabethan times, a large volume of tokens (mainly of copper or lead) circulated as a form of private coinage due to the failure of the Crown to mint coinage of low denomination (the Crown only minted gold and silver coins). However, this private coinage was not treated as currency of the realm. That is, as legal tender. As a result, a person could not be legally obliged to accept it and such payments could not be enforced in

¹⁵¹ Salzman, n 149, pp 25-8. Also, RR Sharpe (ed), *Calendar of Letter-Books of the City of London, Letter Book A* (1899), p 61 (in 1282, X acknowledged himself bound to pay £6 to the bearer of a tally). The Letterbooks are the records of the City of London.

¹⁵² Davies, n 148, p 151 'the *tallia dividenda* or, more simply, *dividenda*', which were initially given to tradesmen who supplied goods to the royal court, the *dividenda* being redeemable at the Exchequer, just as the later, more open system of dividend payments on government stock or bonds.' See also Statute of Rutland 1282 (Touching the Recovery of the King's Debt, see O Ruffhead, *The Statutes at Large* (1786), vol 1, pp 74-5), ss 3-7, 9 (*tallias*). Also, 5 Edw III (1331)(Ruffhead, vol 1, p 206), c 2 (rep 1863)(sealed tallies to be taken 'betwixt the purveyors and them whose goods shall be taken... tallies shall be made and sealed with the purveyors' seals of the things so taken, by which tallies satisfaction shall be made to them from whom such goods be taken').

¹⁵³ BOE were also used to similar effect. Davies, n 148, p 155. The first BOE is said to have been issued in 1156. Ibid, p 156 'According to Einzig, the first known foreign exchange contract was issued in Genoa in 1156 to enable two brothers who had borrowed 115 Genoese pounds to reimburse the bank agents in Constantinople, to which their business was taking them, the sum of 460 bezants one month after their arrival.' The reference is to P Einzig, *The History of Foreign Exchange* (1970). See also A Hingston Quiggan, *A Survey of Primitive Money* (rep. 1978). In China, it is said that citizens and businessmen in Chengdu privately used paper money (*jiao zi*) in AD 995 in business transactions, with official paper money used in 1024 in Yizhou, see *A History of Chinese Currency* (Xinhua, 1983), p 203.

¹⁵⁴ Davies, n 148, pp 147-53, 253.

¹⁵⁵ Henry, n 149, p 158 'if the debt was taken with a tally, the simplest method of avoiding double payment was to demand a return of the tally and then to break it. The demandant could not prosecute without the original tally if the tally was taken. A writing likewise could be used as a receipt, but where a written tally was taken in the first place the simplest course was to destroy it when it was paid.' See also, Ibid, pp 164-5.

¹⁵⁶ Davies, n 148, pp 148-52, 365. The Treasury tally was abolished in 1826, pursuant to an Act of 1783. Ibid, p 365.

¹⁵⁷ OED, n 129(*coin*) 'Bailey, n 129 (*coin*) 'Coin, F[rench] perhaps of *Cuneus*, L[atin] a wedge...Gr[reek] an image, because it hath the figure of the prince's head upon it; and some will have it from *cunna*, span[ish] to coin] any sort of stamped money.' ODEE, n 129 (*coin*) 'B. die for stamping money XIV [14th century]; piece of money XIV [14th century] (Ch[aucer]); coined money XIV [century](Gower).' Jacob, n 142(*coin*) '*cuna*, *pecunia*' Seems to come from the Fr[ench] *coign*, i.e. *angulus*, a corner; whence it has been held, that the ancientist sort of coin was square with corners, and not round as it now is.' Johnson, n 129(*coin*) '[by some imagined to come from *cuneus*, a wedge, because metal is cut in wedges to be coined]. 1. Money stamped with a legal impression. 2. Payment of any kind.'

¹⁵⁸ Davies, n 148, chs 1 & 2.

¹⁵⁹ Jacob, n 142(*coin*)(writing in 1729) 'Coin is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom; and this is one of the royal prerogatives belonging to every sovereign prince, that he alone in his own dominions may order and dispose the quantity and value, and fashion of his coin. But the coin of one king is not current in the kingdom of another, unless it be at great loss; though our king by his prerogative may make any foreign coin lawful money of England at his pleasure, by proclamation. Terms de Ley 136..'. The reference is to the law dictionary *Les Termes de la Ley* (last ed, 1721). See also Jacob, n 142 (*coinage*) '*Cunagium* Is the stamping and making of money, by the king's authority.' See also Coke, n 47, vol 2, p 576 (cited *Statutum de Moneta* 20 Edw 1 st 4 (1292) 'By this Act it appears, that no subject can be enforced to take in buying and selling, or other payment, any money made, but only of lawful metal, that is, of silver or gold...'). Also, Coke, n 47, vol 1, 207b (s 336 'lawful money of England, either in gold or silver, is of two sorts, viz. the English money coined by the king's authority, or foreign coin by proclamation made current within the realm.'). Also, Ibid, 208(a). See also, *Mirror of Justices*, n 45, SS, vol 7, pp 8, 11.

¹⁶⁰ Counterfeiting, impairing or clipping of the king's coin was made high treason by Treason Act 1351 (25 Edw III c 14 rep). The fact the coin was cracked or worn did not impair it. However, to clip it (i.e. to cut bits off it) was high treason since the actual value of the silver or gold was then less than the declared value. Further, clipped coins were not treated as legal currency, see 19 Hen 7 c 5 (1503, rep 1832). By 8 & 9 Will 3, c 26 (1696, rep 1832), to blanch coins (colour them) in order to make them look like gold or silver, when not, was a felony. Further, it was high treason to make any stamp, dye, mould etc for coining except at the Mint. When coins were no longer hammered but milled (i.e. given a milled edge to prevent clipping) a person could refuse the old hammered coins as not legal tender, see 9 Will 3, c 2 (1697, rep 1867). See also Jacob, n 142 (writing in 1729) (*coin*) 'Counterfeiting of the coin extends only to gold and silver coin; for the coining of farthings or half-pence, or pieces to go for such [i.e. pretending to be such], of copper, incurs a penalty of £5 for every pound weight, by stat 9 & 10 W 3, c 33 [1698, rep].'

the king's court.¹⁶¹ However, in 1613, the Crown issued copper coins and - in time - this started the process of nominality in English coinage since the base metal was not worth the declared sum (paper money was always nominal - the paper not being worth the declared sum). Since 1919, all British coinage has been nominal (excepting special issues of gold and silver coins for numismatic purposes).¹⁶² Thus, all commercial transactions involving payment in legal tender - whether coins of the realm or paper money - today, comprise nominal consideration only.¹⁶³ Even more so, are electronic payments effected by credit card or by interbank transfer (such as SWIFT) etc. They are - in fact - *evidence* of a transaction rather than the transfer of something of intrinsic value as such, being tokens (in the sense of signs or evidence) to record accounting transactions. They do not, *per se*, comprise *valuable* consideration;

- **Jetton.**¹⁶⁴ Also called counters, in early times, these were stones (or shells) which were used to count (account).¹⁶⁵ The Greeks called them *cyphers* and the Romans, *calculi* - from which latter word the English word to 'calculate' comes. They were called by the French *jettons* - from the verb, *jetter* (to throw). They were used by the Exchequer (and others, such as in monasteries) to record debts by being placed in lines on a table (or a cloth) with markings - not unlike a Chinese *abacus* in effect.¹⁶⁶ They also appear to have been used as gaming counters. Although jettons were of no value in themselves - in the absence of small value coins of legal tender - they were sometimes used as a form of private currency¹⁶⁷ (see 14(b));
- **Oath.**¹⁶⁸ The oath (a declaration in the name of a deity)¹⁶⁹ is age old. It is also a token - a *verbal* sign that a person has bound himself to do something.¹⁷⁰ In ancient times, its purport was that the oath giver delivered himself to the deity for punishment, if he broke the oath.¹⁷¹ The oath (often) accompanied the making of a promise, including an agreement. It was also (often) combined with other formalities such as the handing over of a physical token or swearing on an altar or on a religious text. The degree to which societies (including courts) accorded the oath as evidence of a person being bound depended much on the status of religious observance in that culture at any one period of time. Thus, Babylonian, Biblical, Roman and Anglo-Saxon society all regarded oaths as evidence of a person being bound morally but not legally so - a person who breached their oath was treated as one of ill fame (disgraced, *dedecus*, in Republican Rome).¹⁷² In medieval England - in part (possibly) due to the rise of

¹⁶¹ Jacob, n 142(*coin*)(writing in 1729) 'But 'tis said a payment in farthings is not a good payment. 2 Instit. 517'. The reference is to Coke, n 47, vol 2, p 517 where Coke, discussing the levying of fines (relating to land), stated that a fine was (duly) levied 'when the writ of covenant is returned and the concord [agreement between the parties] and the king's silver duly entered, this makes the land to pass...' See also, p 511 (*king's silver*). See also Coke, n 47, vol 2, p 576 (see n 159 above).

¹⁶² Fletcher, n 149, p 5 'as late as AD 1919...the last generally circulated English silver coins made from almost pure silver were minted. Queen Elizabeth II's coins are, in reality, all tokens.'

¹⁶³ For a useful review of British coinage and their weight, see Earl of Liverpool, n 132.

¹⁶⁴ T Snelling, *A View of the Origin, Nature and Use of Jettons or Counters* (London, 1769).

¹⁶⁵ *Ibid*, p 1.

¹⁶⁶ *Ibid*, p 13. The Exchequer tables in the 12th century were 10 feet by 5 feet covered by a chequered cloth - black lined with white (or green with red lined) squares. See Davies, n 148, p 148. See also S Johnson (trans), Richard, Son of Nigel, *The Course of the Exchequer* (Nelson, 1950), a translation of the *Dialogus de Scaccario*, thought to have been written c.1170s, see p xlii and pp 6-7 for the form of the Exchequer table. See also T Madox, *The History and Antiquities of Exchequer* (2nd ed, 1769 rep Greenwood Press, 1969).

¹⁶⁷ *Ibid*, p 7.

¹⁶⁸ JE Tyler, *Oaths, their Origin, Nature and History* (1834). See also J Tillotson, *The Lawfulness and Obligation of Oaths*. A Sermon preached at Kingston upon Thames, July, 21, 1681. Oaths are categorised into (a) promissory; and (b) assertory. Tillotson, p B3 'An assertory oath is when a man affirms or denies upon oath a matter of fact, past or present: when he swears that a thing was, or is so, or not so. A promissory oath is a promise confirmed by an oath, which always respects something that is future: and if the promise be made directly and immediately to God, then it is called a vow, if to men, an oath.'

¹⁶⁹ Fleta, n 44, vol 99, p 65 'An oath is an affirmation or denial of something, strengthened by swearing upon a sacred object'. See also Tyler, n 168, p 243. Tillotson, n 168, p B3 'An oath is an invocation of God, or an appeal to him as a witness of the truth of what we say.' He also noted, p B1 'an oath...depends wholly upon the sense and belief of a deity. For no reason can be imagined why any man that does not believe [in] a God, should make the least conscience of an oath; which is nothing else but a solemn appeal to God as a witness of the truth of what we say.'

¹⁷⁰ The word 'oath' comes from the Germanic (variants, including 'oth'). See also Onions, n 129 (*oath*) and Johnson, n 129 (*oath*). Linguistically (and, perhaps, etymologically) the word 'oath' may have derived from Hebrew 'oth' (token). As a token, it was verbal evidence of a person binding himself.

¹⁷¹ SM Phillips, *Treatise on the Law of Evidence* (1814), p 12 'It is calling upon God to witness what we say, and invoking his vengeance, if, what we say, be false.' Cited by Tyler, n 168, p 12.

¹⁷² See also early Welsh law, *Laws of Hywel the Good* (Hywel Da)(King of the Britons, c. 880-900), see W Probert, *The Ancient Laws of Cambria* (1823). 'If a man wish to deny a contract and another urge him to complete it, and he also deny it, the law enacts that his own personal oath will be sufficient to deny it, unless there is a counter oath.' WH Buckler, *The Origin and History of Contract in Roman Law* (1895), p 4 (commenting on the earliest Roman law) 'If an agreement had been solemnly made in the presence of the gods, its breach was punishable as an act of gross sacrilege.' He also noted that an oath was morally binding in the time of Cicero [106-43 BC] 'though it then had no legal force'. Prior to that an oath breaker may have been treated as an outcast. *Ibid*, pp 11, 12. See also CR Edmonds, *Cicero's Three Books of Offices* (1880), Book 3, p 159 'an oath is a religious affirmation; but what you solemnly promise, as if the deity were witness, to that you ought to adhere...he...who violates an oath, violates Faith,' *Ibid* 'the word *fides*, of faithfulness, is no other than a performance of what we have promised.'

professional swearers¹⁷³ - the king's court treated an agreement arising from an oral promise as too informal (a *nudum pactum*), even if accompanied by an oath(s).¹⁷⁴ English *canon* law, however (generally) treated an oral promise as binding if accompanied by a (Christian) oath;¹⁷⁵

- **Deed/Writing.** From early times, writing was evidence.¹⁷⁶ However, to identify that a specific person was bound, further evidence (authentication) was usually required. Thus, Babylonian and Biblical society used a seal to authenticate while Roman society used a subscription. And, Anglo-Saxon society used a mark such as a cross. The Normans are accredited with introducing the seal to England - although it may have been used by some Anglo-Saxon kings and important people prior to this. By c.1308, the legal concept of a deed developed - a sealed writing that was delivered.¹⁷⁷ The key component was the *seal* - itself a *token* (evidence) of being bound. The signature did not become common in England until the 16th century and, in time, it supplanted the seal in the case of an individual. Even if a writing was not by way of deed it could constitute evidence if marked by a person. Or, (possibly) even if unmarked - at least, up until c.1189 when Glanvill wrote;¹⁷⁸
- **Handshake.** This also comprised a token (evidence). The use of a handshake is recorded in the Bible - although it was used to evidence a person being bound long before then. Further, in times past, it was (likely) not a handshake in the modern form. Rather, it was a *handstrike* - slapping one palm against another - which was given to evidence that agreement had been reached.¹⁷⁹ For their part, Scandinavian (and Viking) society seem to have used a *handclasp* - the clasp of the arm up to the elbow - as opposed to a handshake or a handstrike. This also seems to have occurred in Anglo-Saxon society - at least, in the Viking part of England after the Vikings invaded and settled from 886 AD;¹⁸⁰
- **Drink to Seal the Bargain.** This also comprised a token (evidence). In Babylonian, Anglo-Saxon and medieval times, contracting parties, sometimes, drank (or feasted) together to evidence the binding nature of their agreement (also, to entertain transaction witnesses, to thank them for their assistance as well as, likely, to help them recall the event in the future). This drink to seal the bargain (often, called a '*wet bargain*' in later societies) was, often, accompanied by other evidences at the same time - such as a handshake and the giving of an oath. Indeed, the handshake and drink to seal the bargain were both forms of *arra*.

The use of tokens was central in earlier societies as *evidence* that parties had reached an agreement (*consensus*). As Patrick put it:

As a formal act of promising, covenant [contract] making involves a performative act of putting the promises into effect, of *binding the parties to their word*. The technical term for such a performative act is an act efficacious in

¹⁷³ See also Tyler, n 168, pp 43-4 (address to Henry VI [1422-71] in 1439 referring to those who made their living by 'bearing of false witness in inquests'). See also F Pollock & FW Maitland, *The History of English Law* (Cambridge UP, 1968)(**'P & M'**), vol 2, p 636 '[t]he concentration of justice at Westminster did much to debase the wager of law by giving employment for a race of professional swearers.'

¹⁷⁴ They may also have been influenced by the fact that the Bible imposed no secular penalty for breach of an oath (cf. for false witness in court). See Tyler, n 168, p 198 *et seq.*

¹⁷⁵ Even in canon law, there was something of a dichotomy, with Christ opposing giving an oath, see ns 376 & 378. Cf. St Paul, Book of Hebrews, ch 6, v 16 'Men swear by someone greater than themselves, and the oath confirms what is said and puts an end to all argument.' See also Tillotson, n 168.

¹⁷⁶ So too, in medieval England. C Kerrison, *A Common-place Book of the Fifteenth Century* (1886), 'Charters, deeds, writings 'evidences, or *mynyments* [muniments] that concern men's enheritance [inheritance]'. (*italics supplied*).

¹⁷⁷ Since paper did not reach England until the 14th century, the writing would, almost invariably, be on parchment (although stone, leather *etc* was also possible). A pre-requisite that it had to be on parchment to be a deed, does not seem to have come until much later, see n 584.

¹⁷⁸ From the Norman Conquest up until c.1189 (when Glanvill wrote), it is likely that some charters were unmarked and still had probative effect (see n 418, referring to a case in 1154). However, after Glanvill, it is likely that they had to be sealed to have much probative effect. Otherwise, they were simply an '*escrowl*' (a writing).

¹⁷⁹ SA Cook, *The Laws of Moses and the Code of Hammurabi* (Adam & Charles Black, 1903), p 209 refers to 'the striking of hands as an indication of agreement.' Ibid, p 235. Tyler, n 168, pp 104-5 maintained that, in the Bible, an oath was given between inferiors and '*hand joining*' (as he called it) was given between equals. For a handshake between kings in the Babylonian period see Oates, n 148, p 110. See also Shakespeare, King Henry V, v, 2, 134 'Give me your answer; i'faith do; and so clap hands and a bargain: how say you, lady?' King John, iii, 1, 93 'No longer than we well could wash our hands, to clap this royal bargain up of peace.'

¹⁸⁰ BS Phillpotts, *Kindred and Clan* (1913), p 220, 'Pledging by hand-clasp is a very definite feature of Scandinavian custom, and the English noun *handsel* is definitely a Scandinavian loan word. We cannot be certain that the Anglo-Saxons had not the same custom, but it is at least curious, in that case, that the only references to it in the post-Conquest borough customs are both in towns within the Danelaw.' She referred to M Bateson, *Borough Customs* (1904), SS, vol 21, pp 171-2 (fn). Ibid, p 182 referring to the Grimsby Charter (1259) c 6 'no one shall make bargains by *hand-clasp* for herring or other fish, or for corn, except burgesses of the said town; and that hand-clasp contracts shall hold unless the merchandise for which hands were clasped are of worse quality than was agreed, and of this a reasonable estimate shall be made by men worthy of credit.' (*italics supplied*). Also, to the *Laws of Edmund* (AD 939-46), see AJ Robertson, *The Laws of the Kings of England from Edmund to Henry I* (Cambridge UP, 1925), p 11, para 7.1 ('*on hand*'). See also early Welsh law, see *Laws of Hywel the Good*, n 172, p 159 'If one man make a contract with his neighbour, and place his hand in his neighbour's hand without covenantors [transaction witnesses], and one of them subsequently wish to deny it, his own personal oath will be sufficient to make the denial valid.'

form, meaning that the expression of certain words and gestures, usually established by custom (like shaking hands or signing a document), effects [i.e. brings about] the relationship between the parties.¹⁸¹ (*italics supplied*)

Further, tokens were (often) combined for added probative effect. For example - a handclasp accompanied by an oath and, then, a drink to seal a bargain - were common in Scandinavian society and the Vikings would have brought this with them when they invaded England. The evidential worth, however, of the above tokens mentioned was different in different societies. It also changed at different times. And, in the English legal context, it changed depending on the court assessing its effect. Thus, in England, there developed a hierarchy of evidence with some tokens being more important than others in determining whether an agreement (*consensus*) had been reached. Also, these tokens could play more than one role. Thus,

- ***Role - Token Symbolising the Subject Matter.*** A token could symbolise (represent) the subject matter. In early societies, land - since it was not physically deliverable - could be represented by a shoe (or a clod of earth or a knife). Such as in Biblical, Roman, Anglo-Saxon and medieval England.¹⁸² And, a deed could represent land, a movable or any other subject matter of an agreement. And, a coin could represent a bag of silver that was otherwise weighed out.¹⁸³ Thus, in barter - the fundamental basis of all contract - land (represented by a clod of earth) could be exchanged for silver. And, when coinage came on the scene, land (represented by a clod of earth) could be exchanged for a coin (representing a bag of silver);
- ***Role - Delivery of Token Symbolised being Bound.*** Primitive society only existed with immediate exchange (delivery) of one thing for another. Even though there was agreement (*consensus*), delivery of possession (*seisin*) - that is, exchange - of the subject matter was also a pre-requisite for a valid contract. However, later, delivery of the subject matter might be delayed - such as in delayed payment of the full price (or the goods). In this case, a token was used to symbolise the parties being bound even though there was delay in delivery. This was achieved by using an *arra* (there are variant spellings) - an earnest of mutual intent. The *arra* could be a coin. However, it could also be a ring, a seal, a handshake, a drink to seal the bargain *etc.* It could be of value (such as a ring or a coin of value to comprise part payment). However, it could also be of no worth whatsoever. The key thing was that delivery of the *arra* (often, in the presence of transaction witnesses and in public) comprised manifest evidence of a mutual intent to be bound. It may be noted that the word 'token' is the generic description, the *arra* is a token used in a specific context - commercial transactions.

These rather simple devices - the token (to represent subject matter) and the *arra* (to manifest an intent to be bound as well delivery of it comprising symbolic delivery of the subject matter) are the root of all trade, enabling commodities to be exchanged more easily in the first case and enabling delayed payment (credit) in the second.

- These tokens were especially useful in societies where coinage did not exist. Or, when it was in short supply for a long period (as in Anglo-Saxon times, when coinage did not exist for 200 years);
- Further, the use of an *arra* (including a seal and a tally) enabled multiple trades to be conducted without merchants having to carry large amounts of silver (or coins) on them, risking being attacked;
- More importantly, an *arra* helps explain the doctrine of consideration since - when an *arra* was used (such as a sealed deed, the *arra* being the seal) - no other consideration was necessary. *Thus, the true nature of consideration is linked to its evidencing consensus (agreement) between the parties - just like the arra.*

There are a number of texts on the nature of tokens. Some are of a general nature¹⁸⁴ and others relate to the 16th,¹⁸⁵ 17th¹⁸⁶ and 18th centuries.¹⁸⁷ Yet others concern the use of tokens in specific trades¹⁸⁸ or in particular geographical areas.¹⁸⁹

¹⁸¹ D Patrick, *Old Testament Law* (1986), p 233.

¹⁸² Thus, when the Canaanites sold land to Abraham, it was represented by a shoe (see 6(c)). A shoe also indicated that the seller was free and not a slave (possibly, women and children also did not wear shoes and, thus, it also reflected the capacity of the seller as an adult male). Further, the shoe may have, in early times, symbolised ownership of the land (by having the right to walk on it). Therefore, delivery of the shoe may have represented delivery of that right. For their part, the Romans used a clod of earth to represent land (it was not necessary for the clod to be from the land to be sold). The Vikings liked to use a weapon (a sword, knife *etc.*) to represent land - reflecting their violent disposition and the fact that they had land allocated to them for fighting alongside their chief. Rings (and knives and swords) may also have been a form of private currency in Anglo-Saxon times, see P Einzig, *Primitive Money* (1966), p 260.

¹⁸³ Silver (rather than gold, which was much rarer) was the common currency in most societies (including English societies). Prior to coinage, it was in powder form. Thus, Abraham weighed out silver, to pay for the land he sought to acquire from the Canaanites (see 6(c)).

¹⁸⁴ See e.g. (a) JRS Whiting, *Trade Tokens. A Social and Economic History* (David & Charles, Newton Abbot, 1971); (b) Fletcher, n 149; (c) L Jewitt, *English Coins and Tokens* (Swan Sonnenschein, 1886).

¹⁸⁵ e.g. E Fletcher, *Leaden Tokens and Tallies: Roman to Victorian* (Greenlight Publishing, 2005) ('E Fletcher').

In conclusion, this article considers the abolition of the doctrine of consideration. It does so emphasizing that its development as a legal concept in Elizabethan times must be considered against the backdrop of how commercial trading was effected prior to - and during - Elizabethan times. Thus, an historical analysis is appropriate.

6. CONSIDERATION IN BIBLICAL TIMES

(a) Consideration Synonymous with Evidence

Where - and when - coins came on the human scene is unclear. Possible locations often cited are China or the Middle East. When coins were first created is also unclear. It is age old and, equally, subject to speculation. However, coins were closely associated with handwriting and with numbers. Thus, numbers (strokes) made on a clay tablet - or on parchment, papyrus or a metal dump - were a means of counting (accounting) and evidence of them can be found in the Sumerian civilisation at least 3,000 BC (indeed, even earlier).¹⁹⁰ It is unnecessary, for the purposes of this article, to discuss coinage and the doctrine of consideration that far back. A good starting point is the Bible - not least, since the Bible and ecclesiastics considerably influenced Anglo-Saxon law. In the Bible, the words 'token', 'symbol', 'sign', 'mark', 'seal' and 'evidence' meant the same thing, being a translation of the Hebrew word 'oth' (pronounced 'oath').

(b) 'Token' in the Bible

When discussing tokens, Shiells (1891)¹⁹¹ referred to the Book of Genesis (written, c. 5-6th century BC). In it, God makes a covenant (that is, a pact or agreement) with Noah on bringing him out of the ark. Thus, God states - in the St James version of the Bible:

This is the *token* of the covenant [*agreement*] which I make between me and you...I do set my bow in the cloud, and it shall be for a *token* between me and the earth.¹⁹² (*italics supplied*)

The word 'token' here is synonymous with the words 'sign', 'mark' and 'seal.' Also, with the word 'evidence.'

- The Latin used in the *Vulgate* is 'signum',¹⁹³ itself, a translation of the Hebrew 'oth'.¹⁹⁴ Further, generally, 'signum' is translated as a 'mark, token, sign, indication' as well as a 'sign, signal, watchword, password';¹⁹⁵

¹⁸⁶ e.g. (a) M Dickinson, *Seventeenth Century Tokens of the British Isles and their Values* (Spink & Son Ltd, 1986); (b) G Berry, *17th Century England Traders and their Tokens* (OUP, 1988); (c) W Boyne, *Trade Tokens issued in the 17th Century in England, Wales and Ireland* (E Stock, 1889).

¹⁸⁷ e.g. (a) CR Hawker, *Druid Tokens: Eighteenth Century Token Notes from Matthew Boulton's Letters* (Brewin Books, 1996); (b) R Dalton & SH Hamer, *The Provincial Token - Coinage of the 18th Century* (1910); (c) Newmark, *Tokens in the Industrial Revolution* (Shire, UK, 1980); (d) M Phillips, *The Token Money of the Bank of England 1797 to 1816* (Effingham Wilson, 1900); (e) E Baldwin & RNP Hawkins, *Dictionary of Makers of British Metallic Tickets, Checks, Medalets, Tallies and Counters 1788-1910* (AH Baldwin & Sons, 1989); (f) J Atkins, *The Tradesmen's Tokens of the Eighteenth Century* (WS Lincoln & Son, 1892); (g) J Counter, *An Arrangement of Provincial Coins, Tokens and Medaletes issued in Great Britain, Ireland and the Colonies* (1798).

¹⁸⁸ e.g. (a) P Mathias, *Collecting Coins: English Trade Token :The Industrial Revolution Illustrated* (1962); (b) W Longman, *Tokens of the 18th Century connected with Booksellers and Bookmakers* (Longmans, 1916); (c) JY Akerman, *Tradesmen's Tokens struck in London and its Vicinity* (1849, rep Burt Franklin, 1969).

¹⁸⁹ e.g. JAD Mayne & JA Williams, *Coins and Tokens of Cornwall* (Constantine, 1985).

¹⁹⁰ Davies, n 148, ch 1 analysed the position. For China, see n 153, Yizhou, *Introduction*, 'Chinese currency has a history of 4,000 years.'

¹⁹¹ R Shiells, *The Story of the Token as belonging to the Sacrament of the Lord's Supper* (New York, 1891). Shiells noted, p 25 'A token has been exactly defined as 'a sign, mark, or remembrancer [record] of something beyond itself. A pledge that something then specified shall be done or given.'

¹⁹² Book of Genesis, ch 9, v 12. See also v 13 'I do set my bow in the cloud, and it shall be for a token of a covenant between me and the earth'. Also, v 17 'And God said unto Noah, This is the token of the covenant, which I have established between me and all flesh that is upon the earth.' The Revised Standard Version (1952) ('RSV') states: 'v 12. This is the *sign* of the covenant which I make between me and you and every living creature that is with you, for all future generations' Ibid, v13. 'I set my bow in the cloud, and it shall be a *sign* of the covenant between me and the earth.' Ibid, v 17 'God said to Noah 'This is the *sign* of the covenant which I have established between me and all flesh that is upon the earth.' The New Revised Standard Version (OUP, 1989)('NRSV') and *The Compact NIV Study Bible. New International Version* (Hodder & Stoughton, 1998) ('NIV Bible') also use the word 'sign'. See also generally, MD Schutzius II, *The Hebrew word for 'Sign' and its Impact on Isaiah 7:14.* (WIPF & Stock, 2015), pp 17, 39, 49. See also Shiells, n 191, p 25.

¹⁹³ *Biblia Sacra Vulgata* (Deutsche Bibelgesellschaft, 1994)(the 'Vulgate').

¹⁹⁴ EW Goodrick & JR Kohlenberger III, *The Strongest NIV Exhaustive Concordance* (1999) (*sign*). The word 'oth' (*owth*) was usually translated as 'sign', 'token', 'mark', 'proof', 'evidence' etc. The same applied to the Greek translation (*semeion*). See generally, Schutzius, n 192, who, p ix, noted: 'The writers of the Old Testament used the Hebrew word [ot] seventy-nine times in fourteen books.'

¹⁹⁵ See Lewis & Short, n 130.

- The word '*consideration*' - in the sense of evidence or proof - would, also, not be an inaccurate translation (i.e. 'this is the *consideration* of the covenant which I make between you and me.').

Another Biblical instance may be found in the Book of Tobit which is contained in the Apocryphal New Testament (it is thought to have been written c. 225-175 BC).

- In the story, one Tobit deposited with his friend Gabael 10 talents of silver in money bags. This deposit was evidenced by a chirograph - reflected in our modern deed.¹⁹⁶ Years later, Tobit asked his son (Tobias) to recover the money. The latter asks '*What token shall I give him ?*'.¹⁹⁷ Other translations are '*What evidence am I to give him*' or they refer to a '*sign*'.¹⁹⁸ Tobit replies that the writing (the chirograph) is sufficient evidence. The proves correct, Gabael paying up on sight of it.¹⁹⁹

There are many other references to the word '*token*' (sign) in the Bible²⁰⁰ - including that of Saint Paul in the Second Letter (Epistle) to the Thessalonians. This letter is thought to have been written c. 51 AD (though other scholars place it as late as AD 115 and not being written by St Paul). He refers to his greeting to them being written in his own hand to *evidence* that the letter was dictated by him.²⁰¹ Thus, he stated:

The salutation of Paul with mine own hand, which is the *token* in every epistle: so I write.²⁰²

More modern translations use the word '*mark*' in preference to the word '*token*' in their translations.²⁰³ Therefore, St Paul was indicating that his handwriting was the evidence by which readers could determine if the letter was by him. Thus, '*token*', '*mark*', '*sign*', '*handwriting*', '*evidence*' and '*proof*' (of authenticity) are all words used to refer to his subscription.

In conclusion, in the Bible, the words 'token', 'symbol', 'sign', 'mark', 'seal' and 'evidence' meant the same thing, being a translation of the hebrew word 'oth'.

(c) Sales & Gifts - Pre-requisites

Jewish law closely followed earlier Babylonian law. In particular, the Code of Hammurabi.

- One of earliest examples of written law yet discovered.²⁰⁴ Hammurabi was a Babylonian king who reigned from c.1792-50 BC (middle chronology);
- His Code - which is said to have antedated the laws of Moses in the Old Testament by c.1000 years²⁰⁵ - was re-discovered on the acropolis of Susa in Persia in 1901.²⁰⁶ It comprised some 282 commandments (statements of law)

¹⁹⁶ The NRSV, n 192, ch 5, v 3 'Tobit answered his son Tobias, 'He gave me his bond and I gave him my bond. I divided his in two; we each took one part [of the writing], and I put [his] one with the money. And now twenty years have passed since I left this money in trust...get back the money from Gabael.' A chirograph was a writing on parchment which was cut through the middle, one portion remaining with one contracting party and the other remaining with the other. Usually the cutting was made by indenting it (making a tooth-like cut) or by a wavy line. Thus, the two pieces could be matched up. Also, sometimes, the word '*chirograph*' was written which was cut through as part of the process of indenting. See McBain Deeds, n 35, p 33, n 34. See also Bracton, n 42, vol 2, p 109.

¹⁹⁷ Shiells, n 191, p 26 (referring to a 1584 edition of the Bible. The King James version of the Bible does not contain the Book of Tobit).

¹⁹⁸ The NRSV, n 192, ch 5, v 2 uses the word '*evidence*'. The Vulgate, n 193 uses the word '*signum*'.

¹⁹⁹ Ibid. The angel Raphael, acting as servant of Tobias, gives Gabael the bond of Tobit (presumably, Gabael then matched up that piece of the chirograph with his own to confirm its authenticity, though the Bible does not mention this). Then, ch 9, v 5 'Gabael got up and counted out to him the money bags, with their seals intact.' The seals would have been those of Tobit and Gabael.

²⁰⁰ e.g. Goodrick, n 194.

²⁰¹ Signatures were rare in Roman times. Thus, it is (most) unlikely St Paul signed the letter with his name.

²⁰² Shiells, n 191, pp 25-6, quoting ch 3, v 17.

²⁰³ The RSV, n 192, states: 'I, Paul, write this greeting with my own hand. This is the *mark* [sign] in every letter of mine; it is the way I write.' The NRSV, n 192, also refers to '*mark*'. The NIV Bible, n 192, states: 'I, Paul, write this greeting in my own hand, which is the distinguishing mark in all my letters. This is how I write.' *The Jerusalem Bible*, New Testament (Darton, Longman & Todd, 1967) states 'From me, Paul, these greetings in my own handwriting, which is the mark of genuineness in every letter; this is my own writing.' The Vulgate uses the latin word '*signum*.' See also Schutzzius, n 192, pp 52-3.

²⁰⁴ See generally: (a) WW Davies, *The Codes of Hammurabi and Moses* (Cincinnati, 1905); (b) C Edwards, *The World's Earliest Laws* (Watts & Co, 1934); (c) RF Harper, *The Code of Hammurabi* (1904, rep Law Book Exchange, 2010); (d) Daruvala, n 94, ch 28, (e) Cook, n 179; (f) MT Roth, *Law Collections from Mesopotamia and Asia Minor* (2nd ed, 1997); (g) D Charpin, *Reading and Writing in Babylon* (Harvard UP, 2010).

²⁰⁵ Hammurabi was the 6th Amorite king of the First Dynasty of Babylon, who reigned for c. 43 years. Davies, n 204, p 8 asserted that he was a contemporary of the Biblical Abraham. See also Cook, n 179, ch 1.

- 35 of which were missing - carved in the language of Babylon (that is, Akkadian) in 49 columns on a block of black diorite nearly eight feet in height. This stele is now in the Louvre, Paris.²⁰⁷

It seems clear that early Biblical commercial law contained in the Old Testament followed Babylonian law.²⁰⁸ Thus, in Biblical law, to legally enforce agreements such as sales and gifts²⁰⁹ - certain pre-requisites were essential, viz.:

(i) *Capacity*. The parties to the agreement had to have contractual capacity. Normally, persons such as slaves, women, infants and the mentally ill (madmen) had none;

(ii) *Subject Matter*. The subject matter had to be identifiable - such as land, goods, a ring, jewels, clothes *etc.* Further, the subject matter had to be capable of being subject to contract. Thus, religious temples and property were, generally, inalienable;

(iii) *Agreement - Oral or Written*. A set form of words (a *formula*)²¹⁰ was employed to indicate the exchange of promises (or *offer* and *acceptance* - the formula could be construed as either). The words also indicated the nature of the transaction. Thus, if the transfer was a gift not a sale, there were no words of payment in reply. This formula could be expressed orally or in writing. Thus, *oral* (as in the case of God and Noah) or in *writing* (a chirograph, as in the case of Tobit). As in Babylonia, it is likely that writing in early Jewish times was more common than may otherwise be thought (given the destruction of records over the centuries).²¹¹

- ***Babylonia - Contract - Writing***. In Babylonia, the writing was sealed by the parties (it was also, often, sealed by witnesses) and placed in an envelope (sealed with the sender's seal) and archived.²¹² Oaths were also (usually) given (with a curse on the breaker of the same),²¹³ and temple priests involved. The system was sophisticated²¹⁴ with land transactions involving the witnesses driving a stake into the land, to fix the boundaries.²¹⁵ Contracts did not have to be in writing.²¹⁶

²⁰⁶ It appears the pillar was originally erected in a temple at Sippara, near Bagdad, Iraq (now called Sippar, c. 30 km southwest of Bagdad).

In c. 1200 BC, an Elamite king (Shutruk-Nahhunte I) sacked Sippara and took the pillar to Susa (now called Shush, in Iran) some 200 miles away. See also Davies, n 204, pp 10-1 and Oates, n 148, p 75 (picture of *stele*).

²⁰⁷ The stele shows Shamash, the god of Justice, delivering his code to Hammurabi who stands before him (both have long beards). See Harper, n 204, *frontispiece*. The Code also contained curses against those who did not obey, or who altered, his commandments (the lord of the heavens laid a 'sin' upon him). This has considerable similarities to God handing his commandments to Moses in the Old Testament. Further, since the distance between Baghdad (where the stele was originally located) and Jerusalem is c. 540 km (335m), there would have been considerable social, and legal, interaction such that it is legitimate to assert that Mosaic law derives, in part, from Babylonian law. See also Edwards, n 204, *Preface*.

²⁰⁸ Daruvala, n 94, p 595 'Mosaic law was very similar to Babylonian law.' See also Cook, n 179 and Charpin, n 204.

²⁰⁹ Both gifts and contracts are agreements (pacts) since both require offer and acceptance. Both can also be reciprocal (i.e. reciprocal gifts). The difference is that a gift is gratuitous, arising from pure liberality and without legal compulsion. See generally, GS McBain, *Modernising the Law of Gift* [2016] ILR, vol 5, no 1, pp 254-304 ('**McBain Gift**').

²¹⁰ OED, n 129(*formula*) '1. A set form of words in which something is defined, stated, or declared, or which is prescribed by authority, or custom to be used on some ceremonial occasions.'

²¹¹ Daruvala, n 94, p 589 'In Babylonia and Assyria business was done by deed [chirograph] or bond before [transaction] witnesses, not only when the transaction took place between strangers but between members of the same family.' See also Cook, n 179, p 207. Edwards, n 204, p 17 (*Code of Hammurabi*), art 7 'If a man has bought silver, or gold, or man slave, or woman slave, or ox, or sheep...without elder [i.e. officials acting as transaction witness] or [a written] contract, or receives them in deposit, that man shall be considered a thief: he shall be slain.'

²¹² The writing was usually on clay, although they also used bronze, stone, ivory and parchment. In the case of clay, the writing was, often, sealed in an envelope on which the sender impressed his seal. Charpin, n 204, p 77. The writing itself was also sealed by the parties. Ibid, p 83 'As in all civilisations, the use of seals fulfilled three needs: 'to close (and guarantee the integrity or confidentiality of a text), to assert ownership, and to authenticate an act (by manifesting that it truly expresses the will of an individual or of a moral person).'' (quoting Metman, 1961). Ibid, p 84 'Very often, there were also the seal impressions of a certain number of witnesses, whose names were inscribed on the contract and who were in some sense guarantors of the authenticity of the act. A contract in due form, sealed by the seller, was considered unassailable in court...' Such contracts were, often, placed in reed baskets, wooden chests or earthenware jars and archived in temples and palaces. Ibid, pp 101-2, 130, 151-3. For pictures of seals used see Oates, n 148.

²¹³ Daruvala, n 94, p 591 'Contractual oaths [i.e. a set formula of words] played a great part'. Ibid, p 592 'The nature of the transaction was made clear by using the words sold, [with] money paid in full to prevent withdrawal from the contract.' See generally Charpin, n 204, ch 4.

²¹⁴ Ibid, 'The idea of contract was fully formed in the law of Babylon. Any business transaction was reduced to the form of contract and executed before witnesses and a notary, and was required to be signed. All deeds of sales, loans, *etc.*, were treated as contract.' Ibid, p 591 'There is no doctrine of consideration in Babylonian law, but the great peculiarity is the system of documentary evidence in all transactions. Written contracts were in use. Priests exercised notarial and judicial powers. Contractual oaths played a great part. The parties affixed their seals to such contracts; witnesses were required to sign their names with the date of the contract before an official who also signed; the document was filed in the public archives. Contracts were reproduced in duplicate [i.e. in the form of a chirograph].' See also Edwards, n 204, p 28 (*Code of Hammurabi*), art 104 'If a trader has entrusted corn, wool, oil, or any other goods to a retailer to trade with, the retailer shall write down the value and give it to the trader. Then shall the retailer take a *sealed* receipt for the silver given to the trader [in settlement].' Also, art 105 'If the retailer is negligent and has not taken a *sealed* receipt for the silver given to the trader, the silver that is not

- ***Biblical Law - Contract - Writing.*** Biblical law copied the use of the seal.²¹⁷ While contracts (as in Babylonia) were, initially, oral, the Book of Jeremiah (describing events c. 626 BC) reflects a movement towards written contracts of sale. He describes buying a field from his cousin for 17 shekels of silver by a writing which he signed and had witnessed (by transaction witnesses who also signed). Jeremiah then had it rolled up and sealed it (to prevent it being tampered with, as opposed to authenticating his signature).²¹⁸ He gave both the sealed version and an unsealed copy to his secretary (Baruch) in the presence of the seller and 'the witnesses who had signed the deed [i.e. the transaction witnesses] and of all the Jews sitting in the courtyard of the guard. [i.e. the elders sitting at the city gate].'²¹⁹

(iv) *Delivery.* The subject matter - or a token of it (in Biblical law, a shoe (sandal) was used to symbolically represent the land) - had to be physically handed over.²²⁰ Thus, delivery of possession (*seisin*) was required - this to avoid fraud and uncertainty;

(v) *Transaction Witnesses.* The failure to have witnesses would have invalidated the transaction as well as (often) laid a party open to an accusation of theft or false witness.²²¹ Witnesses were essential to reduce theft as well as the risk of violence, in the event of dispute. These, often, would have been professional transaction witnesses operating at the city gate or temple.²²² Probably, they attached their seal or other mark - like a modern notary,²²³

sealed shall not be carried to account.' Also, art 122 'If a man desires to deposit with another man silver, gold, or anything else, he shall exhibit all before the elders, draw up a contract, and then make the deposit.' Also, art 123 'If he has given on deposit without elders [i.e. transaction witnesses] or contract, and where he has given they contest it, there is no claim.' Also, art 165 'If a man has made a gift of [a] field, or orchard, or house, to his son, the first in his eyes [i.e. the firstborn] and has *sealed* him a tablet...'. (*italics supplied*)

²¹⁵ Charpin, n 204, p 156. Full title to a house was symbolised by driving a stake into its wall. Ibid, p 156.

²¹⁶ Ibid, p 170.

²¹⁷ NIV Bible, n 192, Book of Genesis, ch 38, v 18 'And he [Judah] said, what pledge shall I give thee? And she [Tamar] said, thy signet...'. See also Goodrick, n 194 (*seal*). Pharaoh, king of Egypt had a signet ring (Book of Genesis, ch 41, v 42) as did Xerxes, the Greek king (Book of Esther, ch 3, v 12, royal edicts issued in the name of Xerxes and 'sealed with his own ring'. See also, ch 8, v 8). So did Darius the Mede (Book of Daniel, ch 6, v 17 'the king sealed it with his own signet ring'). Jewish law copied this e.g. Jeremiah, ch 22, v 24 'As surely as I live' declares the Lord 'even if you, Jeholachin son of Jeholachim king of Judah, were a signet ring on my right hand'...). Ibid, Book of Isaiah, ch 3, v 21 (signet rings) and Book of Haggai, ch 2, v 23. See also Luke, ch 15, v 22 ('Put a [signet] ring on his finger'. The ring would have been that of the father, to indicate that the son had now the authority of the father). See also Book of Nehemiah, ch 9, v 38, 'we are making a binding agreement, putting it in writing, and our leaders, our levites and our priests are affixing their seals to it.'

²¹⁸ Cook, n 179, pp 208-9 'The transaction was put in writing, witnesses were called and the money weighed out in their presence, and they signed their names. In this case the witnesses were court officials. The purchase-deed was sealed and preserved in a receptacle and...a duplicate was drawn up.' Cook noted that 'In later Jewish times it was only occasionally that a copy of a deed was put on record...'

²¹⁹ NIV Bible, n 192, ch 32, v 9 'I bought the field...from my cousin...and weighed out for him seventeen shekels of silver. I signed and sealed the deed, had it witnessed, and weighed out the silver on the scales. I took the deed of purchase - the sealed copy containing the terms and conditions, as well as the unsealed copy - and I gave this deed to Baruch [his secretary] in the presence of my cousin... and of the witnesses who had signed the deed and all of the Jews sitting in the courtyard of the guard.' See also E Gibson, *The English Works of Sir Henry Spelman published in his lifetime together with his Posthumous Works, relating to the Laws and Antiquities of England* (1723, it was first published in 1695) ('*Spelman*'), p 233, 'Jeremiah bought the field...by writing sealed, according to the custom of their law, with the common seal, and copies thereof delivered to the parties, containing the particular manner of the sale, with the price and name of the witnesses.'

²²⁰ See n 182. Shoes were also used by way of pledge, NIV Bible, n 192, Book of Amos, ch 2, v 6 (selling the needy for a pair of sandals).

²²¹ Cf. Daruvala, n 94, p 589 *re* Babylonian law 'A contract was not valid unless it was sealed and witnessed. The sealing was accompanied by an oath. The oath ...had probably to be taken in a sacred place. The [transaction] witnesses were a body of men who could be found in the courts of a sacred place like a temple.' Edwards, n 204, p 17 (*Code of Hammurabi*), art 9 'If a man has lost anything, and finds it in the hands of another; if the holder says, 'A seller sold it me; before the elders [i.e. officials acting as transaction witnesses] I bought it,' And if the claimant says, 'I can produce witnesses who will recognise my property.' Then the purchaser shall bring the vendor who gave it him, and the elders before whom he bought it; and the claimant the witnesses recognizing his lost property. The judge shall weigh their evidence. The elders before whom the purchase was made, and the witnesses recognizing the property, shall affirm before God what they know. The seller shall be held for a thief and slain; the claimant shall receive back his lost property; and the purchaser shall receive back the money he paid from the house of the seller.' Also, art 10 'If the purchaser have not produced the seller from whom he received it, and the elders before whom he bought it; but the claimant has bought witnesses recognizing the property; then the purchaser shall be held for a thief, and slain; and the owner shall take his lost property.' Also, art 11 'If the claimant has not bought his witnesses recognizing the property, he has acted in bad faith; he has calumniated [made a false accusation]; he shall be slain.'

²²² See also ns 218 & 221. See also for Babylonian law, Cook, n 179, pp 61-2 'In the old contract tables the depositions are made before...witnesses.' Ibid, p 69 'In Babylonia witnesses appear to have formed an official class; since every act of business, legal or otherwise, had to be set down in contracts, reputed and qualified men were doubtless in frequent demand as witnesses.'

²²³ Daruvala, n 94, p 591 'an official who also signed.' Ibid, 'witnesses affixed their own seal if they could not write.' Ibid, p 592 'witnesses used their own seal.'

(vi) *Publicity*. In Babylonia, priests exercised notarial and judicial powers. Thus, such transactions would have been conducted before them in a temple or other public place - such as the city or town gates.²²⁴ In Biblical times, the city and town gates were where officials (elders)²²⁵ were stationed, to permit people to enter. Outside these gates, markets were placed²²⁶ and there were officials there who acted as the more modern equivalent of 'clerk of the market'. They witnessed market sales as transaction witnesses and they adjudicated disputes. Gifts would also have been in public - not least, to manifest the generosity of the giver. In Babylonia, a record of land transactions was kept in public archives.²²⁷ This, also, (likely) occurred in Biblical times.

As well as these pre-requisites, an *arra* (an 'earnest' in English) was, often, used.

(vii) *Arra*. Although not a pre-requisite of a contract, an earnest (Hebrew, *erab*) was a token. It made it clear that: (a) agreement had been reached and the moment *when*. Also, (b) delivery of the *arra* comprised a *symbolic representation of delivery* when actual delivery of the subject matter was not contemporaneous with the conclusion of the contract, but later. This was especially so in the context of the price/payment, whether in money or goods, since an *arra* symbolised money and was only used in business transactions.

Thus, in the Book of Genesis, Tamar asked Judith what payment he would give her to sleep with him. When he replied he would give her a goat, she asked: 'Will you give me something as a pledge [hebrew, *erabon*, earnest] until you send it [the goat]?' She requested 'your seal and cord', which he gave. This token indicated that Tamar held himself bound to deliver the goat, which he later did.²²⁸ There are also New Testament references to earnest (Greek, *arrabon*).²²⁹ The use of an earnest in contracts is to be found in Greek and Roman law as well as in Anglo-Saxon and later English law although it, also - in all of them - was not a pre-requisite as such for a contract.

In conclusion, in Biblical times, agreements such as sales or gifts required various pre-requisites and any transaction lacking them would have been treated as unenforceable (a 'nudum pactum' or empty agreement, to use Roman terminology).

- For example - on a sale of cattle, slaves or other goods - if the formula was not properly given (or transaction witnesses were not present or the sale was conducted in private) it would not be enforceable since the suspicion would be that the goods were stolen or that the act was tainted by fraud in some way;
- *Why* these pre-requisites were required in ancient times is readily understandable. There was widespread illiteracy. Also, most transactions would have been oral. Further, there were different languages and cultures involved and, thus, much risk of confusion. Finally, there was much brigandage and theft of goods. Thus, various pre-requisites were imposed to reduce these problems.

Two examples may be given of sales and gifts in Biblical times. One from the Book of Genesis, the other from the Book of Ruth (thought to have been written c. 225-175 BC).

- **Sale.** Abraham bought a field with a cave (in Hebron, Canaan, some 30km south of Jerusalem) from Ephron the Hittite, to bury his dead. The transaction was conducted in the presence of all the Hittites who had come to the gate of the city - the place where legal matters were transacted and witnessed in Canaan. The Bible states: 'So Ephron's field in Machpelah near Mamre - both the field and the cave in it, and all the trees within the borders of the field - was legally made over to Abraham as his property in the presence of all the Hittites who had come to the gate of

²²⁴ Ibid, p 593. Cook, n 179, p 58 'In Babylonia, from the earliest times, we find that the 'gate' was the place where justice was administered.' There was (likely) a temple to Kittum (God of Justice) at the gate where justice and a bureau of weights and measures were located. See Charpin, n 204, p 33.

²²⁵ NIV Bible, n 192, Book of Exodus, ch 3, v 16 (footnote) 'The hebrew for this word means [literally] 'bearded ones', perhaps reflecting the age, wisdom, experience and influence necessary for a man expected to function as an elder. As heads of local families and tribes, 'elders' had a recognised position also among the Babylonians, Hittites, Egyptians (see Ge[nesis] 50:7), Moabites and Midianites (see Nu[mbers] 22:7). Their duties included judicial arbitration and sentencing (see Dt [Deuteronomy] 22; 13-19) as well as military leadership (see Jos[hua] 8:10) and counsel (see 1 Sam[uel] 4:3).' See also Cook, n 179, p 59 'the city gate...served the purpose of a law court.' Job was an elder who sat at the gate, see Book of Job, ch 29, v 7.

²²⁶ e.g. Ibid, Book of 2 Kings, ch 7, v 1 (a *seah* of flour [about 1kg] will sell for a shekel and two *seahs* of barley for a shekel at the gate of Samaria.' Cf. Babylon, where a stele was placed in the market place indicated the price of foodstuffs. Charpin, n 204, p 234.

²²⁷ Daruvala, n 94, p 592 'A change of ownership in the case of land or house must be made by a deed [chirograph] of sale....The copy of the deed was kept in the temple archives as registration of title.'

²²⁸ NIV Bible, n 192, Book of Genesis, ch 38, v 17-8. The seal was probably a small cylinder seal used to execute clay documents, by rolling the seal over the clay. The owner wore it round his neck on a cord threaded through a hole drilled lengthwise through it. Ibid.

²²⁹ Ibid. 2 Corinthians, ch 1, v 22 and ch 5, v 5. Also, Ephesians, ch 1, v 14. Some Bible translations refer to the word 'pledge' instead of 'earnest'. However, this is incorrect since Biblical passages where goods were given to secure a loan (correctly) use the word, pledge. See also Cook, n 179, p 234, fn 1.

the city.'²³⁰ In this example, all of (i)-(vi) above, occurred. Further, since there was a sale, there was an offer ('I give you the field') accepted by payment of silver ('I will pay the price of the field. Accept it [400 shekels of silver] from me'.) - albeit this can also be construed as a promise and counter-promise. Land - not being physically transferable - would have been symbolically represented by Ephron handing over a token to Abraham. Although not specifically mentioned, this was, probably, his shoe;²³¹

- **Gift.** When a kinsman of Elimelech gave Boas a parcel of land belonging to him, he took off his sandal and give it to Boas in the name of *seisin* of the land (after the manner in Israel) in the presence of witnesses.²³² Here, the land was represented by a sandal. There was no reciprocity. However, reciprocity could occur in the case of gifts. For example the Queen of Sheba gave king Solomon '120 talents of gold, large quantities of spices, and precious stones.' For his part, he gave her 'all she desired and asked for, besides what he had given her out of his royal bounty.'²³³

In conclusion, barter (also, called exchange of goods),²³⁴ sale (an exchange of goods for money) and gift were only enforceable if certain pre-requisites were observed. Further, the legal requirements in Biblical times for barter, sales and gifts were identical in most features. Thus:

- all required a formula to indicate offer and an acceptance (or a promise and counterpromise - I doubt there would have been jurists around at that time to quibble over how the formula could be construed) as well as to identify the nature of the transaction in question (gift, barter, sale);
- all required a subject matter - one capable of being the subject of a contract (that is, identifiable and alienable). This could be actual or a token by way of a symbolic representation - such as a sandal to represent land.²³⁵ Further, the token could be of *actual* or *nominal* value. For example, gold or silver (i.e. actual value) or something of less (or no) intrinsic worth in itself, such as a writing (a chirograph) or an *arra*;
- the subject matter (or a token of it) had to be delivered;
- all required evidence - this being either oral or in writing;
- all required transaction witnesses;
- all had to be conducted in public (in the case of barter and sales, in 'open market');
- all could involve reciprocity (although a gift was, normally, unilateral).

However, a gift was (easily) distinguishable from a sale - just as barter was (easily) distinguishable from sale, the latter not being an exchange of goods but payment of money for goods.

- The formula in all three was different, reflecting the different *intention* of the parties. Thus, in the case of the gift of a field to Boas, there was no intention to trade (or, to use the older word, no intention to 'treat'). As a result, Boas did not employ the formulaic reply 'Listen to me, I will pay the price of the field.'

(d) Handshake as Arra

While a formula was used in the case of certain contracts such as barter, sale and gift it seems that - for other contracts - an oral agreement was sufficient with a handshake. The handshake was a form of *arra*.

²³⁰ NIV Bible, n 192, Book of Genesis, ch 23, vv 17 & 18. Ephron stated what was, likely, the formulaic language 'Listen to me; I give you the field, and I give you the cave that is in it. I give it to you in the presence of my people [i.e. the transaction witnesses]. Bury your dead.' Abraham 'Listen to me, if you will. I will pay the price of the field. Accept it from me so that I can bury my dead there.' Ephron then quoted the price (400 shekels of silver) and 'Abraham agreed to Ephron's terms and weighed out for him the price he had named in the hearing of the Hittites: four hundred shekels of silver, according to the weight current among merchants.' This wording also reflects offer ('I [will] give [or sell]') and acceptance (hebrew *laqach* - literally 'take').

²³¹ See n 182.

²³² NIV Bible, n 192, Book of Ruth, ch 4, v 7 'Now in earlier times in Israel, for the redemption and transfer of property to become final, one party took off his sandal and gave it to the other. This was the method of legalising transactions in Israel.' See also Coke, n 47, vol 1, 49b (s 60).

²³³ Ibid, I Kings 10, v 19, 13.

²³⁴ See e.g. NIV Bible, n 192, Book of Genesis, ch 47, v 16 (livestock exchanged for food).

²³⁵ Goods could also be symbolically represented when in writing, such as (in Sumerian times) various strokes to represent the number of animals.

- It bound a person. Also, delivery of the handshake (hand strike) comprised the symbolic representation of the handing over (delivery) of the subject matter - as any other *arra* did.²³⁶ It was also more convenient. A person might not have a coin or other token available in the desert, but his hand, always. Further, the handshake had no intrinsic value and it remained with the shaker. In the case of other *arras* - they were (generally) returned on completion (such as Judith returning the seal to Tamar after receiving the goat);
- The Bible provides instances of the handshake in a legal context such as to evidence the entering into of a treaty or when acting as a surety (guarantor).

It may also be noted that references to the hand (hebrew, *yad*) in the Bible, often, constituted a token (that is a, symbol or sign) to represent power as well as *possession*. Therefore, to shake the hand was to deliver something into the power (possession, *seisin*) of another - including one's help or employment. It would have, often, been accompanied by a religious oath.²³⁷

- **2 Kings.** In this Old Testament book (said to have been written in the Babylonian exile period, c. 550 BC), Jehu seeks to kill the family of Ahab. In his chariot he meets Jehonadab on his way to meet him. '*Jehu greeted him and said, 'Are you in accord [agreement], as I am with you ?*'²³⁸ '*I am*' Jehonadab answered. '*If so,*' said Jehu, '*give me your hand*'. *So he did...*'²³⁹
- **Ezekiel.** In this Old Testament book (which contains certain visions of Ezekiel in the period 593-571 BC, though it may not be of that date) the king of Babylon made a treaty with a member of the royal family in Jerusalem and required the latter to give an oath to keep it. The latter, later, broke his oath. God indicated that, in punishment, the latter would die in Babylon (in exile) stating: '*He despised the oath by breaking the covenant [agreement]. Because he had given his hand in pledge and yet did all these things, he shall not escape.*'²⁴⁰
- **Ezra.** In this Old Testament book (thought to have been written c. 399 BC), the descendents of Jeshua and his brothers '*all gave their hands in pledge to put away their [foreign] wives*'²⁴¹
- **Proverbs.** In this Old Testament book (an anthology of wise sayings of uncertain date), reference is made to a person guaranteeing another's debt (or other obligation). That is, acting as a surety. Thus, proverbs included the following statements:

(i) '*My son, if you have put up security for your neighbour, if you have struck hands in pledge for another...*'²⁴²

(ii) '*He who puts up security for another will surely suffer, but whoever refuses to strike [shake] hands in pledge is safe.*'²⁴³

(iii) '*A man lacking in judgment strikes hands in pledge and puts up security for his neighbour*'²⁴⁴

²³⁶ Ibbetson Words and Deeds, n 121, p 84, in the English medieval context, stated 'Local custom...shows that a promise might be held binding without a deed, but still some form was apparently essential, usually in the form of a handshake (perhaps the vestigial remains of the passing of a *festuca* or pledge); in some areas the practice was to finalise an agreement with a drink, and the giving of earnest money - *arrha* - and its acceptance by the promisor had a similar function.' It is asserted that the deed (*viz.* the seal), a handshake, a *festuca* (*tally*), a *wed* (gage or pledge), a ring (including a signet ring and a wedding ring) as well as the giving of earnest money (including a God's penny) were all *arras* - tokens to evidence that a party intended to be legally bound, as well as their delivery symbolically representing the delivery of the subject matter of the agreement on the part of the transferor. See also HK Lucke, *Striking a Bargain* (1962) 1 Adelaide LR 293 (who, however, failed to note the handshake(strike) was, at least, as old as Biblical times and that it comprised an *arra*) and Henry, n 149, p 228. Also, H Adams *et al*, *Essays in Anglo-Saxon Law* (1905), p 190 'the Anglo-Saxon *wed*; being derived from the root *vidian* (*obligare*), it signified the means of legally binding the agreement of the parties.'

²³⁷ For oaths in the Old Testament see Tyler, n 168, p 97 *et seq.* In giving the oath the hand was, sometimes, lifted up or a hand was placed close to the thigh. Ibid, pp 97-113.

²³⁸ Literally, the translation is 'Is your heart right, as my heart is with your heart?'. See Tyler, n 168, p 105.

²³⁹ NIV Bible, n 192, Book of 2 Kings, ch 10, v 15.

²⁴⁰ Ibid, Book of Ezekiel, ch 17, v 18. The word '*pledge*' is not apt since he was not acting as a surety. Thus, given his hand '*in agreement*' might be better. For the treaty oath in the case of Babylonia, see Charpin, n 204, pp 164-7. See also Tyler, n 168, pp 105-6 who also states 'Diodorus Siculus [a Greek historian, who flourished during the 1st century BC] says...the most binding of all pledges among the Persians was joining of hands.' The right hand was probably given.

²⁴¹ Ibid, Book of Ezra, ch 10, v 18. The word '*pledge*' is not apt since they were not acting as sureties. Thus '*gave their hands in agreement*' might be better.

²⁴² Ibid, Book of Proverbs, ch 6, v 1.

²⁴³ Ibid, ch 11, v 15.

²⁴⁴ Ibid, ch 17, v 18.

(iv) 'Do not be a man who strikes hands in pledge or puts up security for debts; if you lack the means to pay, your very bed will be snatched from under you.'²⁴⁵

In conclusion, the handshake (handstrike)²⁴⁶ evidenced an agreement having been reached (and the time). It also comprised a symbolic representation of delivery of the subject matter. One party 'delivered' his hand to the other who accepted it. Whether a handshake was intended to be legally enforceable would have been determined from the circumstances.

(e) Drinking to Evidence an Agreement

In Babylonian times, kings - when effecting an alliance (treaty) - often performed a symbolic gesture, such as drinking wine (or beer or other liquor) or eating together.²⁴⁷ The idea was that a violator would be poisoned or otherwise cursed by the gods if he reneged on what he had agreed. The same may be found in the New Testament when St Paul referred to such a curse (drinking and eating evidencing a covenant made with the Lord);

Whosoever shall eat this bread, and drink this cup of the Lord, unworthily, shall be guilty of the body and blood of the Lord...For he that eateth and drinketh unworthily eateth and drinketh damnation to himself.²⁴⁸

In Biblical times, the Jewish parties may not have drank alcohol (or feasted) to seal the bargain, since Nazirites (those who consecrated themselves to God) were forbidden wine or other fermented drink.²⁴⁹

In conclusion, like a handshake (and, often, accompanying it) the custom of drinking to seal (i.e. to 'wet') a bargain is to be found in Biblical law - as well as in Anglo-Saxon and medieval law.

(f) Conclusion

On considering all the references to the words '*token*', '*mark*', '*sign*', '*signature*' and '*evidence*' in the Bible, it seems clear that these words were used as synonyms. Indeed, they also embraced words such as a '*signal*', '*password*', '*watchword*' or a '*religious talisman*.'²⁵⁰

- ***Token - Evidence of Value.*** Thus, the word '*token*' was a generic term employed to refer to '*evidence*.' These tokens might have an actual (that is, an intrinsic, value) or they might not. A token in the form of a coin with a number of account stamped on it would (generally) have an actual value - in that the gold (or silver) content of the coin reflected its declared value (albeit, coinage in those times was subject to debasement). Thus, it was '*valuable*' consideration - to use an expression in English law in later times - being legal tender having an intrinsic value. However, it might not. For example, the chirograph of Tobit (on parchment) - or the signature of St Paul - had no intrinsic value *per se*. It was of nominal value. So too, a handshake. This was to be the same under Roman law, where sticks of no value were used (see 7(d));
- ***Token - Representational.*** Tokens could also symbolically represent things. For example, a sandal, in Biblical times, could represent land. Thus, delivery of it constituted symbolic delivery of the subject matter it represented. The hand also could be a token to symbolically represent delivery, when employed in the form of a handshake (handstrike).

²⁴⁵ Ibid, ch 22, v 26.

²⁴⁶ The handstrike was also used to effect sales in Roman law (see 7(c)) and in English local customs, such as striking an animal with a hand (or stick) to evidence agreement and delivery. Or, striking the table with a gavel (or hammer) at an auction.

²⁴⁷ Charpin, n 204, pp 159-63. Transaction witnesses were also party to this, the liquor and food, doubtless, helping them to later recall. Slitting the throat of a donkey (likely, a sacred animal) was also utilised. Tyler, n 168, p 127 'One of the most ancient forms of oath, either in Greece or Rome, was that of slaying an animal, very generally a swine, and imprecating the curse of heaven, in case of falsehood, to fall as inevitably on the perjured head, as death was the fate of that victim.' Homer, *The Iliad* (Penguin Classics, 2003), p 53, shows the early Greeks giving oaths and then spilling wine from a cup with the imprecation 'Zeus, greatest and most glorious, and you other immortal gods! May the brains of whichever party breaks this treaty be poured out on the ground as that wine is poured, and not only theirs but their children's too; and other men possess their wives.' Buckler, n 172, p 14 'The sacrificial wine seems originally to have added force to the oath by symbolising the blood which would be spilt if the gods were insulted by a breach of that oath.'

²⁴⁸ NIV Bible, n 192, 1 Corinthians ch 11, vv 27 & 29. See also Numbers, ch 5, v 24 (requiring a woman to drink water, to test for an unfaithful wife). See also Tyler, n 168, p 155 and Charpin, n 204, p 163.

²⁴⁹ Ibid, Book of Numbers, ch 6, v 3 'If a man or woman wants to make a special vow, a vow of separation to the Lord as a Nazirite, he must abstain from wine and other fermented drink...'

²⁵⁰ Shiells, n 191, p 27 'In all ages, and among all nations, there was a constant endeavour to invent a suitable emblem which would mark its possessor as the votary of some special religion, and reveal him, either openly or secretly, to his fellow believers. Among such symbols may be specified amulets, talismans, *sacrabaei*, phylacteries, Gnostic gems and scapularies.'

As for agreements (contracts) they could be oral or in writing. In the case of exchanges, sales and gifts certain legal formalities were required for them to be enforceable (actionable). If the agreement lacked these it was not legally enforceable. It was a '*nudum pactum*' - an empty (naked, invalid) agreement. However, there was no doctrine of consideration in Biblical law - no such pre-requisite for the enforceability of a contract.²⁵¹

In conclusion, in Biblical times, 'consideration' meant 'evidence' (synonyms being a token, mark, sign). There was no doctrine of consideration.

7. CONSIDERATION IN GREEK AND ROMAN TIMES²⁵²

In Biblical times, the English doctrine of consideration did not exist and '*consideration*' would have meant no more than '*evidence*'. In Greek and Roman law, the position was the same. As in Biblical times, the Greeks and Romans also used tokens - including in a commercial context.²⁵³ They also had pre-requisites in respect of contracts but there was no pre-requisite equivalent to the doctrine of consideration. In respect of these matters:

(a) Use of Tokens

The Greeks and Romans adopted earlier human practice in respect of tokens, using them for similar functions.

- Such tokens could be of value. For example, coins of legal tender - which might be described as '*public*' coinage. In Roman law, this resulted in a distinction between barter (the exchange of goods) and sale.²⁵⁴ Tokens could also comprise a '*private coinage*' - designed to have some value in a more restricted sense - albeit, they were not legal tender as such. Or, they might have no intrinsic value at all, such as a password, a signal or a signed (or marked) letter.

All these comprised *evidence*, being the authentication of something. Fletcher noted:

archaeologists digging in Greece have found numerous tokens made from bone, terracotta, lead and bronze that seem to have been used as tickets of admission to official functions, religious ceremonies and other gatherings. Dozens of lead tokens on display in an Athens museum date from the 4th century BC, and are decorated with images including bows and arrows, cows, dolphins, and crossed torches, as well as lettering. They have been interpreted as safeguards against loss of pay issued to poorer citizens who had to attend court on official business. An excavation at the ancient Greek site of Kamarina uncovered 150 lead tokens bearing citizens' names. They seem to have been issued as lottery tickets to men hoping to win election to municipal office. And in the British Museum there are some small lead tokens bearing images of comedy and tragedy masks. They date from the 3rd century BC and were probably used as entrance tickets to Greek theatres.²⁵⁵

²⁵¹ Daruvala, n 94, p 596 'There is no doctrine of consideration in Jewish law.' Ibid, p 591 'There is no doctrine of consideration in Babylonian law...'

²⁵² See generally, (a) TC Sandars, *The Institutes of Justinian* (Longmans, 1962 imp); (b) WW Buckland, *A Text-book of Roman Law from Augustus to Justinian* (Cambridge, 1921); (c) WW Buckland & AD McNair, *Roman Law & Common Law. A Comparison in Outline* (2nd ed, revised by FH Lawson, Cambridge, 1952); (d) AM Pritchard, *Leage's Roman Private Law* (Macmillan, 1961); (e) HF Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge UP, 1952); (f) A Borkowski & P du Plessis, *Textbook on Roman Law* (3rd ed, 2005); (g) J Muirhead, *The Institutes of Gaius and Rules of Ulpian* (Edinburgh, 1895); (h) RW Lee, *The Elements of Roman Law* (Sweet & Maxwell, 1946 rep); (i) F de Zulueta, *The Roman Law of Sale* (Clarendon Press, 1957); (j) A Watson (trans), *The Digest of Justinian*, University of Pennsylvania Press (1985); (k) R Zimmermann, *The Law of Obligations* (OUP, 1996); (l) M Mauss, *The Gift* (trans. WD Halls, 1997); (m) de Zulueta, *The Institutes of Gaius* (Oxford, Clarendon Press, 1958); (n) Buckler, n 172. See also DM Walker, *The Oxford Companion to Law* (1980).

²⁵³ When looking at the origins of Roman law, the observation of the German jurist Ihering (1818-92) - quoted by P & M, n 173, vol 1, p 1 - that one should study Babylonian law, applies.

²⁵⁴ De Zulueta, n 252, p 1 (quoting the Roman jurist, Paul) 'Sale is the exchange of a thing for money. Till money was invented, there could only be barter; as soon as money was invented, there was sale, the precise object of money being to serve as a medium of exchange.' See also Watson (*Digest of Justinian*), n 252, vol 2, p 55, citing book 18, title 1.1 pr 'Paul, Edict, book 33: All buying and selling has its origin in exchange or barter. For there was once a time when no such thing as money existed and no such terms as '*merchandise*' and '*price*' were known; rather did every man barter what was useless to him for that which was useful, according to the exigencies of his current needs; for it often happens that what one man has in plenty another lacks. But since it did not always and easily happen that when you had something which I wanted, I, for my part, had something that you were willing to accept, a material was selected which, being given a stable value by the state, avoided the problems of barter by providing a constant medium of exchange. That material, struck in due form by the mint, demonstrates its utility and title not by its substance as such but by its quantity, so that no longer are the things exchanged both called wares but one of them is termed the price.' For the history of barter see also, Davies, n 148, p 9 *et seq.*

²⁵⁵ Fletcher, n 149, pp 11-2. E Fletcher, n 185, p 10 'The Romans...employed *tesserae* in a number of ways: for the small stone or glass cubes and tiles used to make mosaics; for dice and playing pieces in board games, for things not unlike Victorian calling cards (*tessera hospitalis*); for what we might nowadays call meal tickets (*tesserae frumentariae*); for pieces used as token money given to deserving poor...(*tesserae mummariae*); and even for the password used by soldiers to mark friend from foe before going into battle (*tessera militaris*).' Publicly issued tokens were also employed for distributions of corn, games, veneration, circuses and gifts and private tokens for guilds, bathhouses,

As for Roman tokens (*tesserae*)²⁵⁶ Shiells noted:

Roman *tesserae*, or tokens, were freely used for identifying those who had been initiated into the Eleusinian and other sacred mysteries. They were given to the victors at the public games, as vouchers that they were, for life, the wards of the state. They were given to poor citizens as an order on the authorities for a certain amount of grain. A *tessera nummaria* performed the functions of a modern bill of exchange, or as in the case of Tobit, of a note of hand [actually, a chirograph evidencing a deposit of money and an obligation to repay].²⁵⁷ The *tesserae convivales* must have been nearly the same as our invitation cards to a party, and were handed to the slave who kept the door at the banqueting house...²⁵⁸ More sacred than all were the *tesserae hospitales* which were used between families bound together by the closest ties of interest and love. Such a *tessera* gave the holder a claim on the protection of all those who knew its secret meaning. The homeless and wayworn wanderer was admitted into the bosom of the allied household and had all his wants supplied if he could show (even though it was years before) that their respective forefathers had exchanged the *tesserae* of concord and friendship.²⁵⁹

Thus - as in the Biblical period - in Roman times, tokens were *evidence* of something. This might be the right to membership of a religion entitling them to participate in certain mystic rites. Or, entry into a house for a banquet. Or, evidence of identity for securing certain commercial benefits - such as a right to a grain allowance. Like more modern BOE and promissory notes, tokens could, also, constitute evidence of a debt. However, the token did not need to have any intrinsic value.

- The widespread use of tokens in Greek and Roman society is also understandable. Most people were illiterate. Thus, writing was not common (including signing one's name). There were also many different languages to contend with in these polyglot nations. Further, coinage was not widespread. Thus, a huge amount of trade was by barter;
- And, when coinage was used, it was (often) not of actual value but of nominal value since Roman (and Greek) coins²⁶⁰ were subject to frequent debasement throughout their long history²⁶¹ - debasement being the result of devaluation or adulteration of the coinage.²⁶² Therefore, given the possibility of counterfeit and debased currency, it is to be expected that ordinary people often avoided it by - in effect - creating an alternative (private) currency using tokens.

In conclusion, tokens were in widespread use in Greek and Roman times, similar to Biblical times.

brothels, inns, by boat operators, fishermen, pack-horse teams, livestock markets and workshops. Ibid, p 12. They also seem to have been used for soldier's pay in, at least, Roman Egypt. See, Ibid, p 12 and JG Milne, *The Lead Token Coinage of Egypt under the Romans* (Taylor & Walton, 1908).

²⁵⁶ Lewis & Short, n 130 (*tessera*) '1. Most frequently a die for playing....2. In milit[ary] lang[uage].., a square tablet on which the watchword was written, a watchword, parole, countersign. 3 *tessera hospitalis*, a tally, token, which was divided between two friends, in order that, by means of it, they or their descendents might always recognize each other.... IV. A square tablet or block, a checker for the construction of pavements, ornamenting garments etc... V. A token, ticket, billet for the distribution of corn or money. '

²⁵⁷ See ns 196-9.

²⁵⁸ Shiells, n 191, p 29. Ibid, p 115 'the Roman use of the token as a *tessera militaris*, on which the soldier's watchword was engraved, and without which, no one was permitted to pass.'

²⁵⁹ Ibid, p 31. Fletcher, n 149, p 12 'The Romans used the word *tesserae* to refer to tokens of bone, ceramic, lead and bronze. These *tesserae* circulated throughout the Roman world, nowhere more prolifically than in Rome itself where hundreds of thousands of plebeians and other free but impoverished citizens benefited daily from bread handouts. No emperor dared to end the custom and risk the wrath of the mob, but possession of a bread token was always part of the social contract...*tesserae* were just as common-place in the Roman circus industry - as entrance tickets to the games, as brothel tokens, as receipts for issues of weapons to gladiators, and as part of the massive gambling frenzy that gripped the entire city when gladiators engaged in mortal combat.'

²⁶⁰ Pritchard, n 252, pp 352-3, stated that the introduction of coinage into Rome 'probably did not occur until 289 BC.'

²⁶¹ Davies, n 148, p 95 noted that 'Augustus (30 BC to AD 14) carried out a thorough reform of the coinage system, issuing a new gold aureus at 42 to the pound weight, and a half-sized gold quinarius at 84 to the pound as well as a large silver denarius, also at 84 to the pound, with 25 denarii being worth 1 aureus or 100 sesterces. Both gold and silver coins were practically pure.' Ibid, p 97 'By AD 250, however, the silver content of the coins was down to 40 per cent....and by AD 270 the silver content had fallen to 4 per cent or less.' By the fall of Rome to the Visigoths in [AD] 410 inflation had wholly eroded the value of the silver currency. Ibid, p 108.

²⁶² Ibid, p 171 'Debasement could occur either through making coins of the same nominal value lighter, e.g. the number of pennies minted from a given weight of silver, which was a simple 'devaluation'; or more drastically and deceitfully by mixing cheaper metal with the precious metal, i.e. 'adulteration'; or, of course, a combination of these two methods.' Ibid, p 198 'debasement has the three following possible elements: first the crying up, or calling up, of the coinage, which means simply giving new coins, which in all essentials are the same as the previous issue, an officially decreed higher nominal value; secondly there is the not logically dis-similar method of making coins smaller or lighter, though of the same officially designated values as previously and out of precisely the same purity of metallic content; thirdly, there is the process of making the metallic content of the coins out of cheaper metals than were previously used and officially attempting to enforce their acceptance as if they were issued in the previously unadulterated form.'

(b) Roman Law - Enforceability of Contracts

Roman law employed a 4 fold classification of contracts²⁶³ and, in later Roman times, most contracts would have been in writing.²⁶⁴ Further, in Roman law:

- writing was (generally) *evidential* rather than *dispositive* in nature;²⁶⁵
- writings would not usually have been signed²⁶⁶ or sealed (wills excepted)²⁶⁷ by the contracting parties. Nor, indeed, written by them. Instead, the document would have been written by a secretary or professional scribe and 'signed' by a party by way of the subscription of a farewell phrase (such as St Paul used, see **6(b)**);²⁶⁸
- writings would (often) have been sealed by transaction witnesses who, later, could testify in respect of them - although witnesses were not a pre-requisite to a valid contract.²⁶⁹

Thus, Roman law was different - in respect of writing - to early Biblical law. In the case of the former, the writing was subscribed by a party adding a phrase (a subscription).²⁷⁰ In the case of the latter the writing was sealed (and, in later times, signed at times). However, neither used signatures as such. Both, however, used transaction witnesses who (often) also sealed the writing. Further, both would (often) have used professional scribes to write. As for agreements under Roman law:

- if they did not fall with certain privileged categories - or there was no legal ground (cause) to assign it to such a category - it was not legally enforceable (actionable). It was termed an empty (invalid) agreement;

²⁶³ Borkowski, n 252, p 254 'A contract can be broadly defined as an agreement that is enforceable at law. Gaius [i.e. *The Institutes of Gaius*] classified contracts into four categories, and Justinian [in his Digest] adopted his basic scheme. These categories were differentiated according to the source of the obligation: (i) consensual contracts: the obligation arose simply from the agreement of the parties; (ii) verbal [oral] contracts: the pronouncement of particular words in a set form created the obligation [i.e. *stipulatio*]; (iii) contracts *re*: the delivery of a *res* created the obligation, e.g. loan, deposit; (iv) contracts *litteris* ('by written record'): originally the obligation arose from an entry written in a ledger, although by Justinian's time its source was simply a written acknowledgement of a fictitious loan. In the consensual contracts agreement alone sufficed, but in the other categories some extra ingredient was necessary.' As Borkowski also noted, such a classification was, actually, unsatisfactory since it did not take account of other agreements that undoubtedly had a contractual effect such as pacts and innominate contracts. See also Muirhead, n 252, p 208 *et seq* (quoting Gaius) 'let us consider [obligations] that arise from contract. Of these there are four *genera*; for an obligation is contracted either by thing done, by [spoken] words, by writing, or by consent.' See also Lee, n 252, pp 278-81.

²⁶⁴ See also Borkowski, n 252, p 262. Jolowicz, n 252, p 428 'Early Roman law used writing very little, but it is clear that, under Greek influence, legal documents had become common before the end of the republic...though there is little evidence about consensual contracts, it can hardly be doubted that in important cases they were also generally reduced to writing, or at least that they were confirmed by a stipulation which was written down.'

²⁶⁵ Jolowicz, n 252, p 431 'It is a commonplace of legal history that the earlier use of writing is purely evidentiary, and Roman law forms no exception to the rule...Only in two cases did the civil law develop a form of writing which was in any way dispositive. One case is the very peculiar '*literal contract*', and the other the *mancipatory will*....' Cf. p 435 'In the post-classical period the influence of Greek ideas concerning the effect of writing was to go much further, especially in connection with the registration of documents and written forms of conveyance.'

²⁶⁶ Ibid, p 430 'it must be understood that the signature, as we understand it, was unknown. That is to say, there was no principle that the appending of a person's name in his own handwriting constituted the adoption by him of the document to which it was appended. If, however, a document were written in whole or in part by the person to be charged under it, its authenticity would be better evidenced than if it were wholly in someone else's handwriting. Hence arose the practice of adding a short phrase indicating adherence to a document written by someone else...'

²⁶⁷ Ibid, 'Sealing by the party was also one way in which a document might be executed...but it was not, so far as we know, ever necessary for the validity of a document, and it gradually lost its importance to the signature.'

²⁶⁸ For example, *epistulae* (letters) from the Roman emperor to officials would have ended with a farewell. As Jolowicz noted, n 252, p 378 such 'were prepared in the department *ab epistulis*, and, just as to-day a man signs a letter which may be written for him by his secretary, so this '*farewell*' was written by the emperor himself, for the ancient signature does not, like ours, consist of the name merely, but of a phrase to which the name may or may not be added.'

²⁶⁹ Jolowicz, n 252, p 430 'sealing as a method of execution by the party must, of course, not be confused [with] the sealing by witnesses which serves the purpose of enabling them when called upon to recognise their seals and to testify that the document in question is one which they saw executed. Failure to acknowledge one's seal was an offence. For the purpose of identification the name of each witness was written (in the genitive) opposite his seal.' For the early use of 5 transaction witnesses, see Buckler, n 172, p 27 ('the witnesses approved the transaction as a whole, and vouched for it being properly and fairly performed'). Also, p 94 (stipulation required no witnesses).

²⁷⁰ For the later Roman law, Sandars, n 252 (*Institutes of Justinian*), p 362, book 3, title 23 'where there is a written contract, we have enacted that a sale is not to be considered completed unless an instrument of sale has been drawn up, being either written by the contracting parties, or at least signed [subscribed] by them, if written by others; or if drawn up by a *tabellio* [notary] it must be formally complete and finished throughout; for as long as any of these requirements is wanting, there is room to retract, and either the buyer or seller may retract without loss.' [this also assumes that no earnest has been given].

- these categories, and causes, did not involve any pre-requisite of a benefit or detriment - unlike the English doctrine of consideration,²⁷¹
- thus, when Roman law stated *ex nudo pacto non oritur actio* (an empty or naked agreement does not give rise to an action) this comprised no reference to consideration as a pre-requisite since there was no such pre-requisite.

Scrutton put the difference thus:

At Roman law, it [a *nudum pactum*] had been, not an agreement made without consideration, but an informal agreement, [one] which did not come within some one of the privileged classes which were actionable, or which had no *causa*, or mark assigning it to one of the privileged classes,²⁷²

As for the term, *ex nudo pacto*, the Digest of Justinian - quoting the Roman writer Ulpian - stated:

By universal law some agreements²⁷³ give rise to actions, some to defenses.²⁷⁴ 1. Those which give rise to actions do not have a name of their own but take the proper name of the contract [to which they refer], such as sale, hire, partnership, loan, deposit, and other similar contracts....4...when no ground exists, it is settled that no obligation arises from the agreement. Therefore, a naked agreement gives rise not to an obligation [*nuda pactio obligationem non parit*] but to a defense.²⁷⁵

In short, Roman law categorised what agreements were actionable (legally enforceable). If there was no ground (synonyms being '*cause*' or '*reason*') for an agreement to fall within certain privileged categories, the agreement was '*empty*' (synonyms being '*naked, insufficient, invalid*') and not actionable - giving rise to no obligation (no legal bond or tie). As a result, the Roman word '*causa*' was (and is) not at all the same as the English word, '*consideration*.' Also - Buckland noted - the word '*cause*', when used in Roman law, was inconstant in meaning:

the word '*causa*' is a very unreliable instrument. Even where it is used to signify a basis of right it does not always mean the same thing...indeed the lexicons give a bewildering number of meanings and shades of meaning.²⁷⁶

Buckland also stated:

What Ulpian means is that there can be no agreement on a mere pact as such - it must be shown that the agreement is one of those which the law makes actionable. He is expressing a great difference between the Roman conception and that of our law [English law]. To the Romans an agreement was not actionable unless there was some reason [i.e. *causa*] why it should be. To modern English law an agreement is actionable unless there is some reason why it

²⁷¹ Kiralfy, n 1, p 189 'In Roman law a number of different '*causes*' were accepted as making a consensual contract binding, though not all of these involved reciprocal benefits or detriments.'

²⁷² Scrutton, n 88, p 100. See also Jolowicz, n 252, pp 529-30 'Classical law had given no action on a formless agreement unless it fell within one of the named categories of consensual contracts.' Borkowski, n 252, p 258 'Not all agreements amounted to contracts, only those that were actionable at law. What made an agreement actionable? It was the existence of some ground, reason or '*cause*' (*causa*) for enforcing the agreement.' See also Brown, n 92, p 13.

²⁷³ Watson, n 252, vol 1, p 62 (quoting the *Digest of Justinian*), book 2 title. 14.1 'pact is derived from agreement (the word peace comes from the same origin). 2. And agreement is the agreement and consent of two or more persons about the same thing. 3. There is a general word '*agreement*' relating to everything agreed upon by those who make some contract or settlement with each other; for just as those who are collected and come from different places into one place are said to come together, so those who, from different motions of the mind, agree on one thing, that is form one opinion [can be said to come together]. Moreover, so true it is that the word '*agreement*' has a general significance that Pedius neatly says that there is no contract, no obligation which does not consist of an agreement, whether it is achieved by the handing over of something or by the use of certain words. For a stipulation, which is made by the use of certain words, is void unless there is agreement. 4. But most agreements are called by some other name, for example, sale, hire, pledge, or stipulation.'

²⁷⁴ Ulpian also noted that a praetorian Edict had established that the praetor would not enforce contracts made: (a) maliciously; (b) contrary to legislation; or (c) fraudulently. Watson, n 252, vol 1, p 64 (quoting the *Digest of Justinian*), book 2, title. 14. 7 'The praetor says 'I will enforce agreements in the form of a pact which have been made neither maliciously nor in contravention of a statute, plebiscite, decree of the senate or edict of the emperor, nor in fraud on any of these...9. The praetor says that he will not enforce a pact made with malice. Malice occurs where there is craftiness and deceit.. And as Pedius says, a pact is made with malice whenever one thing is intended for the purpose of cheating another and there is a pretence that something else is intended.'

²⁷⁵ Watson, n 252, vol 1, p 63 (*Digest of Justinian*), book 2, title. 14. 7. See also Zimmermann, n 252, ch 17.

²⁷⁶ Buckland, n 252, p 425. Ibid, p 426 '*Causa*' thus means actionability and not something else independent of actionability which produces that characteristic. ' See also Buckland & McNair, n 252, pp 227 ('The Roman law of contract required neither a doctrine of *causa* nor a doctrine of consideration...'). Also, Pritchard, n 252, p 316 ('the Romans classified their contracts by the source (*causa*) of the particular obligations, i.e. by the event that brought their liability into existence.'). See also Borkowski, n 252, p 258 (see n 272). Lorenzen, n 105, p 630 'the word *causa* in its application to the law of contracts had in Roman law proper a number of different meanings. No general theory can be deduced from the Roman texts.'

should not be. '*Causa*' thus means [in Roman law] actionability and not something else *independent of actionability*²⁷⁷ which produces that characteristic.²⁷⁸ (*italics supplied*)

Therefore, Roman law stipulated what agreements were actionable (legally enforceable) while English law approaches the subject from the opposite end, stipulating what agreements are not actionable. However, the doctrine of consideration did not exist under Roman law. There was no such pre-requisite for making a valid contract. Thus, English law cannot possibly have derived the doctrine from the Roman word '*causa*' (although '*causa*' may have been mis-used at times in English legal writing).

In conclusion, Roman law had no doctrine of consideration.

(c) Sale

As for the most common form of contract viz. sale, a valid sale (*emptio venditio*) in later Roman law required as pre-requisites:

- (i) an agreement;
- (ii) a fixed price (in money);²⁷⁹
- (iii) the parties to have capacity;²⁸⁰
- (iv) a subject matter - one capable of being the subject of sale.²⁸¹

As for (i), this was:

an agreement of wills (*consensus*) orally, in writing or even [given] by messenger. This could be proved in several ways. The conduct of the parties often constituted such proof, e.g. shaking hands or exchanging rings. There was no need, however, to prove that the parties had made the agreement in each other's presence (potentially an advantage over *mancipatio* and *stipulatio*).²⁸²

Implicit within the concept of a sale was an offer and acceptance. Indeed, as Mauss pointed out in respect of sale (*emptio venditio*), the word *vendere* includes *dare*, to give and *emere*, to accept. This was also reflected in Biblical law.²⁸³ However,

- while Biblical law required *delivery* of the subject matter, later Roman law did not;
- nor did later Roman law require a set formula of words (that is, a stipulation, *stipulatio*)²⁸⁴ - such as specified by Gaius;²⁸⁵

²⁷⁷ Consideration (being a pre-requisite) is '*independent*' of the actionability (enforceability) of a contract.

²⁷⁸ Buckland, n 252, p 426.

²⁷⁹ See de Zulueta, n 252, pp 16-20.

²⁸⁰ Ibid, p 10 'The three essentials in the formation of a contract of *emptio venditio* are therefore: the thing (*res* or *merx*), the price, and the consent of the parties'. He failed to mention capacity.

²⁸¹ See Lee, n 252, pp 302, 304. Also, Pritchard, n 252, pp 317-8, 357; Borkowski, n 252, pp 259, 263-6; Buckland, n 252, p 479; De Zulueta, n 252, pp 10-6. Cf. Later English law where no '*fixed*' price was required as a pre-requisite. See also De Zulueta, n 252, p 19, that the price be adequate was not necessary in Roman (or English) law.

²⁸² Ibid, p 262. Muirhead, n 252, p 228 (*quoting Gaius*) 'such contracts [consensual contracts] may, through the intervention of a letter or a messenger, be entered into between those who are not in each other's presence, which is impossible in the case of an obligation by spoken words.' Buckland, n 252, p 478 'Consent. No form was needed: consent could be shewn in any way.' See generally, de Zulueta, n 252, p 7 'consensual [contracts]...were enforceable on the ground of mere agreement, just as a modern contract.' Ibid 'consensual contracts require nothing more - neither formality nor delivery of a *res corporalis* - for their formation. Hence they can be concluded *inter absentes*, by letter or messenger.'

²⁸³ Mauss, n 252, p 53 '*Vendere*, originally *venum-dare*, is a composite word of an archaic prehistoric type. Without any doubt it clearly includes an element *dare*, which reminds us of both gift and transfer.' Ibid, '*Emere* is to take, to accept something from someone.' See also Buckler, n 172, p 139.

²⁸⁴ Watson, n 252 (*Digest of Justinian*), book 45 title 1.5.1. '*Pomponius, Sabinus*, book 26: A stipulation is a verbal expression in which the man who is asked replies that he will give or do what has been asked.' Zimmermann, n 252, pp 68-9 'Verbosity begets obscurity, and obscurity gives rise to disputes. If the stipulator is forced to sum up his proposed transaction in a question, its content becomes clear and indisputable...The insistence on question and answer with the characteristic repetition of at least a key word (the verb) also made it abundantly clear when a contract had in actual fact been concluded.' See also Borkowski, n 252, p 291 (formal promise made in answer to a formal question). See generally, Zimmermann, n 252, ch 3.

²⁸⁵ Muirhead, n 252, p 210 (*quoting Gaius*) 'A verbal obligation is created by question and answer thus: 'Do you religiously engage that such or such a thing shall be given?' [*dari spondeo*] 'I religiously engage [*spondeo*];' 'Will you give?' [*dabis*] 'I will give' [*dabo*]; 'Do you promise?' [*promittis*] 'I promise' [*promitto*]; etc'. The problem with stipulations was that if the answer did not correspond to the question; they were invalid. Ibid, p 215. See also Lee, n 252, p 291-3 who noted that reducing the stipulation to writing went back, at least, to the time

- nor did later Roman law require a sale to be witnessed by transaction witnesses;²⁸⁶
- nor did later Roman law require a sale to be conducted in public.

In short, the later Roman law of sale was simpler than Biblical law. More particularly, it recognised that *delivery* could be more easily effected - or, rather, be symbolically fulfilled - by an exchange (delivery) of writing²⁸⁷ - something English law was, later, to do in the case of deeds.

(d) Arra

Where the sale was not one where the full purchase price was paid forthwith, an *arra* was (often) given by the buyer to the seller to 'seal' the bargain. That is, to confirm that an agreement had been reached. However, it was not a pre-requisite under Roman law, just as it was not under Biblical law. Borkowski noted:

The practice of giving *arra* ('earnest money') made proof of agreement relatively straightforward. *Arra* was a token of good faith and seriousness of purpose, given by the buyer to the seller to cement the bargain...The *arra* could consist of money (in which case it amounted in effect to a deposit) or of some other item of value, e.g. a ring. It did not have to be of particular commercial value,²⁸⁸ although the seller occasionally demanded something valuable as a penalty should the buyer default - if the buyer did so he forfeited the *arra*. But if the buyer performed his obligations, he could redeem the *arra* unless it was a deposit, in which case it would be credited to him against the price. What if the seller defaulted? The Greek practice was that the seller would have to return the *arra* twice over, i.e., the *arra* itself plus an equivalent amount. It is possible that the Romans adopted a similar rule, but the texts are inconclusive....*At no stage of Roman law was arra regarded as necessary for the validity of a contract of sale. Its function was to provide proof of serious intent... (italics supplied)*²⁸⁹

The ultimate sentence is the nub of the matter. Giving an *arra* was not a pre-requisite. It was evidence of an agreement (*consensus*) being reached.²⁹⁰ Further, the *arra* could constitute part payment of the price, if valuable and this was so intended. Finally, the *arra* was a symbol of value but need have no value itself.

In conclusion, the arra was evidence of an agreement being reached (as under Biblical law).

of Cicero [106-43 BC] and was very common in the Empire. By AD 200 if a writing recorded that a person had promised, the effect was the same as if he had replied to a preceding question. Ibid, p 293, 296-8. See also Jolowicz, n 252, pp 432-3.

²⁸⁶ Borkowski, n 252, p 261 (quoting *Institutes of Justinian*) book 3 title.22.1 'Obligations contracted by mere consent are exemplified by sale, hire, partnership and agency, which are called consensual contracts because no writing, nor the presence of the parties, nor any delivery is required to make the obligation actionable, but the consent of the parties is sufficient.' See also Sandars, n 252, p 361. Zimmerman, n 252, p 230 'The contract of sale (*emptio venditio*) was purely consensual. The sole basis for the respective obligations to deliver the goods and to pay the purchase price was the agreement between seller and purchaser. No form was needed, no witnesses had to be present, no *rei interventio* [intervening thing] was required.' Pritchard, n 252, pp 353-4 '*Emptio venditio* arose then when a vendor agreed to sell (*vendere*), a purchaser to buy (*emere*), some object of property (*res* or *merx*) for a definite or ascertainable price (*pretium*), and the contract was complete at the moment the price was fixed (*certum*), regardless of whether the *res* had been handed over, the price paid, or anything given as earnest.' Cf. The older requirement for there to be a delivery of the goods (*traditio*), Mauss, n 252, pp 52-3 and Lee, n 252, p 132.

²⁸⁷ Lee, n 252, p 135 'the later Empire, when the delivery of a written deed of conveyance took the place of the delivery of the land. This was the *traditio per cartam*, which persisted into and through the Middle Ages. Sometimes even this was dispensed with. A recital that delivery had taken place served the same purpose. Contemporaneously, the practice grew up of registering transfers of land in the appropriate office (*insinuatio apud acta*).'

²⁸⁸ Cf. Mauss, n 252, p 48 'The thing pledged is normally without value: for example, sticks are exchanged, the *stips* in the '*stipulation*' of Roman law...'. See also Zimmermann, n 252, p 72 'The word '*stipulari*' itself goes back to '*stips*', so that some staff ritual was probably involved as well.'. A handshake (delivery of the hand) was sufficient. Probably, like Biblical law, in Roman times, this was more a striking of the hand to reflect the older method of sale by way of mancipation (*mancipatio*) in which a bronze or copper bar/stick by the buyer was struck against a balance in public and delivered by the buyer. The buyer at the same time has taken hold of the subject matter of the sale. Thus, there was contemporaneous delivery of the goods and delivery of the price. See also Lee, n 252, p 113; Pritchard, n 252, pp 192-3; Jolowicz, n 252, pp 145-8; Mauss, n 252, pp 52-3; Borkowski, n 252, pp 197-9 and Buckler, n 172, pp 28, 55. One wonders whether the reference to sticks (*stips*) was to a tally - and that it may have been marked with the price recorded in some fashion (such as by notches).

²⁸⁹ Borkowski, n 252, p 262. See also Zimmerman, n 252, p 233 (he indicated there was dispute as to the effect of the *arra* by the time of Justinian). See also Lee, n 252, p 303, the *arra* was "to indicate that the bargaining of the parties had ended in a firm agreement. It was proof of the conclusion of the contract - *argumentum emptionis et venditionis contractae*'. Lee also noted that the *arra* could comprise part payment. Ibid, p 303. See also Pritchard, n 252, p 355; de Zulueta, n 252, pp 22-8 and Buckler, n 172, p 146 (*arra* as evidence).

²⁹⁰ See also Muirhead, n 252, p 229 (quoting *Gaius*) 'Purchase and sale is contracted the moment parties have agreed about the price, although it have not been paid, nor any earnest given; for what is given in the name of earnest is only evidence that a purchase and sale has been contracted.' See also Sandars, n 252, p 362 (quoting *Institutes of Justinian*), book 3, title 23 'The contract of sale is formed as soon as the price is agreed upon, although it has not yet been paid, nor even an earnest given; for what is given as an earnest only serves as proof that the contract has been made.' See also Buckland, n 252, p 479.

(e) Biblical & Roman Law Compared

A problem with most of the English texts on Roman law (many of which are Victorian) is that they failed to analyse Biblical (and Babylonian) law. If they had, they would have realised that the contractual pre-requisites for all three - especially sale - were not dis-similar. And, that all became simpler - doubtless, to help trade - over the course of time. To compare sale in Biblical and in Roman law:

- **Biblical Law**. A sale in Biblical times (likely) required: (i) capacity of the contracting parties; (ii) a subject matter, one capable of being subject to a sale; (iii) an agreement couched in a formula given orally or in writing; (iv) delivery of the subject matter; (v) transaction witnesses; (vi) publicity. In the case of (ii), a symbol could be used for land, such as a sandal (the parties did not have to be on the land or in view of it). Further, although not a pre-requisite, an *arra* was (often) used to evidence acceptance by the buyer in the case where the full price was not paid at once (whether the contract was written or oral). A ring, coin, seal or handshake²⁹¹ could comprise an *arra* - the same also being part of the purchase price, if valuable;
- **Roman Law**. Early Roman law was not dis-similar to Biblical law - with (iii) being met by a formula (*stipulatio*) and mancipation (*mancipatio*) requiring transaction witnesses and publicity.²⁹² Also, a symbol could be used for land (usually a clod of earth). The parties did not need to be on the land or in view of it. However, in later Roman law - while (i)-(ii) of the Biblical requirements were retained - a writing (subscribed by the parties) could cover (iii) and (iv), delivery of the writing symbolically representing delivery in (iii).²⁹³ Further, (v) and (vi) were dispensed with as pre-requisites although - in practice - they were (likely) employed as a precautionary measure.²⁹⁴ The Roman law of sale also required the price to be agreed (probably, Biblical law was the same. e.g. in the case of Abraham's purchase of land a specific sum (400 shekels) was offered).²⁹⁵

In conclusion, the pre-requisites for sale in Roman law were simpler than those in Biblical law.

(f) Conclusion

The doctrine of consideration was unknown to Roman law.²⁹⁶ However, confusion on this matter occurred with some English legal writers - especially Victorian ones. Keen to find the origins of the English doctrine in Roman law, they seized on the Roman terms '*nudum pactum*' and '*causa*' as evidence of it. However, they were wrong. The pre-requisites for a contract being actionable (enforceable) under Roman law were not the same as those under English law. Further, these pre-requisites did not include consideration. And, '*causa*' cannot be treated as a synonym for '*consideration*'. Thus, as Scrutton observed, Roman law did:

little more than supply the terms '*nudum pactum*' and '*causa*' which acquired a distinctively English meaning.²⁹⁷

²⁹¹ The early Roman form of stipulation in which a party promised (*promittis* ?, see n 285) suggested a stretching forth of the hand (*promittere*, to stretch forth [the hand]), as Zimmermann noted, n 252, p 72.

²⁹² Buckland & McNair, n 252, p 110 '*Mancipatio* is...a formal recognition of the transfer of property, the essence of which is its publicity, since it requires five witnesses. It includes a formal investiture of the receiver, since he lays his hand on the thing or, in the case of land, probably a symbol of it; but there is also a formal handing over of the price, if it is a sale (though in historical times it is only a symbol of the price), and even if it is not a sale there is a pretence that it is a price. *Mancipatio* of land need not be on the spot and required no entry.' See also Borkowski, n 252, p 197-9 (mancipation was abolished by Justinian).

²⁹³ Ibid, p 113. Also, in the 5th century, Emperor Leo [Eastern Roman Emperor, AD 457-74] dispensed with the question and answer format of the stipulation. Zimmermann, n 252, p 80 'The words no longer mattered; of importance was only that the parties had reached *consensus* at the same time and the same place'. Also, by the time of Justinian and his Digest [i.e. AD 530-3], p 81 'In the practice of his time the formal oral stipulation no longer existed.' See also Buckler, n 172, p 112.

²⁹⁴ Technically, even stipulation had not required witnesses. Jolowicz, n 252, p 293 (no witnesses and no writing required). However, in practice, there would have been transaction witnesses in most instances, to help prove it. Buckland, n 252, p 432 'The law required no witnesses, though proof would be difficult without them, unless, as came to be the usual course, a memorandum of the transaction was drawn up.'

²⁹⁵ See n 231 (text).

²⁹⁶ See e.g. that of Jenks, n 91, p 224 'The doctrine of consideration was apparently unknown to the Roman jurists...It came into English law purely as a matter of accident, as an incidental consequence of a special manner of proof; and it was not until it was familiar in this capacity that men perceived its value as a doctrine of substantive law.' Jenks also noted in a footnote 'The only trace of it in Roman law known to the writer is in the doctrine of *leonina societas*.' See also Pritchard, n 252, p 315 'The cause of the great distinction between Roman and English law is the English doctrine of consideration which enables any agreement supported by consideration to be regarded as *prima facie* a legal contract.'

²⁹⁷ Scrutton, n 88, p 101. Lorenzen, n 105, had much the same view. Ibid, p 636 'It is now established...that the doctrine [of consideration] is of common law growth and remained uninfluenced by the principles of Roman or continental law. All that was borrowed from the Roman law was the phrase '*ex nudo pacto non oritur actio*', which came to denote in English law something quite different from what it did at Rome.' Ibid, p 637.

One would agree. Indeed, if Roman law really *had* been the source of the doctrine of consideration, it would, almost certainly, have been present in Scots and German law (where it is not found) since they had a closer affinity to Roman law. Thus, to the Roman mind (as to the Biblical), the word (and concept of) '*consideration*' would have meant the same as evidence. Nothing more.

In conclusion, Roman law had no doctrine of consideration.

8. NATURE OF CONSIDERATION - ECCLESIASTICAL USE

It is important to consider the use of tokens in the early Christian church from Roman times since Anglo-Saxon law (and medieval English law) was considerably influenced by the same. It also helps explain how the Anglo-Saxons likely executed commercial transactions when they had no coins for some 200 years and, even thereafter, when coins were in scant supply until the 10th century.

(a) Tokens in the Early Church

In the Roman Empire (including its presence in England until c. 410 AD), the early Christian church - one which often encountered repression and betrayal - used tokens (*tesserae*) to evidence membership.²⁹⁸ Shiells noted:

The token must thus have come down to us from the earliest times of Christianity. When it was difficult to tell who could be trusted, it would be readily accepted as a convenient method for excluding imposters who sought to destroy the new faith, or renegades who had disgraced their profession.²⁹⁹

More especially, participation in holy communion (the holy mystery) was limited to those in '*good faith*'. That is, members of the (catholic) church who had not committed serious sins. Possession of a token was the evidence of the same.³⁰⁰

- Similar to tokens were letters of communion (*litterae communicariae*). These were the precursors to church tokens and were given to persons of one Christian congregation in order to allow him/her to gain access to receive communion elsewhere.³⁰¹ Later, they were sealed by the church (or bishop) to provide additional confirmation of their authenticity and, in time - as Shiells noted - '*it seems probable that the sigillum, or seal alone, came to be accepted as a sufficient voucher.*'; (i.e. a parchment/leather etc with the seal but without writing);³⁰²
- Letters of commendation (*litterae commendatariae*) were also issued - to enable members of a Christian congregation to receive hospitality elsewhere, by being received into the houses of other Christians and supplied with hospitality (bed and board). They were required since there was much fraud as well as danger of betrayal to the Roman State when it persecuted Christians.³⁰³

²⁹⁸ Shiells, n 191, pp 31-2 'The early Christian church would readily adopt the custom as a safeguard against traitors and informers. The defection of 'the man of Kerioth' [Judas] taught the persecuted brethren the necessity for a token and a password to be entrusted only to those of tried and approved standing. We do know that *tesserae baptismales* were given to the converts who, by baptism, were added to the church.'

²⁹⁹ Ibid, p 33.

³⁰⁰ Ibid, pp 35-7 'Catechumens were broadly divided into two classes, the *audientes*, or hearers, and the *competentes*, or those who were sufficiently taught. The hearers were permitted to attend the opening services of the church, such as the psalms and the sermon, but were sent away before the prayers. The sacraments, the creeds, and the sublime doctrines of the Trinity, and the atonement were reckoned among the hidden mysteries (*occulta*) only to be made known to those who were fully initiated and accounted as *fideles*, the faithful ones. The properly instructed novices were accepted and advanced accordingly...At the celebration of Holy Communion the greatest care and vigilance were used so as to exclude all unbelievers and improper persons. The church doors were shut and guarded by the appointed officers. The neophytes were sent away, (*missa catechumenorum*) and even the faithful were not admitted if they came late to the solemnity....When the ceremony was about to commence, when the priest stood ready to uncover the elements which had been set on the communion table and covered with the sacred veil, the deacon shouted, 'the doors ! the doors !' The attendants sprang forward to close the church gates and keep out all who had not attained to full membership.' See also MM Tenney, *Communion Tokens: Their History and Use* (1936) and E Fletcher, n 185, p 19 (use of lead tokens by Benedictine monks to evidence attendance canonical hours).

³⁰¹ Ibid, p 38. Shiells cited St Paul in the Bible, See NIV Bible, n 192, 2 Corinthians, ch 3, v 1. Also, Acts of the Apostles, ch 18, v 27.

³⁰² Ibid, p 40 'For an additional security, the seal of the church or bishop was affixed to the letter, and it seems probable that the *sigillum*, or seal alone, came to be accepted as a sufficient voucher. At length, any certificate of membership was designated as a *formata*, a word which signifies not only a formal rescript or mandate, but also the stamp or official impression on a coin or piece of metal.'

³⁰³ Ibid, pp 38-9. See also NIV Bible, n 192, Book of Galatians, ch 2, v 4 'some false brothers had infiltrated our ranks to spy on the freedom we have in Jesus Christ'. Shiells also referred to *littera peregrinorum*, which applied to poor itinerant Christians who visited Holy sites. This was open to abuse, *ibid*, p 58.

(b) Later use of Church Tokens

Thus, tokens (sometimes, accompanied with a password) were issued to enable participation in communion as well as to receive hospitality from other Christian believers. The former was no different to Roman times where tokens were given for participation in other religious rites (mysteries).³⁰⁴ In the case of Christianity, a token often employed in early times bore the sign of the fish.³⁰⁵ Looking ahead to Elizabethan times, many Protestant churches adopted the practice of using tokens when it was dying out in the Catholic church.³⁰⁶ Such tokens (also called tickets)³⁰⁷ were small pieces of lead, tin, leather, pewter, paper, wax, glass, brass, pasteboard, copper or wood.³⁰⁸ They were not intended to be transferable or negotiable. Indeed, that would have defeated their purpose.³⁰⁹ Further, they had no value - not even nominal value.³¹⁰ Shiells observed:

Like the Roman *tesserae*, they sometimes had a representative, but not an intrinsic value. A purse full of *mereaux* [tokens] was no better than an empty purse.³¹¹

That said, it seems clear that some church tokens were sold.³¹² Some religious tokens - such as the bread penny - also seem to have been used to secure entitlement to bread (as in Roman times).³¹³ Thus, these tokens were a form of private currency. The use of tokens also became secular as Shiells noted:

States, provinces, municipalities, corporations, fraternities, cathedral chapters, and every kind of organisation had their appropriate tokens. In short, they were used as tickets or tokens of admission, or as certificates of brotherhood at convocations of every kind. At sheriff-courts, synods, free masons' lodges, *etc.* All corporate organisations used them...³¹⁴

In conclusion - as in Roman times - tokens were in widespread use in the early catholic (and, later, protestant) churches to evidence things. Thus, the church kept alive - after the decline of the Roman empire - the Roman practice of using tokens as a form of private currency when legal tender was scarce. Also, of using tokens to evidence (prove) things such as church membership. This is important since tokens were also employed in Anglo-Saxon times in commercial transactions - both as a form of private currency and to evidence things (i.e. as an arra) - and this was (likely) endorsed by the catholic church.

³⁰⁴ Ibid, p 43.

³⁰⁵ Ibid, p 147 'Three centuries before the lamb, the dove, and even the cross itself were openly used as Christian devices, the little bronze fish was secretly worn as a *tessera* by the new convert. It was at once a reminder of his vows and a badge of his faith.' The fish was used since the Greek word *piscis* comprised the initial letters of the words 'Jesus Christ, God's son, Saviour.'

³⁰⁶ See generally, Fletcher, n 185, ch 7 (communion tokens).

³⁰⁷ The use of the word 'token' as a 'sign' may be seen in the First Helvetic Confession 1536 cited by Shiells, n 191, p 79 'the sacraments are not merely tokens [*tesseras*] of Christian organizations, but they are also symbols of divine grace.' Ibid, French Confession of Faith 1559, art 34 'the sacraments are joined to the Word...that they may be to us pledges and tokens [*marreaux*] of the grace of God'. The french *marreau* [or *mereau*] likely came from the latin, *mereri*, to deserve and the Anglo-Norman '*merce*, *meer*' meaning mercy or grace. Ibid, p 80 which also states 'tokens...were only given to those who were found worthy'. See also Kelham, n 150, '*merce*, *meer*, mercy, grace') and E Fletcher, n 185, p 21 (lead tokens comprising souvenirs for pilgrims in Rome, were used in 1200 and prior to that).

³⁰⁸ Ibid, pp 18-9 'The token itself was usually a small plate of lead, marked with some device referring to the congregation which owned it, or to the ordinance with which it was connected, the date of church organisation or of pastorate, and, '*Let a man examine himself*', or some such appropriate text.' See also Ibid, pp 95 & 107.

³⁰⁹ In the context of the Protestant churches in Scotland, Shiells, n 191, p 117 'This offence of receiving tokens, as it were under false pretences, and then giving them to unworthy persons who could not themselves obtain them, was a frequent recurring scandal and grievance throughout the churches.' So too, counterfeiting tickets, Ibid, p 122.

³¹⁰ Indeed, Shiells noted, n 191, p 24, that discarded tokens were sometimes buried to prevent people collecting them like coins. He also noted that tokens were melted down for the new issue. Also, that 'Some Laodicean sessions sold their own tokens as waste metal'. However, the latter was bulk value, not individual value. That said, it may be that some church tokens evidenced the payment of church dues and easter offerings. See, pp 52-4. Cf. p 53 'The Presbyterian church never exacted such dues and 'never sold her sacraments'. Easter offerings (or token money) was money paid or payable at Easter time. It may have existed prior to the Reformation, in the form of a payment for being confessed (shrived) and receiving the sacrament.

³¹¹ Shiells, n 191, p 95.

³¹² Fletcher, n 149, p 57 'Both the Holy Catholic and the Reformed Church in France were using communion tokens in the 1560s. Dutch protestants followed suit in the 1580s; and in England by the time of Elizabeth I's reign [1558-1603] tallies had evolved to the status of tickets that had to be purchased in order to gain admission to Holy Communion services. In 1592 St Saviour's Church, Southwark sold more than 2,000 such leaden tickets at two pence each; by 1620 the price had risen to three pence *per* token. Many other English church records refer to '*Communion Halfpence*', so perhaps Southwark overcharged. In the diocese of Durham in the late 16th century the Easter reckonings were lists of parishioners who had paid for their communion tokens, and those who had not.'

³¹³ Shiells, n 191, p 73 'a bread penny, given to the poor who came for catechetical instruction on Sundays. Such pieces could be exchanged for a loaf at the baker's shop.'

³¹⁴ Ibid, p 95.

9. ANGLO-SAXON LAW³¹⁵

Kiralfy stated that - not only was there no theory of contract in Anglo-Saxon law - there were hardly any contractual transactions.³¹⁶ While the latter is an over-statement, there was much less commerce than in Roman times. Further, in the Anglo-Saxon period, the law was relatively simple. It had to be for a variety of reasons:

- **Population**. The population was small. When the Anglo-Saxons first arrived in the 5th century AD, there was (likely) a great decline in the population due to war and plague (the same occurred in Europe).³¹⁷ This was exacerbated with the arrival of Danish armies (the Vikings) from AD 866.³¹⁸ Even by the time of the Norman Conquest in 1066, the population of England would (likely) have been no more than 2 million people³¹⁹ and widely scattered at that. Also, few people in Anglo-Saxon times were able to read, write or were numerate;
- **Different Cultures & Languages**. Anglo-Saxon England comprised a mixture of cultures with different languages and three legal systems;³²⁰
- **Troubled Times**. England was frequently convulsed with disease, violence and war. London - and the few other major towns which existed - were, often, sacked.³²¹

Anglo-Saxon England was also, mainly, agricultural. There was relatively little by way of trade³²² - including foreign trade - something which only began to change by the 10th century. Further - and this was likely the result both of Germanic customs and the influence of Catholic church as well as the absence of writing - there was a heavy emphasis on custom and on ceremony (ritual) in all spheres of life, including in legal matters. The tendency was to do things as they had been done in the past. Thus, legal and judicial innovation was slow and there was little change during the Anglo-Saxon period.³²³ For the purpose of this article, the following may be noted:

(a) Coinage

Even before the Roman Conquest, coins had circulated in Britain. These comprised not only coins which originated from abroad. There were also pewter (potin) coins or coins using a copper/tin/lead alloy, manufactured by tribal smiths. These were of nominal value.³²⁴ During later times in Roman Britain, the

³¹⁵ See generally: (a) FL Attenborough (ed), *The Laws of the Earliest English Kings* (NY, 1963); (b) JH Baker, *An Introduction to English Legal History* (Reed, 4th ed, 2002) ('**Baker Introduction**'); (c) J Hudson, *The Oxford History of the Laws of England* (OUP, 2012); (d) FW Maitland, *Domesday Book and Beyond* (Fontana, 1965); (e) BR O'Brien, *God's Peace and King's Peace. The Laws of Edward the Confessor* (Univ. of Pennsylvania Press, 1999); (f) P & M, n 173; (g) Robertson, n 180; (h) FM Stenton, *Anglo-Saxon England* (OUP, 3rd ed, 1971); (i) B Thorpe (ed), *Ancient Laws and Institutes of England* (Commissioners on the Public Records, 1840); (j) F Palgrave, *History of the Anglo-Saxons* (W Tegg & Co, 1876); (k) R Barber, *Chronicles of the Dark Ages* (Folio Society, 2008); (l) O Flintoff, *The Rise and Progress of the Laws of England and Wales* (John Richards, 1840); (m) Adams, n 236.

³¹⁶ Kiralfy, n 1, p 177 'Not only was there no theory of contract in Anglo-Saxon law, but there were hardly any transactions in their nature contractual.' P & M, n 173, vol 1, p 57 'a law of contract can hardly be said to exist and, so far as it does exist, is an insignificant appurtenance to the law of property.'

³¹⁷ This could have been by as much as 50%, see GS McBain, *Modernising the Law: Breaches of the Peace and Justices of the Peace* (2015) *Journal of Politics and Law*, vol 8, no 3, p 166. The first invasion of the Saxons is generally taken to be that of Hengist and Horsa in AD 449, see generally Flintoff, n 315, pp 64-5.

³¹⁸ From AD 866, Danish armies began to winter in England - as opposed to raiding periodically. They brought with them their Danelaw.

³¹⁹ RH Britnell, *The Commercialisation of English Society 1000-1500* (Manchester UP, 1996), p 5 asserted that 'There were perhaps fewer than 3m people living in the 13,278 places recorded in Domesday Book.' Cf. CK Allen, *The Queen's Peace* (Hamlyn Lecture, 1953), p 4, who thought that the population of England in 1087 was c. one and a half million people. See also Davies, n 148, p 137 (he estimated that, in 1087, the population was between 1.375m - 1.5m).

³²⁰ Even as late as the time of Henry I (1100-35), it was stated that 'English law is...divided into three parts...one is the law of Wessex, another the law of Mercia, and the third the Danelaw.' See also Downer, n 40, p 97. Barber, n 315, vol 2, p xi 'Anglo-Saxon England was in many ways a remote and isolated land, with far less of a Roman heritage than the rest of Western Europe, and with a culture that was strikingly different.'

³²¹ See generally, McBain *Law Merchant*, n 134.

³²² The principal item of trade was cattle which, in the absence of coinage, were treated as such, see n 329-30.

³²³ Henry, n 149, p 6 'law among primitive peoples changes very slowly.' Ibid, p 8.

³²⁴ Fletcher, n 149, p 13 'Before the Romans arrived [55 BC] Celtic tribes here and on the Continent produced superb gold and silver coins based on the gold starters of Philip of Macedon [359-336 BC], and silver drachms of Alexander the Great [356-323 BC]. But such high value coins could not satisfy the needs of common people who had to make day-to-day purchases in local market places. Potin (the French word for pewter) answered that need. Potin coins have come to light in their thousands on numerous Celtic sites. They do not seem to have been produced to any universally accepted weight standard; even within one tribe or tribal type there are many variations. They circulated as token coinage, accepted by the general consensus as a medium of exchange, in the same way as we use paper money today.' See also Davies, n 148, p 90; Naismith, n 138 and E Fletcher, n 185, p 17.

Romans debased the silver content of their legal tender. Thus, it was of nominal value. Also, local bronze coins seem to have been given to Roman soldiers as a form of pay. It was of nominal value. Further, coins imitating Roman ones were issued.³²⁵ Finally, *tesserae* [i.e. tokens other than coins] were also used in Britain, leading Fletcher to note that:

long before England existed as a State the uses to which tallies³²⁶ and tokens had already been put - as accounting records, receipts, emergency and imitation money, tickets and gaming pieces - foreshadowed their use in almost identical ways nearly 2,000 years later in the 17th, 18th, 19th and 20th century Britain.³²⁷

More importantly - for the purposes of this article - it meant that public and private coinage of nominal value was part and parcel of Anglo-Saxon life. Further, it seems clear that public coinage did not exist for, at least, 200 years after the departure of the Romans. This, due to the destruction of mints (and the skills of moneyers/coiners) as well as the collapse of any central Government authority. As a result, in the absence of legal tender, there was - from c. AD 410-630 - a '*prolonged period of barter*.'³²⁸ *What, then, was used when there was no legal tender?*

- ***Cattle***. It seems cattle often comprised the currency³²⁹ something that Anglo-Saxons would have been used to, since their German forebears also used this method, being suspicious of coins.³³⁰ Such usage explains the considerable number of references to cattle in Anglo-Saxon legislation, as well as the severe punishment (death) for stealing them. The word '*cattle*' was used in a generic sense to include other domestic animals (such as goats and sheep) but not (usually) horses.³³¹
- ***Private Coins/Tokens***. It is likely that tokens (including private coinage) were used in markets and to trade. As in Roman times, they may also have been used as a form of *arra*. That is, they were handed over to evidence that an agreement had been concluded (also, as part payment where the *arra* was valuable, such as a ring). Further, there may have been a system of '*paying on the nail*' as in medieval times in England. That is, in markets, merchants giving tokens for purchases between each other (of cloth, leather and other goods) and, then, at the end of the day, settling up at a designated place in the market (the table/pillar)³³² by only paying the balance. This designated place was also where the reeve (sheriff) - who was the government official who presided over the market - was present (likely, with soldiers) to resolve disputes. This system would have helped reduce theft. It may also have enabled merchants to '*carry over*' balances from one market to another (if they trusted each other) reducing the need to carry silver on them and incur the risk of being robbed;
- ***Hacksilver***. Hoards of broken silver plate and other pieces have been found by archeologists. Thus, the Vikings and others used chunks of silver plate as a crude form of currency.

³²⁵ Ibid, p 13 'In Britain, imitation coins with blundered inscriptions and ever decreasing size circulated as tokens of earlier *antoninianii*. Known as *barbarous radiates* from the radiate crown worn by the ruler of the obverse, they shrank to barely 5mm diameter and are often referred to as minims or *minimissimi*.'

³²⁶ It is unclear the extent to which wooden tallies were used in Anglo-Saxon times. However, since tallies are age old, it is likely.

³²⁷ Ibid, n 13.

³²⁸ Davies, n 148, p 114. Also, p 118 quoting P Spufford, *Money and its use in Medieval Europe* (CUP, 1988) 'by about 435 AD, coin ceased to be used as a medium of exchange. Not for 200 years...were coins again used in Britain as money.' Even after this period rents (including to the king) were often paid by way of food (called food rents) until the 8-9th centuries. See Naismith, n 138, p 30. E Fletcher, n 185, p 17 'Two or three clouded centuries must pass before we have any evidence of a money economy once again established in Britain.'

³²⁹ There were also standard rates. Attenborough, n 315, p 161 (*Laws of Aethelstan*, AD 924-39) 'An ox shall be valued at a *mancus*, [the value of the West Saxon shilling] and a cow at twenty pence, a pig at ten pence, and a sheep at a shilling.' See also Naismith, n 138, p 287 and Einzig, n 182, p 259.

³³⁰ *Tacitus on Britain and Germany* (Penguin, 1954), pp 111, 118 noted that the Germans used cattle and horses to pay fines - including fines for homicide. Ibid, p 104 'The peoples of the interior, truer to the plain old ways, employ barter.' Also, of their flocks of sheep and cows 'It is numbers that please, numbers that constitute their only, their darling, form of wealth.' See also McBain Gift, n 209, pp 254-304, fn 48. The early Romans had also used cattle as a currency, *pecunia* coming from *pecus*. See also Hingston Quiggan, n 153, p 277.

³³¹ Davies, n 148, p 42 'Cattle - a vague term variously meaning cows, buffalo, goats, sheep and camels, and usually but not always excluding horses...'. Ibid, p 44 'they [cattle] were movable, an immense advantage, forming man's earliest working capital and the linguistic origin not only of our '*pecuniary*' from the Latin '*pecus*' or cattle, but also our terms '*capital*' and '*chattels*'. Similarly, the Welsh '*da*' as an adjective means '*good*', and as a noun, both '*cattle*' and '*goods*'. See also P & M, n 173, vol 1, p 57 'Movable property, in Anglo-Saxon law, seems for all practical purposes to be synonymous with cattle...'. However, they did not draw a connection between this and lack of currency.

³³² In Babylonia, it would seem that markets were designated by a *stela* (pillar) being set up, the *stela* also recording the law (see e.g. n 207). In Anglo-Saxon England one suspects that markets had something similar, where the reeve and other officials, as well as the professional transaction witnesses, sat and where deals were made and settled. This made sure that people effected transactions when the market was open ('*open market*') and not private deals.

When coinage was re-introduced in Anglo-Saxon England (whether from abroad or homemade) from c. AD 630³³³ it was expensive - being of gold and silver. It became debased in time as well as being (often) cut into smaller pieces. Thus, it would not have been held by poor - local market - traders, even in a debased form or in smaller pieces. Indeed, one would suggest that local traders would have been cautious about accepting small (tiny) pieces of gold and silver since they were easy to lose. Further, it was impossible to easily tell whether they were genuine or not. As it is, the re-introduction of coins in Anglo-Saxon England c. AD 630³³⁴ was something of a false dawn and it was not until AD 765 that a unified currency prevailed throughout England in the form of the penny (save for Northumbria) and not until the Statute of Greatley AD 928 that this country was sufficiently unified for Anglo-Saxon law to stipulate a single national currency.³³⁵ Davies stated:

a handsome penny of good quality silver supplanted all rivals in the kingdom of Kent in about [AD] 765 and was being extended all over England, except Northumbria, until the wholesale disruption caused by the Viking invasions [AD 866 onwards] and the settlements in the Danelaw interrupted the political and financial unification of England.³³⁶

As for Northumbria, Fletcher stated:

Northern rulers began their metallic coinage around AD 680 with silver *sceattas*³³⁷ bearing the king's name...By AD 800 the local northern economy had declined as a result of wars, and with it the coinage, which suffered gradual debasement. By AD 860 most Northumbrian *sceattas* were silver-less, being struck from copper and brass, though they retained some outward similarity to the earlier silver issues. My limited experience of finding these coins occurred many years ago on the promontory not far from Whitby Abbey in North Yorkshire. A huge Anglo-Saxon market regularly took place in the vicinity of the abbey, attracting traders from all parts of Britain. Southern silver *sceattas* and northern debased *sceattas*, as well as copper and brass *styccas* (as they were often known) came to light together in this trading context. I wonder now if the *styccas* served as token fractions of the southern *sceattas* in a busy market where small change must have been in demand. To use copper and brass in that manner would have required not only agreement within the marketplace on what each piece was worth in relation to the silver coins, but also some local authority to guarantee that anyone who accepted *styccas* could exchange them later for coins at the agreed rate.³³⁸

In conclusion, in Anglo-Saxon times - as well as silver legal tender issued by the kings (often, of nominal value since it was debased or cut up) - there was a large amount of 'private' currency and other tokens (all of nominal value) used to effect commercial transactions. Further, cattle were used as currency. This - together with the absence of Roman law - affected the way in which the Anglo-Saxons entered into contracts. Indeed, they (in effect) ignored Roman law and conducted trade on principles similar to Biblical law. This is unsurprising since ecclesiastics had a great influence on the Anglo-Saxon legal system.

(b) Anglo-Saxon Law - Contracts

Roman legal principles would have continued in England for a time after the departure of the Roman administration in AD 410. However, the Anglo-Saxons prevailed from c. AD 534-54 onwards. Further, the 5th century in England was a period of turmoil - with plague, population decline, tribal wars and the abandonment of many cities and towns.³³⁹ A unified system of government broke down.

³³³ Fletcher, n 149, p 14 'By AD 630 Anglo-Saxon rulers were minting native gold *thymas*, and by AD 680 silver *sceattas* had begun to circulate in the south...'. See also Davies, n 148, ch 4.

³³⁴ Naismith, n 138, pp 5, 37.

³³⁵ See McBain Gift, n 209, pp 254-304, fn 48.

³³⁶ Ibid. At p125 'The first true English penny, though initially produced in Kent, almost certainly at the Canterbury mint, thus dates from [AD] 765....'. However, care needs to be taken with this statement since the penny, as such, had been in use prior to AD 765. Indeed, the laws of Ine (king of Wessex, 688-726) refer to it. It was the larger scale production of the penny in AD 765 that enabled its use to spread throughout England, apart from Northumbria which retained its *sceattas* and *stycas*. See also **Appendix A**.

³³⁷ The word '*sceat*' (plural, *sceattas*) meant treasure. Davies, n 148, p 123. The word may have derived from the Gothic '*skatts*' meaning cattle or coin. See Hingston Quiggan, n 153, p 277 and Einzig, n 182, pp 261, 266.

³³⁸ Fletcher, n 149, p 14. He continued 'If that's what happened there it's as near as damn it to how 17th century token farthings functioned in the marketplace almost a thousand years later.'

³³⁹ See GS McBain, *Abolishing the Crime of Public Nuisance and Modernising that of Public Indecency* (2017), International Law Research, vol 6, no 1, pp 6-7 ('**McBain Public Nuisance**'). The state of dis-repair in England in the 5th century may be seen from the writing of a cleric, generally referred to as Gildas the Monk or St Gildas (c. 494 AD or 516 AD - c 570 AD). In his *De Excidio Britanniae* (On the Ruin of Britain) trans. JA Giles (Dodo Press) and writing c.AD 540, he stated that, after the arrival of the Anglo-Saxons Hengest and Horsa (AD 449), p 28 'all the columns [major towns] were levelled to the ground by the frequent strokes of the battering ram, all the husbandmen routed, together with their bishops, priests, and people, whilst the sword gleamed, and the flames crackled around them on every side. Lamentable to behold, in the midst of the streets lay the tops of lofty towers, tumbled to the ground, stones of high walls, holy altars, fragments of human

- Since the Anglo-Saxons were (generally) illiterate, writing would have died out in most commercial transactions and trade would have been conducted orally. There would also have been much less trade with the Continent which, also, was convulsed with *anomie*. Further - as previously noted - in the period AD 410-630, it seems likely that the issue of legal tender (i.e. coins issued at public mints) ceased. Thus, exchange (barter) would have been the dominant form of trade.

As to the formal requirements for entering into contracts, it is asserted that sophisticated Roman jurisprudence soon fell away and that - at least, from 630 AD when publicly issued coinage was issued by the various local kings - commercial law was more dependent on Biblical precepts than Roman law. This was helped by the fact that Anglo-Saxon law was drafted - and heavily influenced by - clerics.³⁴⁰ Evidence of this can be seen from Anglo-Saxon law requiring sales to be: (a) in designated market towns (i.e. the market place); (b) before the king's official (the town or port reeve) or transaction witnesses; and (c) using a standard *formula*. These were all Biblical practices. Thus, the position in respect of commercial transactions was (likely) as follows:

(i) **Capacity**. As with Biblical (and Roman law), various people had no capacity to contract. For example, slaves, women, infants and the mentally ill;

(ii) **Subject Matter**. As with Biblical (and Roman) law, the subject matter had to be identified - such as land, goods, a ring, jewels, clothes *etc.* Further, the subject matter had to be capable of being subject to contract. Thus, the property of the king(s) and of temples would not have been alienable;

(iii) **Agreement - Oral or Written**. Agreements in writing would have been rare. Thus, oral contracts would have been the norm. Like the early Roman *stipulatio* (see 7(c)) and the Biblical formula (see 6(c)) in Anglo-Saxon times, a set form of words (a *formula*) was employed. This was - usually - couched in a standard question and answer format. For example, the seller asked the buyer if he would give him a stipulated price for his goods, to which there was an answer.³⁴¹ The formula distinguished between a sale and a gift. In the case of a gift, the formula '*dono dare*' would have precluded any suggestion of exchange - '*dono*' signifying the motive (reason) was a gift and '*dare*' that title/possession was to pass by delivery (the latter word also being used for barter and sale).³⁴² It is also likely that a gift would never have been conducted in a designated market but, rather, in the public drinking (feasting) hall.³⁴³ In later Anglo-Saxon times, there was writing (a charter or *carta*).³⁴⁴ In terms of execution, a person made a distinctive mark (often, the '*sign*' of the cross).³⁴⁵ Seals (including signets) were not generally used in Anglo-Saxon times³⁴⁶ and were said to have been introduced by the Normans.³⁴⁷ A signature as such (i.e. a person signing his name) was also (as in Biblical and Roman times) unlikely. Writing

bodies, covered with livid clots of coagulated blood, looking as if they had been squeezed together in a press, and with no chance of being buried'. Gildas had previously mentioned, p 9, that Britain had 28 cities. He also stated that 'neither to this day [c. AD 540] are the cities of our country inhabited as before, but being forsaken and overthrown, still lie desolate; our foreign wars [i.e. with the Picts and the Scots] having ceased, but our civil troubles still remaining.' See also Barber, n 315, vol 1, pp 119-24.

³⁴⁰ Naismith, n 138, p 93 'the reach of Christian faith into Anglo-Saxon society was deep.' Barber, n 315, vol 1, p xiv 'the other great power in the land was the church.' This was reflected in the tone and content of Anglo-Saxon law. e.g. Ibid, vol 3, p 53 (*Laws of Alfred*). Spelman, n 219, p 233 maintained that sales of Anglo-Saxon land law followed the Bible (Abraham and Jeremiah).

³⁴¹ For example, 'Will you give me 1 shilling for this cow?' 'I will give.' Cf. Borkowski, n 252, pp 291-3 (*stipulatio*).

³⁴² McBain Gift, n 209, p 175. These words had a similar connotation under Roman law. See also Mauss, n 252, p 143 'the Romans had no other word than *dare*, to give, to designate all the acts that made up the *traditio*.'

³⁴³ Gift giving was an important (and public) part of Anglo-Saxon society. See also Mauss, n 252, where the *Foreword* noted, p xiv 'Gifts are given in a context of public drama, with nothing secret about them.' There was no obligation on receiving a gift, as Tacitus noted, see Barber, n 315, vol 1, p 15 (*quoting Tacitus*) 'They take delight in presents, but ask no credit for giving them and admit no obligation in receiving them.' Rings were frequent objects of gift. So too, ornaments and weaponry. Thus, p 109 (taken from the poem *Beowulf*, c. 975-1025 or before) 'helmets and corslets the prince [Beowulf] presented often to his thanes on the ale-bench in the feasting-hall.' Ibid, p 112.

³⁴⁴ Flintoff, n 315, p 163 'Charters or deeds were amongst the Anglo-Britons sometimes called a writing [*carta*]...and some of such charters, both amongst the Anglo-Britons and the Anglo-Normans, were also called *chirographum*, being applied to such as had the word *chirographum* usually written in capital letters, either at the top or bottom, and cut through or divided by a knife. From the time of the Conquest, deeds or writings were generally called charters.' Hudson, n 315, p 875 'Charters came to England with the church in the seventh century....[they] were not sealed, although many non-royal charters may have been in chirograph form, written out at least twice and then cut into individual copies, with one portion going to each party and sometimes a third going to a significant store place.'

³⁴⁵ Spelman, n 219, p 235 cites examples.

³⁴⁶ A few kings used them. See Spelman, n 219, pp 235-6. W de G Birch, *Catalogue of Seals in the Department of Manuscripts in the British Museum*, vol 1 (1887) refers to seals held by the British Museum in respect of: (a) Offa, king of the Mercians (AD 790, signet ring attached to a grant to St Denis Abbey in France); (b) Coenwulf, king of the Mercians (AD 796-819); (c) Edgar, king of the English (AD 960); (d) Aelfric, Earl of the Mercians (*pre*-1007); (e) Edward the Confessor (1041-66).

³⁴⁷ McBain Deeds, n 35, p 20 'It is possible that, until c.1166, neither charters, nor the use of a seal, was widespread.' There are some rare examples of seals used by Anglo-Saxon kings and monastics. However, they were not common among private individuals. As for charters, there are some 1500 charters extant from the 7th century to the Norman Conquest (about 200 in single sheet form). Ibid, p 39. See also P & M, n 173, vol 1, p 94 and vol 2, pp 223-4.

would have been rare in everyday market transactions. Instead, barter and sales would have been conducted orally with the giving of an *arra* to evidence the fact that the parties had reached agreement when the transaction was not effected immediately;

(iv) **Delivery.** The delivery of possession (*seisin*) of the subject matter was essential to avoid fraud as well as uncertainty.³⁴⁸ In the case of land, in Biblical times, a sandal was used to represent the same (see 3). In the case of the Anglo-Saxons, land was usually represented by a clod (sod) of earth (as with the Romans)³⁴⁹ or a twig, knife or rod (stick).³⁵⁰

(v) **Transaction Witnesses.** As in Biblical times, Anglo-Saxon law (Laws of Edgar, c. 962/3) required the presence of 2 - or more - transaction witnesses.³⁵¹ These were trustworthy persons who had previously sworn an oath that they would give true testimony as to what they would see - and hear - at any sale transaction.³⁵² Transaction witnesses were also required when debts were incurred.³⁵³ An alternative to transaction witnesses in sales was the presence of the reeve of a port - a '*port*' being a trading place (possibly, a reference to a designated market town). He was the king's official who acted like a later clerk of the market.³⁵⁴ The failure to have witnesses would have invalidated the transaction as well as (often) laid a party open to an accusation of theft or of bearing false witness (i.e. lying).³⁵⁵

³⁴⁸ The need for physical delivery was also required as part of Roman law. Mauss, n 252, pp 49-50 '[In earlier Roman law a] distinction was also made between the *res Mancipi* and the *res nec Mancipi*, [these were Roman categories of property] according to the forms of sale. As regards the former, which are made up of precious things, including immovable goods and even children, no disposal of them could take place save according to the precepts of the *Mancipatio*, the '*taking*' (*capere*) in hand (*manu*)...one can understand that a solemn handing over, *Mancipatio*, creates for these things, the *Mancipi*, a legal tie.'

³⁴⁹ Muirhead, n 252, p 276 (quoting *Gaius*) 'a turf was taken from the land or a tile from the house'. This was to represent land in court. The turf did not have to be from the actual land. For the Anglo-Saxon (and Scandinavian) sod of earth, see also P Vinogradoff, *Transfer of Land in Old English Law* (1907) Harvard LR, vol 20, no 7, p 539.

³⁵⁰ P & M, n 173, vol 2, p 85 'The two men each with his witnesses appear upon the land. A knife is produced, a sod of turf is cut, the twig of a tree is broken off; the turf and twig are handed by the donor to the donee; they are the land in miniature, and thus the land passes from hand to hand. Along with them the knife may also be delivered, and it may be kept by the donee as material evidence of the transaction; perhaps its point will be broken off or its blade twisted in order that it may differ from other knives. But before this the donor has taken off from his hand the war glove, gauntlet or thong, which would protect that hand in battle. The donee has assumed it; his hand is vested or invested; it is the *vestita manus* that will fight in defence of this land against all comers; with that hand he grasps the turf and the twig. All the talk about investiture, about men being vested with land, goes back, so it is said, to this impressive ceremony. Even this is not enough; the donor must solemnly forsake the land. May be, he is expected to leap over the encircling hedge; may be, some queer renunciatory gesture with his fingers (*curvatis digitis*) is demanded of him; may be, he will have to pass or throw to the donee the mysterious rod or *festuca* which, be its origin what it may, has great contractual efficacy.' P & M also noted that the curved fingers gesture was Anglo-Saxon. Probably, the glove was as well. All these tokens represented delivery of ownership of the land, the knife (probably) being used as a more permanent reminder of the same, since turf and twig would perish quickly. Perhaps, the knife also had markings on it to indicate the donor's ownership in some way, such as, later, a seal on a (wooden) tally would. See also McBain Gift, n 209, p 172.

³⁵¹ Henry, n 149, p 71 'Cattle stealing was one of the most troublesome matters in early Anglo-Saxon times, and one of the first to which the laws gave attention. The requirement of two or more witnesses to the sale of a cow was primarily a police regulation, for the purpose of checking cattle-lifting, and the feuds which were apt to result therefrom.' The requirement of (at least) 2 witnesses had Biblical sanction, see NIV Bible, n 192, St Matthew, ch 18, v 16. See also Deuteronomy, ch 19, v 15 ('A matter must be established by the testimony of two or three witnesses.'). Also McBain Deeds, n 35, p 40, fn 178 and P & M, n 173, vol 1, p 59 (*team*).

³⁵² Hudson, n 315, pp 153-4. Flintoff, n 315, p 78 'Amongst other customs of the Saxons was this, that all contracts on the sale or bartering of land must have been made in the presence of witnesses, in order to prevent disputes, and preserve the evidence of the transaction; in default of which the lord could seize the land, until he was satisfied as to the proper owner thereof.' Robertson, n 180, p 35 (*Laws of Edgar*, c.962/3) 'two or three men who have taken the oath in his manner [i.e. to act as transaction witnesses] shall be present as witnesses at every transaction [i.e. buying or selling of goods in a borough or wapentake]'. The *Laws of Canute* (c. 1027) provided that no one was to buy anything worth more than 4d (whether livestock or goods) unless he had the trustworthy witness of 4 men, whether in a borough or in the countryside. See also Hudson, n 315, p 154 and Adams, n 236, p 187.

³⁵³ The form of oath for an alleged debtor would be 'In the name of the living God, I owe not N '*sceatt*' or shilling or penny or penny's worth [*arra*]; but I have discharged to him all that I owed him, so far as our verbal contracts were at first.' See Henry, n 149, pp 23, 52 and Hudson, n 315, p 695. The oath for the transaction witness was: '*In the name of Almighty God, as I here for N in true witness stand, unbidden and unbought, so I with my eyes saw, and with my ears heard, that which I with him say*'. Ibid, p 76. This form of oath likely derived from the *Laws of Edgar* (c. 962/3), see Robertson, n 180, p 35 and it remained up to the 15th century England. See Henry, n 149, p 76. '*Hear this N that I was present seeing and hearing when N loaned to you xx pence on such a day at such a place, so help me all the relics of the saints*.' See also Adams, n 236, p 195.

³⁵⁴ Naismith, n 138, p 35 'trade - and town-related duties, as well as the witnessing of purchases, fell to the king's reeve, who was already a standard part of the machinery of government in the seventh century. Town-reeves occupied and oversaw the king's hall or estate in or near the town where they worked. These were mentioned already in the seventh century...'. See also Flintoff, n 315, p 107 (*gerefa, tun-gerefa*, or reeve). Also, Hudson, n 315, p 154 and Adams, n 236, p 217.

³⁵⁵ As P & M point out, n 173, vol 1, p 59 the primary purpose of witnesses in cattle (and, presumably other animal) sales was to protect against subsequent claims that the cattle had been stolen. Thus, 'there runs through the Anglo-Saxon laws a series of ordinances impressing on buyers of cattle the need of buying before good witnesses. But this has nothing to do with the validity of the sale between the parties. The sole purpose, judging by the terms and context of these enactments, is to protect the buyer against the subsequent claims of any person who might allege that the cattle had been stolen from him'.

(vi) **Publicity.** In Biblical times, sales were conducted at the City gate, where markets would be held and officials stationed (see 6(c)). In Anglo-Saxon times, sales of goods - in the period from the 5th-9th centuries - would have been local affairs - restricted to villages and the few cities still populated (such as London, York, Canterbury, Southampton, Rochester *etc.*)³⁵⁶ Markets (or fairs) in the open countryside would have been few and far between - not least, because of the danger of merchants being robbed and/or killed. Also, there were many petty kingdoms, with danger in traversing from one to the other.³⁵⁷ Further, at least, by the laws of Edward the Elder (AD 899-924) and of Aethelstan I (AD 924-39), sales of more valuable goods (slaves, horses, oxen, cattle *etc.*) were required to be in designated market towns before transaction witnesses and/or in the presence of a port reeve.³⁵⁸ This was not just to prevent theft and to avoid violence arising from disputes;³⁵⁹ mints were required to be located in towns and, thus, the moneyers might help in supplying coinage - as well as in identifying fakes.³⁶⁰ Therefore, the validity of legal tender presented in payment could be better checked.³⁶¹ If people were foolish enough to buy goods outside designated market towns, the laws of Edward the Elder (AD 899-924) imposed a fine, payable to the king, for insubordination (i.e. contempt of the sovereign).³⁶² This seems to have continued to the time of William I (1066-87) and - probably - beyond;³⁶³

(vii) **Surety.** Later Anglo-Saxon dooms (legislation) provided that a person buying, or selling, had to have a surety (*viz.* a guarantor).³⁶⁴

As well as these pre-requisites (very similar to the Biblical ones, save for (vii)), an *arra* would have been used to make it clear that a contract had been concluded.

(viii) **Arra.** As with Biblical and Roman law, the *arra* could be of negligible or no value (e.g. a small coin or a token which, likely, included a tally).³⁶⁵ It did not have to be a token as such. Following Biblical and Roman

³⁵⁶ McBain Public Nuisance, n 339, pp 6-7. London was frequently devastated and, probably, often barely inhabited - including in the period AD 851-86 (35 years). See also McBain Law Merchant, n 134, p 44. As for other cities, for a poem on (it seems) the city of Bath in the early 8th century, see Barber, n 315, vol 3, pp 146-7 'Their ramparts became abandoned places, the city decayed...these courts crumble, and this redstone arch sheds tiles.' Indeed, King Alfred (AD 871-99) claimed that, when he came to the throne, he could not recall a single cleric skilled in latin south of the Thames, see Barber, n 315, vol 2, pp 190-1. However, that is not to say that London did not have a flourishing market(s) at times, especially in the period AD 630-750. Thus, Willibald (the biographer of St Boniface (Winfrid)) noted that St Boniface in c. AD 716 'came to a place where there is a market for the buying and selling of merchandise. This place is called Lundenwich [London *vicus* or town] by the Anglo-Saxons even to this day.' See Barber, n 315, vol 2, p 283. And Bede, *A History of the English Church and People* (Penguin, 1981), p 104, writing c. AD 731, described London as 'a trading centre for many nations who visit it by land and sea.'

³⁵⁷ Unlike the Romans, the Anglo-Saxons (like their Germanic forebears) were very much a rural people who disliked towns and markets. As Mauss noted, n 252, p 60 'Germanic civilisation was itself a long time without markets. It remained an essentially feudal and peasant society, and the notions and even the terms *'buying price'* and *'selling price'* seem to be of recent origin.'

³⁵⁸ It is likely that other contracts were often made in the presence of important people such as bishops and the king. See Henry, n 149, p 113. For the later involvement of the reeve to acknowledge debts, *Ibid*, p 119.

³⁵⁹ In market sales, with witnesses present, if something went wrong, there would have been peer pressure. Further, the portreeve (king's official) or equivalent would have been on hand, to adjudicate. Also, likely, all disputes (as in later fairs) had to be resolved while the market (fair) was open. Finally, one suspects that merchants would have been keen to resolve disputes to prevent ostracism as well as to ensure goodwill for further trading (also, likely, to prevent a knife being stuck in their back or ribs, when leaving town, by a disgruntled purchaser). As indicated elsewhere, probably sales were much more leisurely and careful than in modern times. People had few goods and a bad sale(s) could impoverish them. See also McBain Gift, n 209, p 174.

³⁶⁰ Naismith, n 138, p 132.

³⁶¹ Mints were required to be located in burghs or ports. Naismith, n 138, p 132.

³⁶² Attenborough, n 315, p 115 'my will is that every man shall have a warrantor [to his transactions] and that no one shall buy [and sell] except in a market town; but he shall have the witness of the *'port reeve'* [i.e. the king's official] or other men of credit, who can be trusted. And if anyone buys outside a market town, he shall forfeit the sum due for insubordination to the king; but the production of warrantors shall nevertheless be continued, until the point is known at which they can no longer be found.' It may also be that, by the 10th century, kings were franchising the right to hold markets and, therefore, they had a vested interest in restricting their location to certain towns. *Ibid*, p 174. See also McBain Law Merchant, n 134, pp 41-2. Also, Hudson, n 315, pp 153-4, 156.

³⁶³ See 10.

³⁶⁴ See McBain Law Merchant, n 134, p 42. See also Hudson, n 315, p 154, referring to the *Laws of Aethelred* (AD 978-1016) that 'no-one shall either buy or exchange anything, unless he has a surety and witness.' See also Robertson, n 180, p 55, 67.

³⁶⁵ This followed from early Germanic law. Mauss, n 252, pp 61-2 'In Germanic law any contract, whether for sale or purchase, for loan or deposit, includes the constitution of a pledge. An object, generally of little value, is given to the other contracting party; a glove, a coin (*treugeld*), a knife...the pledge is not only a binding obligation, but also binds the honour, authority, and *mana* of the one who hands it over... For the word *wette*, *wetten*, that the *wadium* of the laws translates, has as much the meaning of *'wager'* as of *'pledge'*. See also Henry, n 149, pp 136-7 (he thought the Anglo-Saxon *wed* was related to the tally). It is asserted that all these references are to an *arra*. That is, tokens to evidence that a party was legally bound. P & M, n 173, vol 2, p 208 'We must observe that the giving of earnest is treated as a quite different thing from part payment. Earnest, as modern German writers have shown, is not a partial or symbolic payment of the price, but a distinct payment for the seller's forbearance to sell or deliver a thing to anyone else.' Adams, n 236, p 190 'The *arrha* was relatively worthless, and was not in fact payment, or part payment; but it was the means of judicially binding the agreement made by the parties, and a real right arose therefrom.'

custom, it could be a handshake (or handgrasp/clasp)³⁶⁶ - as opposed to a hand strike - which was also the Scandinavian (and Viking) custom of executing contracts.³⁶⁷ Further, the Anglo-Saxons were - like their German forebears - great drinkers. Thus, parties to the transaction (as well as transaction witnesses) would, as part of the transaction, have (likely) shared a drink together, to '*wet [seal] the bargain*'.³⁶⁸ This would, also, have been of evidential worth - to encourage transaction witnesses to remember the event, as well as pay them for their attendance. Further, since Anglo-Saxon society was based on allegiance and the oath³⁶⁹ - that is, of a man evidencing his '*good faith*' by oral expression in the presence of witnesses - it is likely that in, the case of sales and other contracts, the parties also swore an oath on the gods (or in a Christian context), to bind themselves.³⁷⁰ For example, the seller swearing on the gods that he was the true owner of the goods being sold. The giving of an oath would have been no light thing. On this a man's '*fame*' (his good reputation and trustworthiness) was based - and the absence of it was a serious matter since a man of ill fame (ill repute) had imposed on him a higher standard of proof in the courts³⁷¹ and he was (generally) treated with little or no respect.

A final issue can be noted in the case of a valid contract in Anglo-Saxon times. *Would an oath alone have been sufficient to effect a valid contract in Anglo-Saxon times? That is, an oath without transaction witnesses or an arra - including a handshake and/or a drink to seal the bargain?* It is asserted it would not - something important in respect of the divergency between secular and ecclesiastical (church) law.

Oath. In the Bible many persons (including God) swore an oath to bind themselves - and oaths were given mutually at times.³⁷² Thus there are references in the Bible to a person '*promising on oath*',³⁷³ '*sealing with an oath*',³⁷⁴ '*promising with an oath*'³⁷⁵ and being '*bound by his oath*'.³⁷⁶ However, even in Biblical times, it would seem that an oath - while binding morally, did not do so legally.³⁷⁷ For example, if Abraham, in buying land from the Canaanites (see 6(c)), had not invoked their standard formula (stipulation) for sale - but merely sworn an oath on his God - this would not have been legally binding - because it was unilateral (and the Canaanites did not recognise his God). Further, even if bi-lateral - and between Jews - it seems clear that there was confusion as to what form bound even morally, which led Christ to deprecate the use of oaths.³⁷⁸ In other words, an oath was

³⁶⁶ P & M, n 173, vol 2, p 190, while noting that the handshake and oath, if broken, resulted in the Catholic church imposing penance in the later Anglo-Saxon period, were uncertain whether it imposed a binding obligation. They stated, pp 188-9 "In many countries of western Europe, and in other parts of the world also, we find the mutual grasp of hands (*palmata, paumee, handschlag*) as a form which binds a bargain. It is possible to regard this as a relic of a more elaborate ceremony by which some material *wed* passed from hand to hand; but the mutuality of the hand grip seems to make against this explanation. We think it more likely that the promisor proffered his hand in the name of himself and for the purpose of devoting himself to the god or the goddess if he broke faith. Expanded in words, the underlying idea would be of this kind: '*As I here deliver myself to you by my right hand, so I deliver myself to the wrath of Fides - or of Jupiter acting by the ministry of Fides, dius fidius [god of oaths, associated with Jupiter] - if I break faith in this thing.*' Whether the Germans have borrowed this symbolic act from the Roman provincials and thus taken over a Roman practice along with the term *fides* or whether it has an independent root in their own heathen religion, we will not dare to decide. However, the grasp of hands appears among them at an early time as a mode of contracting solemn, if not as yet legally binding, obligations.' See also the description of the *arra* as '*handgeld*' in Germanic law, Adams, n 236, p 189.

³⁶⁷ See n 180. See also L Larson, *The Earliest Norwegian Laws* (1935), Gulathinglaw (c. 935-61), p 417 'Hand sold...Concluded with a handclasp in the presence of witnesses'. Ibid, p 67 'all purchases that are hand sold or known to witnesses shall hold...'. Ibid, p 85 (right to demand a labourer to provide such labour as had been hand sold by the employer to him, i.e. agreed on with a hand grasp). B Surtees Phillpotts, *Kindred and Clan in the Middle Ages and After* (1913), p 220 'Pledging by handclasp is a very definite feature of Scandinavian custom.'

³⁶⁸ See also Zimmerman, n 252, p 71 who noted that, in the Roman stipulation, the word '*sponsio*' ('*I promise*') etymologically descended from the Greek, to present a drink-offering. See also Buckler, n 172, p 13. Adams, n 236, p 189, n 3 'The *arrha* was called '*weinkauf*', because it was usually spent for wine drunk by the witnesses of the sale...'

³⁶⁹ As P & M noted in the judicial context, n 173, vol 1, p 39 'Oath was the primary mode of proof...An accused person who failed in his oath, by not having the proper number of oath-helpers prepared to swear, or who was already disqualified from clearing himself by oath, had to go to one of the forms of ordeal.' See also Henry, n 149, p 54 and Adams, n 236, pp 186,188.

³⁷⁰ See 5 (oath).

³⁷¹ For those excluded from being oath worthy in medieval times, see Henry, n 149, p 57.

³⁷² NIV Bible, n 192, Book of Genesis, ch 26, v 30 'Early the next morning the men swore an oath to each other'. For instances of oaths in the Bible, see Goodrick, n 194 (oath, 128 instances).

³⁷³ Ibid. For example, Genesis, ch 24, v 7 'The Lord...promised me on oath, saying 'To your offspring I will give this land...'

³⁷⁴ Ibid, Deuteronomy, ch 29, v 12 'You are standing here in order to enter into a covenant with the Lord...a covenant the Lord is making with you this day and sealing [confirming] with an oath, to confirm you this day as his people.'

³⁷⁵ Ibid, Mark, ch 6, v 23 'he [king Herod] promised her with an oath, 'Whatever you ask I will give you, up to half my kingdom.'

³⁷⁶ Ibid, Matthew, ch 23, v 16 'Woe to you, blind guides ! You say, 'If anyone swears by the temple, it means nothing; but if anyone swears by the gold of the temple, he is bound by his oath.'

³⁷⁷ See 5 (oath).

³⁷⁸ NIV Bible, n 192, Matthew, ch 5, v 37 'you have heard that it was said to the people long ago, 'Do not break your oath, but keep the oaths you have made to the Lord. But I tell you, Do not swear at all: either by heaven, for it is God's throne; or by the earth for it is his footstool; or by Jerusalem, for it is the city of the Great King. And do not swear by your head, for you cannot make even one hair black or white. Simply let your 'yes' be 'yes', and your 'no', 'no'; anything beyond this comes from the evil one.' On the Biblical meaning, see Tyler, n 168.

of insufficient evidential worth in the legal context. As for the Anglo-Saxons (like their German forebears), they had many gods and, doubtless, they used oaths in a legal context for added effect. However, even if bilateral (and between people with similar gods) the Anglo-Saxon dooms do not suggest that oaths comprised sufficient evidence, *per se*, of the existence of an agreement necessary for a valid contract. Nor that their breach would invalidate a contract.³⁷⁹ Instead, for breach of an oath, generally, under Anglo-Saxon law, compensation and/or penance³⁸⁰ were imposed, as well as - in certain circumstances - a criminal penalty.³⁸¹ Further, doubtless, an oath breaker was shunned as one of ill fame. In conclusion, an oath was supplementary (For added (moral) effect) in the case of a contract, but breach of it did not invalidate the contract.

In conclusion, the making of a contract in Anglo-Saxon times differed little from Biblical law. It also employed certain evidential requirements (pre-requisites). These pre-requisites were to be expected in an illiterate and innumerate society where there was no (or scant) coinage, different languages, no trust and a general tendency to resort to violence in the event of disputes.

(c) Anglo-Saxon Law - Consideration

In Anglo-Saxon times, sophisticated jurisprudential concepts of Roman law had no place. Anglo-Saxon law was simpler and more rudimentary.³⁸² It closely followed Biblical law in the case of contracts and gifts. Both would not enforce a '*nudum pactum*' - although they did not use that term. That is, one lacking various evidential pre-requisites to indicate (prove) that a *consensus* had been reached.

- **Pre-requisites.** In the case of sales, for example - while both Biblical and Anglo-Saxon law required: (i) capacity; (ii) subject matter; (iii) agreement (*consensus*), whether given orally or in writing; (iv) delivery; (v) transaction witnesses; (vi) publicity - the Anglo-Saxons also required (vii) a surety (guarantor);
- **Tokens.** Biblical and Roman law made extensive use of tokens: (a) as a form of private currency; (b) to represent the subject matter (*viz.* a clod of earth to represent land); and (c) as an *arra* (including a handstrike/handclasp) - delivery of which *arra* evidenced that an agreement had been reached as well as comprising symbolic delivery of the subject matter;
- **Oral Promise & Oral Contract.** An oral promise by one party and an oral agreement (with, or without, an oath by one or both) - while it may have been *morally* binding in both Biblical and Anglo-Saxon law - was not so legally. It was too weak (cf. if the agreement was in writing or accompanied by an *arra*). Further, an oath was not an *arra* as such - legally. A verbal *arra* maybe - a physical one, no. And a physical one was required to satisfy delivery.

As for the English '*doctrine of consideration*' there is no evidence of such a pre-requisite in Anglo-Saxon law or a need for the same. This was a simpler age - one lacking jurisprudential subtlety.

In conclusion, Anglo-Saxon law had no doctrine of consideration.

10. NORMAN CONQUEST (1066) - GLANVIL (c. 1189)

Despite the Norman Conquest (1066) there is no evidence that commercial transactions - and the Anglo-Saxon law on the same - underwent substantive change.³⁸³ Further, coinage was still scant.

³⁷⁹ See e.g. Attenborough, n 315, p 47 (*Laws of Ine*)(compensation for a false oath *re* vouching to warranty); p 63 (*Laws of Alfred*)(‘every man shall abide carefully by his oath and pledge’); (*Laws of Edward*) (compensation for breach of oath *re* harbouring criminals). See also Robertson, n 180, pp 407-8. Also, p 85 (*Laws of Aethelred*, AD 978-1016, ‘every Christian man shall...carefully abide by his oath and pledge.’ Ibid, p 99. Also, p 171 (*Laws of Canute*, c.1027) ‘strictly abide by his oath and pledge.’ Ibid, p 143 (*Canute's Proclamation of 1020*) ‘all the bishops declare that very severe amends must be made to God for the violation of oaths or pledges.’ Ibid, p 195 (*Laws of Canute*, c. 1027), p 195 ‘If anyone swears a false oath on the relics and is convicted, he shall lose his hand or half his *wergeld* which shall be divided between the lord and the bishop.’

³⁸⁰ JT McNeill & HM Gamer, *Medieval Handbooks of Penance* (Octagon Books, 1965). e.g. *The Penitential of Theodore* (Archbishop of Canterbury, AD 668-90), p 190 (penalty for false swearing (i.e. perjury), 3 years penance).

³⁸¹ See fn 379 (*Laws of Canute*).

³⁸² P & M, n 173, vol 1, p 43 ‘The law of contract [in Anglo-Saxon law] is rudimentary, so rudimentary as to be barely distinguishable from the law of property. In fact people who have no system of credit and very little foreign trade, and who do nearly all their business in person and by word of mouth with neighbours whom they know, have not much occasion for a law of contract.’ Ibid, pp 57-8 ‘We may assume that actual delivery was the only known mode of transfer between living persons; that the acceptance of earnest money and giving of faith and pledges were customary means of binding a bargain; and that contracts in writing were not in use. There is no evidence of any regular process of enforcing contracts, but no doubt promises of any special importance were commonly made by oath, with the purpose and result of putting them under the sanction of the church.’

³⁸³ P & M, n 173, vol 1, p 79 ‘King William shows no desire to impose upon his new subjects any foreign code.’ Ibid, p 88.

(a) Coinage

In 1067, William I created a new mint at the Tower of London. He also provided that the purity of the minted silver pennies must be 925 parts per thousand. This became known as '*sterling silver*'. Hence, English (silver) pennies were known as *sterlings* throughout Europe.³⁸⁴

- However, silver pence - up to the reign of Edward III (1272-1307) - were in short supply. This was less of a problem than might be thought, given that barter was prevalent and that - until the reign of Henry I (1100-35) - even the sovereign accepted payment in kind;³⁸⁵
- It was Henry I who required that (much of) his purveyance be in coin (as well as imposed scutage).³⁸⁶ Further, in feudal times - including early feudal times - peasants were bound to landed estates (slaves and villeins especially so) and they rarely travelled (in part, also, because of the expense and the state of the roads being so poor). They were, generally, paid in food and goods and they engaged in barter, *inter se*, to the extent of any excess or lack,³⁸⁷ albeit coins were sometimes used.³⁸⁸

It is also likely that tokens were used, on manorial estates, to reflect debts and entitlements - especially for agricultural work.³⁸⁹ In short, coinage in England up to AD 1100, would have been (generally) limited to the wealthy (including ecclesiastics) and to merchants.

(b) Contracts

Contrary to popular belief, it is unlikely that William I and his successors effected much legal change. At least, until the reign of Henry II (1154-89). They were too busy trying to hold on to power and to preserve their domains. This especially applies in the commercial field. Further, the Normans - like the Anglo-Saxons - were, in the main, illiterate. Thus, there was little evidence of writing. That said, writing - as well as the sealing of documents (said to be introduced by the Normans)³⁹⁰ - would have increased and trickled down to clerics³⁹¹ and

³⁸⁴ E Fletcher, n 185, p 32. Cf. Coke, n 47, vol 2, pp 575-6.

³⁸⁵ Earl of Liverpool, n 132, p 39 'In the reigns of William I [1066-87] and William II [1087-1100] and during the greater part of the reign of Henry I [1100-35] the king's rents, arising from his demesnes, (which were at that time the principal part of the Royal revenue), though reserved in money, were answered in cattle, corn and other provisions, because money was then scarce among people. The rents of private landholders continued to be paid in kind to a still later period. The commerce of the country, whether foreign or internal, was during this period of no great extent'. He quoted, *inter alia*, Madox (see n 166).

³⁸⁶ Davies, n 148, p 142 'Rather than relying on the customary military service of forty days owed him annually by his tenants-in-chief with their retainers, he [i.e. Henry I] began insisting that these feudal services should be commuted into a cash payment or '*scutage*' (from the latin, '*scutum*', a shield), a process as welcome to the barons as to Henry's finances.'

³⁸⁷ At a minor level this can be seen from the Conversations of Aelfric Bata (a monk, writing early 11th century), see Barber, n 315, vol 3, p 161. In a text for schoolboys, on student bargains (contracts), the conversation is 'You scribe...Write me an exemplar on a roll or sheet, or on a parchment or tablet...Or I'll buy all those things from you right now - I'll give you their price in gold or silver [i.e. sale], or in horses or mares, or oxen, sheep, swine, goats, clothing, wine, honey, grain or beans.' [i.e. barter].

³⁸⁸ Ibid, p 162, in respect of buying a book, the conversation is: 'how much will you give me? I don't want to give quite that much...What do you want then? How many coins will you pay? Believe me, I don't dare give you more or buy it more dearly. Take this if you please. It's not worth more. I'll pay you twelve and count them into your hand... Count the coins here and now so that I can tell if they're valuable and whether they're pure silver. I will. These really are all good ones. Indeed they are.'

³⁸⁹ Fletcher, n 149, p 5 'peasants feudally bound to every great medieval estate often received payments in the form of food, clothing and accommodation. It was generally assumed that such people had no need of proper money. This attitude probably caused the production and use of numerous lead tokens among the labouring classes in medieval times. They circulated locally and must also have changed hands as tallies to record stints of labour done by individual workers. Some of these leaden pieces may also have seen use as gaming counters in country districts. Enormous numbers have come to light, but very little is known about the many and varied markings found on them.'

³⁹⁰ P & M, n 173, vol 2, p 223 'At the date of the conquest the Norman duke has a seal and his cousin the late king of England had a seal; but in all probability very few of William's followers, only the counts and bishops have seals.' They also noted, fn 223, that 'The Monasticon [W Dugdale, *Monasticon Anglicanum*, 1655-73] testifies to the existence of many charters granted by the Norman kings, including Stephen, which either bore no seals, or else were also signed with crosses in the old fashion.' Ibid, p 224 'We must not think of the act of sealing as a mere formality; the impressed wax was treated as a valuable piece of evidence. If a man denied a charter that was produced against him and the witnesses named in it were dead, the seal on it would be compared with the seals on instruments the genuineness of which he admitted, and thus he might be convicted of a false plea.' Hudson, n 315, pp 876-7 'The great majority of charters, particularly from the Anglo-Norman period, record grants to the church. Writing may only have been used for laymen in exceptional circumstances...'

³⁹¹ See e.g. M Adler, *Jews of Medieval England* (Jewish Historical Society, 1939), p 262 (a chirograph by the dean of St Pauls of 1197 in respect of lease of land). It referred to an earnest of 2 marks paid to the dean and chapter and concluded 'in order that this our grant should be firm and stable we have confirmed it by the document of the present writing and by the impression of our seal [*sigilli nostri*], the seal of the cathedral. It was also witnessed by various clerics. Cf. Ibid, p 263 (a chirograph in which one Roger grants a quit rent for land in London in 1202). It referred to an earnest and concluded 'I have given possession (*seisin*) to the said [X] in the presence of the following witnesses.' It was not sealed. However, see Ibid, p 268 (one Peter granted 40 acres of land in London in 1223 to the bishop of London). It concluded 'in

merchants. However, this took time and executing documents with the sign of the cross - as in Anglo-Saxon times - likely continued, as well as charters without a seal.³⁹² Thus, although writing had become more common by the 12th century, the tendency to seal documents belongs more to the 13th century.³⁹³

- However, from the mid-12th century, trading between Europe and England - as well as within England - improved considerably. This resulted in markets as well as large fairs (including international ones) commencing to operate in England on an annual basis.³⁹⁴ These would have brought in money to English sovereigns who made money from exercising their royal prerogative to franchise markets and fairs;
- The increased presence of merchants (local and foreign) produced the development of more flexible (that is, less formal) trade practices in the commercial field in England - which '*law merchant*' was gradually accepted by the common law. That said, little (if anything) of this seems to have occurred in Norman times.³⁹⁵ Rather, it was Edward I (1272-1307) who was keen to promote the law merchant (as well as speedier remedies for merchants) by enacting legislative measures (see 14).

As it is, laws said to have been passed in the time of William I (1066-87)³⁹⁶ required sales (as in Anglo-Saxon times) to be in designated towns³⁹⁷ and with 4 transaction witnesses.³⁹⁸ There is, however, no concept of the doctrine of consideration. Nor is there in the *Laws of Henry I* (written c. 1113).³⁹⁹ Holmes suggested that a binding promise, in the 200 years after the Norman Conquest (i.e. up to 1266), could be made by a pledge of faith or oath - although this would not seem correct in the king's court⁴⁰⁰ since this would be to treat oaths as having binding contractual effect - something Anglo-Saxon law does not appear to have accepted.⁴⁰¹

In conclusion, there was no doctrine of consideration from Anglo-Saxon times to 1189.

order that this gift, grant and warranty may obtain perpetual validity I have made this my charter by the affixing of my seal'. It also provided for many witnesses.

³⁹² P & M, n 173, vol 2, p 223 mentioned charters granted by the Norman kings, including king Stephen [1135-54] which were without a seal or which were signed with a cross. For early seals, see Birch, n 346, vol 1. The earliest seal of a cleric held by the British Museum appears to be: (a) for that of an Archbishop of Canterbury, Anselm (1093-1109); (b) that of a Bishop of London, Richard de Beames (1108-27); and (c) that of an Archbishop of York, Thurstan (1119-40).

³⁹³ Ibid, p 224.

³⁹⁴ See McBain Law Merchant, n 134, pp 44-5, 66-71.

³⁹⁵ The (so-called) *Laws of Edward the Confessor* (probably written c.1130), see O'Brien, n 315, suggest that transaction witnesses and a surety for sales, required in Anglo-Saxon times, was still required c.1130 since it states, p 201, 'It was also prohibited in law that no one buy a living animal or a used garment without pledges [sureties] and good witnesses [transaction witnesses]'. Since '*a living animal*' and a '*used garment*' were not mentioned in Anglo-Saxon law, this may have been some requirement of William I (1066-87) or later Norman kings.

³⁹⁶ Robertson, n 180, pp 253-75.

³⁹⁷ *Ten Articles of William I* (written, c.1080-7) stated: 'we forbid the buying or selling of any livestock except within towns and before three trustworthy witnesses [i.e. transaction witnesses], likewise that of any second hand goods without a surety and warrantor. If anyone does otherwise, he shall pay the value of the goods twice over and in addition the fine for insubordination.' See Robertson, n 180, p 273. Also, McBain Law Merchant, n 134, p 42 and Hudson, n 315, p 380. See also *Willelmi Articuli Retractati* (which may have been written as late as 1210) 'no market or fair [forum] shall be held or permitted to take place except in the cities of our realm, and in boroughs which are enclosed and walled, and in castles, and in well-guarded places, where the customs of our realm and our common law and the dignities of our crown, which were established by our worthy predecessors, cannot lapse or be defrauded or violated, but where all things must be done duly, openly and in accordance with law and justice.' See Robertson, n 180, p 249.

³⁹⁸ The (so-called) *Laws of William I* 'No one shall buy anything 4 pence in value, either livestock or other property, unless he has 4 men as witnesses [i.e. transaction witnesses] either from a town or village. And if anyone claims it and he has not witnesses and no warrantor, the goods shall be given up to the claimant, and the fine shall be paid to the party who is entitled thereto. And if he has witnesses in accordance with what we have declared above, vouching to warranty shall take place three times; and on the fourth occasion he shall prove his ownership of it or deliver it up.' See Robertson, n 180, p 273. Cf. P & M, n 173, vol 1, p 88.

³⁹⁹ See n 40. Although this text does not comprise a statement of the '*laws*' as such (being a legal text), it probably reflects the legal position of that time. See P & M, n 173, vol 2, p 457. Also, Hudson, n 315, pp 380-3.

⁴⁰⁰ Holmes, n 87, AALH, vol 3, pp 719-20 'Two centuries after the Conquest there were three well known ways of making a binding promise; faith, oath, and writing.... Whether this plighting of faith (*fides data*, *fides facta*) was a formal contract or not in the time of the Plantagenets [1154-1485], and whether or not it was ever proceeded upon in the king's court, it sufficiently appears from Glanvill and Bracton that the royal remedies were only conceded *de gratia* if ever'. [the reference was to Glanvill's statement in fn 408]. However, Holmes fails to note the use of the *arra*, to bind.

⁴⁰¹ See 9(b).

11. GLANVIL (c. 1189)

From the latter part of the 12th century, trade in England seems to have greatly increased⁴⁰² and the first legal text - Glanvill, *Treatise on the Laws and Customs of the Realm of England* (c. 1189)⁴⁰³ - contained an analysis of various commercial matters. It was also more sophisticated than Anglo-Saxon law. Glanvill discussed in detail: debts,⁴⁰⁴ sureties (guarantors)⁴⁰⁵ and mortgages.⁴⁰⁶ He also made reference to court compositions (concordes) between persons⁴⁰⁷ as well as to sales. However, Glanvill limited his discussion to the king's court and not to lesser courts, such feudal courts. Thus, he stated:

it is not the custom for the court of the lord king to protect or warrant private agreements of this kind concerning the giving or receiving of things as a gage, or other such agreements, whether made out of court or in courts other than that of the lord king; it follows that, if such agreements are not kept, the court of the lord king will not concern itself with them, and is therefore not bound to pronounce upon the rights or privileges of the several prior or subsequent creditors.⁴⁰⁸

Further, although influenced by Roman law,⁴⁰⁹ the text of Glanvill reflected prevailing English law at a practical level.⁴¹⁰

(a) Debts

Although Glanvill did not expressly refer to the concept of '*nudum pactum*', it seems clear that a mere oral promise was insufficient to ground an action for debt in his time.⁴¹¹ Thus, Glanvil stated, in the context of debt:

When the debtor appears in court in the appointed day, if the creditor has neither gage [security] nor sureties [guarantors] nor any proof except a mere pledge of faith [*fidem*], this is not sufficient proof in the court of the lord king.⁴¹²

⁴⁰² Fitzstephen in his *Description of London* (c.1170) (contained in Stow, *The Survey of London* (1598, rep JM Dent, 1965), p 501, described London as 'possessing above all others abundant wealth, extensive commerce, great grandeur and magnificence.'

⁴⁰³ Glanvill, n 41. See also P & M, n 173, vol 2, ch 5.

⁴⁰⁴ Ibid, p 117 'The cause of the debt may be loan for consumption, or sale, or loan for use, or letting, or deposit or any other just cause of indebtedness...'

⁴⁰⁵ Ibid, p 118.

⁴⁰⁶ Ibid, p 121.

⁴⁰⁷ Ibid, p 94 'It often happens that cases begun in the lord king's court are ended by amicable composition and final concord subject to the consent and licence of the lord king or his justices, whether the plea concerns land or something else. Such a concord is generally, by common consent of the parties, written down in a chirograph, and the written terms read over to the lord king's justices sitting on the bench, in whose presence there is delivered to each his own part of the chirograph, which is identical with the other part.'

⁴⁰⁸ Ibid, p 124. Ibid, p 132 'We deal briefly with the foregoing contracts which are based on the consent of private persons because, as was said above, it is not the custom of the court of the lord king to protect private agreements, nor does it even concern itself with such contracts as can be considered to be like private agreements.' See also Ibid, p xi (*introduction*) 'The details of litigation in feudal courts...are expressly excluded.'

⁴⁰⁹ As the introduction to Glanvill, n 41, p xvi, noted, the revival of Roman law flourished in Bologna under Imerius (c. 1055-c.1130) and his four disciples, the '*doctors*', Bulgarus, Martinus, Hugo and Jacobus. See generally, H Kantorowicz, *Studies in the Glossators of the Roman Law* (Cambridge, 1938) and F Schulz, *Roman Legal Science* (Oxford, 1946).

⁴¹⁰ P & M, n 173, vol 2, p 193 'in the twelfth century two new forces are beginning to play upon the law of contract: the classical Roman law is being slowly disinterred and the canon law is taking shape. Glanvill knows a little, Bracton knows much more about both. For a moment we may glance at them, though the influence that they exercise over English law is but superficial and transient.' Also, vol 1, p 165 [Glanvill] knew something of Roman and of canon law.' Scrutton, n 88, p 77 'Glanvil, though it bears traces of his acquaintance with the Roman law, and adopts in some few cases its terminology, is otherwise entirely free from Roman influence and shows the almost complete purity of the English law at the end of the 12th century from Roman elements.' See also Hudson, n 315, p 696.

⁴¹¹ Jenks, n 91, p 116 'no one pretended in Glanvil's time...that a mere [oral] promise was sufficient to ground an action for debt. The possession of the actual property of the [P][i.e. the money] by the [D] was the true ground of the action.' See also Kiralfy, n 1 (*fides facta*), pp 178-80. WM McGovern, *The Enforcement of Oral Covenants prior to Assumpsit* (1970) 65 Northwestern Univ. LR 576, p 579 ('*McGovern Covenants*'), 'Glanville's statement that an action of debt in the king's court would be dismissed if the [P] had no proof beyond his unsupported word...'

⁴¹² Glanvill, n 41, p 126. He continued 'Of course any breach of faith involved may be sued upon in an ecclesiastical court; but the ecclesiastical judge, though he has jurisdiction over such a crime and may enjoin penance or satisfaction upon the convicted, is forbidden by an assize of the realm [Constitutions of Clarendon 1164] to deal with or to determine in an ecclesiastical court, on the basis of pledge of faith, pleas concerning the debts or tenements of laymen.' The Constitutions of Clarendon 1164 stated c. 15 'Pleas of debt due under pledge of faith or without pledge of faith are to be in the king's justice'. See GB Adams & HM Stephens, *Select Documents of English Constitutional History* (Macmillan, 1933), p 14. Also, Glanvill, n 41, p 191. Also, P & M, n 173, vol 2, p 188 (giving the gist of the Anglo-Saxon oath 'I deliver myself to the wrath of Fides ...if I break faith in this thing.'). In this fashion, God was invoked as a sort of pledgee. See also Ibid, p 191 & 198-9 (*re* Constitutions of Clarendon). See also Hudson, n 315, pp 698-9.

It should be recalled that Glanvill was only dealing with the '*king's court*'. As to what was sufficient proof for a debt in the king's court, Glanvill accepted that proof provided by: (a) a transaction witness; or (b) trial by battle;⁴¹³ or (c) a writing (*carta*), was sufficient. Thus, he stated:

Proof of the debt may be made by a suitable witness,⁴¹⁴ or by battle, or by charter. Now when anyone in court puts in as proof of his debt a charter made by the other party or some ancestor of his, the other party either acknowledges the charter or does not. If the debtor does not acknowledge the charter, he may deny or contradict it in two ways: either by admitting in court that the seal is his but denying that the charter was made by, or with the consent of, himself or his ancestor, or by denying completely both seal and charter...⁴¹⁵ However, if the party against whom the charter is produced to prove the debt immediately acknowledges that charter, then the debtor will be bound to satisfy the creditor according to the terms of the charter.⁴¹⁶

This statement indicates that - by the time Glanvill wrote (c.1189) - the use of writing was more common. So too, the use of seals. As previously indicated, it is said the Normans introduced seals into England (see **10**). These would have been restricted to the king and great magnates at first. However, by the time Glanvill wrote, most merchants would have had a seal.⁴¹⁷

- A case in 1154 indicates the filtering down of seals.⁴¹⁸ The attachment of the seal (an *arra*) evidenced (that is, authenticated or proved) the writing (the *charta* or *carta*).⁴¹⁹ Thus, a person was bound if the writing was sealed.⁴²⁰ Even if unsealed, it was evidential, it seems (at least, according to Holmes) - although by the time of Glanvill this may not have been so.⁴²¹ The fact that Glanvill refers to seals also suggests that other methods of execution (such as the Anglo-Saxon form of signing with a cross) had been displaced by the Norman custom;
- What is interesting is that Glanvill mentions no pre-requisite of delivery in the case of a writing containing a debt - delivery being a later pre-requisite for a deed. Glanvill also does not mention the tally which was being used to evidence a debt since Fitzneale (Richard son of Nigel) mentions Exchequer tallies in his work written in the

⁴¹³ As Salmond Essays, n 89, p 20 pointed out, the champion had to be (at least, in theory) a transaction witness, as also noted by Glanvill, n 41, p 24 ('The demandant is not allowed to prosecute his appeal in person, because prosecution can only be by a suitable witness who heard and saw the facts'). Later, hired champions were used. Trial by battle (combat or duel) seems to have been a Norman invention. P & M, n 173, vol 1, p 39. In the Regulations of William I regarding Exculpation (c. 1068-77), see Robertson, n 180, p 233 the Anglo-Saxon word used for battle (duel) was '*ornest*' (evidence), which as G Neilson, *Trial by Combat* (1890), p 31 noted, had the same meaning as wager.

⁴¹⁴ This would be a reference to transaction witnesses. See also Holmes Common Law, n 87, p 256 (also, '*Suit, secta*, was the term applied to the persons whose oath the party tendered') and Scrutton, n 88, p 76. See also Jenks, n 91, pp 173, 175 & 182 and Salmond Essays, n 89, pp 22-3.

⁴¹⁵ Glanvil continued, n 41, p 127 'In the first case, where he acknowledges the seal publicly in court, he is strictly bound to warrant the charter and to observe without question the agreement set out in the charter as it is contained therein; and he should blame his own poor custody if he suffers damage because the seal was poorly kept. In the latter case, however, the charter may be proved by means of battle [or] by some suitable witness, preferably by one named in the charter itself [this would be a transaction witness]. It is also customary to demonstrate the validity of charters in court by another method, namely by certain and manifest objective proofs; for example, by other charters bearing the same seal and known, because he warrants them in court, to be charters made by him who denies that the charter now in question is his. In such a case, if the seal correspond so exactly with each other that there is no question of any difference between them, the point is taken to be proved; and when anyone is convicted in such a matter, whether in this or any other lawful way, he shall always lose his case, whether the plea concerns debt or land or any other thing, and shall, moreover, be liable to amercement by the lord king. For it is a general rule that anyone who says something in a plea in court and afterwards denies it, or has not suit or warranty or sufficient proof for it, or is driven by sufficient proof to say the opposite or to deny it, is thereby liable to amercement by the lord king.'

⁴¹⁶ Glanvill, n 41, pp 127-8. See also Jenks, n 91, p 118.

⁴¹⁷ For the registration of their loans see the Ordinance of the Jews (1194), see McBain Law Merchant, n 134, p 49. Also, Hudson, n 315, p 707.

⁴¹⁸ A trial in the Curia Regis, *Abbot Walter v Gilbert de Balliol* (c. 1154), see Adams, n 412, p 10, in which Richard de Lucy (Chief Justiciar, 1154- c.1179) said 'The old fashion was not for every little [minor] knight to have a seal, but it was customary for only kings and people of consequence to have them...'

⁴¹⁹ Flintoff, n 315, p 163 'From the time of the Conquest, deeds or writings were generally called charters. Besides *chirographum* and *charta* there were some other general names given to charters after the Conquest; as *conventio*, *concordia*, *finalis conventio*, and *finalis concordia*.' See also Holmes Common Law, n 87, pp 261, 272. Cf. Hudson, n 315, p 691 'There was not yet a distinct legal category of contract in the modern sense; *contractus* for Glanvill was a limited term, used regarding sales and loans.'

⁴²⁰ Holmes Common Law, n 87, p 262 'For if a man said he was bound [in writing], he was bound. There was no question of consideration, because there was as yet no such doctrine.' A person could also be bound by way of record. *Ibid*.

⁴²¹ *Ibid*, p 272 'I know of no ground for thinking that an authentic charter had any less effect at that time when not under seal than when it was sealed. It was only evidence either way, and is called so in many of the early cases. It could be waived, and suit tendered in its place. Its conclusive effect was due to the satisfactory nature of the evidence, not to the seal.'

1170's.⁴²² This suggests that the tally was (probably) not sufficient evidence of a debt in the king's court in his time.⁴²³

(b) Sale

Glanvill also considered sale, stating:

The cause of a debt may also be purchase or sale, as when anyone sells something of his to another; for then the price is owed to the seller and the thing purchased is owed to the buyer. A purchase and sale is effectively complete when the contracting parties have agreed [*inter contrahentes convenit*] on the price, provided that this is followed by delivery of the thing purchased and sold, or ⁴²⁴ by payment of the whole or part of the price, or at least by the giving and receipt of [an] earnest [*arre*].⁴²⁵

This statement marks a change - indeed, a relaxation - from the Anglo-Saxon law of sale.

- Glanvill refers only to 2 things: (a) agreement on the price; (b) delivery of the subject matter (or payment of the whole or part of the price or, at least, delivery of an *arra*).⁴²⁶ Implicit, also, is that the contracting parties had capacity and that the subject matter was capable of being subject to a contract. Thus, additional Anglo-Saxon pre-requisites such as: a formula of words, transaction witnesses, the sale being in a public market and there being a surety(guarantor)(see 9(b)) were no longer required as pre-requisites - although - in practice - some of these were (likely) long retained, such as the use of transaction witnesses.⁴²⁷ This suggests that trade had developed by the time Glanvill wrote - and that times were more peaceful - such as not to require these additional formalities;
- As to an *arra*,⁴²⁸ from Glanvill, it clear that the giving of a token was sufficient evidence for the purposes of litigation in the king's court. As to what the token might be, Glanvill did not feel the need to specify. Presumably, it could be legal tender (a silver penny)⁴²⁹ or a foreign coin or a copper (or pewter or lead) token fashioned in some way by the merchant or another. Since a ring was an *arra*,⁴³⁰ a wax seal impression of a signet ring on parchment would have been treated - legally - as the same (which is also logical, since the seal was as good as the signet but it enabled a person to seal documents many times without having to hand over his signet ring every time).

What is not clear is the position as to the Anglo-Saxon (and older) forms of sealing a contract, *viz.* an oral agreement accompanied by: (a) a handshake;⁴³¹ and/or (b) a drink to wet (seal) the bargain. Glanvill did not mention whether these would have been sufficient in the king's court - although he was clear that an oral

⁴²² Johnson n 166 (translation of the *Dialogus de Scaccario*, thought to have been written c.1170s), p 22-24. The tally comprised the tally and the counter tally (called the foil). The cut on the tally differentiated between gold and silver, as well as the sum owed. Further, since the Exchequer was formerly called the 'Tallies', Ibid, p 7, then (likely) tallies are as old as the English Exchequer which is said to have been introduced by William I (1066-87) from the Exchequer of Normandy. Ibid, p 14.

⁴²³ Writing and sealing tallies may have come later. See also Madox, n 166, vol 2, pp 258-61.

⁴²⁴ This was replicated by Bracton, see text to n 484 (underlined wording).

⁴²⁵ Glanvill, n 41, p 129. Once an earnest had been given the buyer could withdraw (forfeiting the earnest) but Glanvill left uncertain what penalty he had to pay. Ibid, p 130 (see n 428). P & M, n 173, vol 2, p 207 'The contract of sale as presented by Glanvill is thoroughly Germanic. Scraps of Roman phraseology are brought in, only to be followed by qualification amounting to contradiction.' See also WM McGovern, *Contract in Medieval England: The Necessity for Quid Pro Quo and a Sum Certain* (1969) American J of Legal History, vol 13, no 3, pp 173-201 ('**McGovern Quid Pro Quo**') at pp 176-7.

⁴²⁶ As Scrutton noted, n 88, p 76, by requiring delivery, the English law of sale was different to (later) Roman law which did not require it.

⁴²⁷ Hudson, n 315, p 687 'Glanvill makes no mention of the requirement that sales or grants of goods should take place before witnesses in an assembly, a requirement insisted upon by the Anglo-Saxon laws and the Anglo-Norman *Leges* [i.e. the laws of Henry I, see 10(b)].' P & M, n 173, vol 2, p 207 'The specially appointed witnesses, the '*transaction witnesses*' of the Anglo-Saxon laws, have by this time disappeared or are fast disappearing, and we must think of them as having provided, not an alternative form or evidence of the contract, but a collateral precaution: - the man who bought cattle without the testimony was exposed to criminal charges.'

⁴²⁸ Glanvill also noted, n 41, p 130 'when only earnest is given, the buyer will be allowed to withdraw from the contract if he so wishes, on forfeiture of the earnest. But I put the question: may the seller, if he wishes, withdraw without penalty in such a case ? It seems that he may not, because then the position of the seller in such a situation would be better than that of the buyer. Yet if he may not do so with impunity, what penalty shall he pay ?'. See also P & M, n 173, vol 2, p 208.

⁴²⁹ See also **Appendix A**.

⁴³⁰ A ring was also (private) currency in Anglo-Saxon times, see ns 182 & 343 and this must, surely, have continued for some time after the Norman Conquest. As to a tally, see Hudson, n 315, p 697.

⁴³¹ As P & M noted, the later glossators appear to have taken the concept '*pactum*' from the handshake. P & M, n 173, vol 2, p 194 'The mere *pactum* in their eyes derives its name from that mutual grasp of hands (*palmarum ictus*) whereby men were wont to bind a bargain.' He cites the glossator Azo of Bologna (c. 1150-1230), also known as Azo Solandus or Azo Portius (Porcius). His major work was his *Summa Codicis* (Summary of the Digest of Justinian). See generally, FW Maitland (ed), *Select Passages from Bracton and Azo*, SS, vol 8, especially p 143 *et seq.* Cairns, *Creation of the Ius Commune* (2010) and M Bellomo, *The Common Legal Past of Europe 1000-1800* (1995).

promise (with, or without, an oath) was insufficient proof of a debt in the king's court. In respect of the handshake, Pollock and Maitland stated:

Glanvill gives us to understand that a plaintiff who claims a debt in a royal court must produce some proof other than an interposition of faith [Christian oath]. *In other words, the grasp of hands will not serve as a sufficient vestment for a contract.*⁴³²

They also stated:

We should be rash were we to assume that the local courts of the twelfth century paid no heed to these ceremonies. Blackstone has recorded how in his day [1765] men shook hands over a bargain;⁴³³ they do it still; *but already in Henry II's [1154-89] reign the decisive step had been taken; common as these manual acts may be, they are not to become the formal contract of English temporal law.*⁴³⁴

With respect to Pollock and Maitland, the words in italics are not what Glanvill said. Rather, this is their conjecture. Thus, it is asserted - while an oral promise with or without oath - would not have been sufficient proof to found an action in the king's court in the time of Glanvill, one accompanied by a handshake would have been sufficient in a local court and - possibly - in the king's court. After all, the handshake was used extensively in Anglo-Saxon times, a common form of binding a party used by the Scandinavians (and the Vikings when they invaded England from AD 866). It also had the sanction of the church, since it was an ancient Biblical custom. So, when was a few hundred years of custom overturned? ⁴³⁵ The reason for the (possible) error of Pollock and Maitland is that (it seems) they did not realise the handshake - was a form of *arra*.⁴³⁶ It signified that a person was bound. And that, delivery of it comprised the symbolical delivery of the subject matter. Further, Glanvill expressly accepted that an agreement to sell with delivery of an *arra* comprised a legal contract since (to repeat the quotation above) he stated:

when the contracting parties have agreed on the price, provided...this is followed ... at least by the giving and receipt of [an] earnest [*arre*].⁴³⁷

Some support that a handshake would have been enforceable in the king's court may be found in the Scots text, *Regiam Majestatem*, which was (probably) a private composition written c. 1230 or earlier.⁴³⁸ This text copied large chunks of Glanvill, including on contract.⁴³⁹ It stated:

A pact [*pactum*] is the consent or agreement of two or more persons to the same effect, such as the giving or receiving of something.

Also,

⁴³² P & M, n 173, vol 2, p 202.

⁴³³ Ibid, p 203 cited Blackstone, n 49, vol 2, p 488 'Antiently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts.' See also ns 179-180.

⁴³⁴ Ibid.

⁴³⁵ It may have been a policy decision of the king's court to limit the number of cases brought before it. However, Glanvill nowhere says that the handshake was not treated as an *arra*, just as does not say that a ring was not treated as an *arra* (though it was in Roman law and in Anglo-Saxon law, including when delivered in marriage).

⁴³⁶ Neither Maitland nor Pollock may have been aware that shaking/striking hands to seal a bargain stretched back to Biblical times, at least. Further, neither investigated the nature of tokens or the development of currency. Also, P & M, n 173, vol 2, pp 208-9 stated that the earnest was not evidence of a binding contract until the time Fleta wrote (c. 1290). However, this is incorrect (see Glanvill). It always was evidence of a binding contract and Fleta (as well as the *Carta Mercatoria* (1303), see n 502) confirmed it. Thus, it was not part of the law merchant; it was part of the common law and had been binding in Anglo-Saxon (and Biblical) times. P & M had stated, pp 208-9 'It is among the merchants that the giving of earnest first loses its old character and becomes a form which binds both buyer and seller in a contract of sale. To all appearance this change was not accompanied without the intermediation of a religious idea. All over western Europe the earnest becomes known as the God's penny or Holy Ghost's penny (*denarius Dei*)...Thus the contract is put under divine protection. In the law merchant as stated by Fleta we seem to see the God's penny yet afraid, if we may so speak, to proclaim itself as what it really is, namely a sufficient vestment for a contract of sale. A few years later Edward I [1272-1307] took the step that remained to be taken, and by his *Carta Mercatoria* [1303], in words which seem to have come from the south of Europe, proclaimed that among merchants the God's penny binds the contract of sale so neither party may renege from it. At a later day this new rule passed from the law merchant into the common law.' Adams, n 236, p 189, n 3 thought that the God's Penny was called such since it was 'devoted [give] to charity'.

⁴³⁷ See text to n 425.

⁴³⁸ See *Regiam Majestatem and Quoniam Attachiamenta* (based on the text of Sir John Skene, ed and trans. by Lord Cooper, Edinburgh, 1947). Cf. the Scots writer Neilson (quoted by P & M, n 173, vol 1, p 167) who thought it was c.1200-30. Given that it contained much Anglo-Saxon law, this text may have been produced closer to c. 1200.

⁴³⁹ Ibid, p 203 (book 3, ch 10).

The word '*pact*' is derived from '*pax*' and '*actus*', as if an act a pact were an act of peace; for people are said to make pacts when, starting from differing and contrary inclinations of the mind, they arrive after many and various disputes at a common will and opinion. *Another derivation of 'pact' is from the clasping of hands; for of old, when people made a bargain they used to shake hands [the Latin is 'percutiebant' which, actually, refers to striking] in token [signum] of pledged faith. (italics supplied)*⁴⁴⁰

Thus, a '*pact*' (contract, agreement) derives from the old Anglo-Saxon (and Biblical) practice of striking hands, to seal a bargain. And, for the hands to be a token - like any other '*arra*'. However, that said, it may be that - by the time of Glanvill or earlier, there had been what we would call a '*policy decision*' by the king's court to screen out more minor cases and that this included not dealing with contracts reached by way of handshake and/or a drink to seal a bargain. If so, Glanvill did not state as such (nor did the *Laws of Henry I*, c. 1113).⁴⁴¹ As it is, most commercial disputes would not have reached the king's court in any case. They would have been dealt with in lesser courts - not least because of the small sums involved, availability of witnesses, problems of travel, litigation costs *etc.* Thus, there were manor courts (courts baron) which had been around since Anglo-Saxon times. They would have adjudicated on commercial disputes within the manor. Also, there were hundred and county courts which, also, had been around since Anglo-Saxon times.⁴⁴² Further, trade - both domestically and with foreign merchants - had increased greatly in the reign of Henry II (1154-89), especially after the civil war (1139-53). Also, fairs and piepowder courts had developed⁴⁴³ - the latter employing more relaxed formalities for enforcing contracts. Moore considered that the international fairs (including the English ones) reached their peak of prosperity - in terms of income levels - between 1180-1220.⁴⁴⁴ As for financing arrangements, she stated:

Commercial practice at the fairs of England allowed for quite a variety of credit arrangements. In its simplest form, a contract of sale on credit could be established through payment of a God's penny or earnest money, with [transaction] witness. A tally was a popular alternative form of credit instrument...⁴⁴⁵

There were also local courts such as borough courts⁴⁴⁶ and those located at ports (they were, often, situated near the quay).⁴⁴⁷ These would have dealt with commercial disputes under their territorial jurisdiction.⁴⁴⁸ Here, older Anglo-Saxon customs of concluding an oral contract by way of a handshake - accompanied by an oath and/or by wetting the bargain - as well as other local specific customs (including those relating to transaction witnesses and publicity) - would have been enforceable. Further, by the time of Glanvill, gilds (associations of merchants) existed. They (likely) would have had an arbitration mechanism - including peer pressure - to handle disputes between members and between associations.⁴⁴⁹ Thus, in practice, a variety of forms of evidence would have been permitted other than in the king's court, to enforce commercial agreements.

In conclusion, while the king's court (c. 1189) may not have accepted a handshake (or a drink) as a legally adequate means of making a contract, lesser courts would have.

(c) Conclusion

Anglo-Saxon law would not enforce a purely oral agreement (even with an oath). Certain pre-requisites had to be satisfied. So too, English law by the time of Glanvill who made it clear that the king's court required a higher level of evidential formality than lesser courts (which, unfortunately, he did not discuss). In both Anglo-Saxon and early medieval law an agreement lacking certain pre-requisites would have been treated as a *nudum pactum*

⁴⁴⁰ Ibid, p 96. For the striking of hands (and scales) in Roman law, see n 288.

⁴⁴¹ It may be that Glanvill did since he referred to '*pledge of faith*' and, by that, he may have intended to cover the handshake (which was usually accompanied by an oath).

⁴⁴² P & M, n 173, vol 1, p 38, 42. The county court was held twice a year, the hundred court every 4 weeks.

⁴⁴³ When the first piepowder (fair) courts arose is unclear. However, it is possible that they may have existed in the time of Glanvill, see generally, McBain Law Merchant, n 134, pp 66-72. Also, a court existed in London as early as 1221 to dispense speedy justice. It was not a fair court as such since it dealt with disputes of travelling merchants passing through the City. Ibid, p 55.

⁴⁴⁴ EW Moore, *The Fairs of Medieval England* (Pontifical Institute of Medieval Studies, 1985), pp 22-3. See also C Walford, *Fairs Past and Present* (1883, rep NY, 1968), chs 15-18.

⁴⁴⁵ Ibid, p 117. See generally, pp 117-21.

⁴⁴⁶ Anglo-Saxon law had provided for sales in designated market towns, see ns 358-9, witnessed by the reeve or '*other men of credit*'. Likely, these survived after the Conquest and, in time, became part of the local borough (burgh being a fortified town) courts. They would have handled commercial disputes in their jurisdiction, including those arising in any regular market located there.

⁴⁴⁷ There would (likely) also have been courts handling local admiralty matters when the town was also a port. See McBain Law Merchant, n 134, pp 89-92. These would have handled commercial disputes arising from marine matters (including, one presumes, any fish markets).

⁴⁴⁸ Henry, n 149, p 9 'a large proportion of the merchant courts were conducted by the boroughs themselves, for they were generally in either ports or market-towns.' See also Hudson, n 315, ch 30 (borough law).

⁴⁴⁹ A person who reneged on an agreement would likely be ostracised. See McBain Law Merchant, n 134, pp 77-83.

and unenforceable. However, by Glanvill, various pre-requisites were no longer required. Thus, the comparative position was (likely) as follows in respect of a sale:

- **Anglo-Saxon Law.** It required as pre-requisites: (i) capacity; (ii) a subject matter - one capable of sale; (iii) an agreement (*consensus*) - whether oral or written; (iv) delivery; (v) transaction witnesses; (vi) publicity in designated market towns; (vii) a surety (guarantor) (in later law). Further, an *arra* - a token which included a small coin, a ring or a handshake/strike - was used to evidence the fact that an agreement had been reached (a bargain struck) and when;
- **Glanvill.** For enforcement in the king's court, (i)-(iv) were required. Glanvill did not mention (v)-(vii) - although they may also may have been (often) present in practice. Further, following Roman law, Glanvill indicated that a pre-requisite for a sale was that a price be agreed⁴⁵⁰ (likely, on the basis that a failure to agree this meant that the parties had not come to a *consensus*).

What would (likely) not have been enforceable in a secular court of any type in c. 1189 - when Glanvill wrote - was a pure oral agreement - even if accompanied by an oath - without any other concomitant evidence. It was too unreliable, being one party's word against another's.⁴⁵¹ As for the doctrine of consideration, Glanvill makes no mention of it. Nor is there any evidence that he imported into his writing the Roman concepts of '*causa*'⁴⁵² or '*nudum pactum*.' Further, since legal tender was still scant, most transactions would have employed payment in a private currency or been by way of barter. In the case of private currency, this would have been of no worth, *per se*, not being legal tender.

In conclusion, like Anglo-Saxon law, there is no evidence of the doctrine of consideration in the time of Glanvill.

12. **BRACTON (c. 1250)**

While Glanvill - in his short work - did not analyse commercial law in depth, Bracton did more so. The latter was also much influenced by Roman law - as well as by canonists (being a cleric himself) - and he borrowed many concepts from the former without (perhaps) fully understanding their full context. Further, it should be noted that Bracton - like Glanvill - was only concerned with the king's court. He was not seeking to analyse the law at a more local level such as that in manorial courts (courts baron), piepowder courts, borough courts, the London courts *etc.*⁴⁵³ Finally, Pollock and Maitland were not complimentary on Bracton's analysis of contractual matters. Certainly, he seems to have adopted (large) chunks from elsewhere (from Azo of Bologna, see (b)).⁴⁵⁴ Also, Bracton's work was a private treatise and it was published (probably) after his death. Thus, it reflects only his private opinion - an unrevised one at that.

(a) **Coinage**

English trade greatly developed in the 12th-13th centuries. In part, this was due to more interaction with the Continent resulting in an increase in fairs (including international ones) as well as national markets. It was also facilitated by the increased volume of English (silver) currency. Fletcher noted:

⁴⁵⁰ See n 424 (text), 'the contracting parties have agreed [*inter contrahentes convenit*] on the price...'.

⁴⁵¹ That is not to say that oral agreements *with* transaction witnesses would not have been enforced in courts such as the court baron. Indeed, they seem to have been, see Maitland, *The Court Baron*, SS, vol 4, p 84 'mere parol of a man without suit [i.e. proof by transaction witnesses] shall not be heard.' Ibid, p 117. See also Henry, n 149, p 19. Cf. the ecclesiastical courts. P & M, n 173, vol 1, p 128 'With great difficulty were the courts Christian prevented from appropriating a vast region in the province of contract. They claimed to enforce - at the very least by spiritual censures - all promises made by oath, or by '*pledge of faith*.' The man who pledges his faith, pawns his Christianity, puts his hope of salvation in the hand of another. Henry II [1154-89] asserted his jurisdiction over such cases; Becket claimed at least a concurrent jurisdiction for the church. Henry was victorious. From this day onwards the royal court was always ready to prohibit ecclesiastical judges from entertaining a breach of faith, unless indeed both parties to the contract were clerks, or unless the subject matter of the promise was something that lay outside the jurisdiction of the temporal forum.'

⁴⁵² Cf. This is not to say that he did not refer to Roman law in places, Glanvill, n 41, xxv, xxviii, p 117. However, Glanvill's use of '*causa*' is not the same as Roman law's employment of the word to identify certain categories of privileged transactions that were enforceable.

⁴⁵³ See Bracton, n 42, vol 2, p 19 'England has as well many local customs, varying from place to place, for the English have many things by custom which they do not have by law, as in the various counties, cities, boroughs and vills, where it will always be necessary to learn what the custom of the place is and how those who allege it use it.' Ibid, p 22 'Custom, in truth, in regions where it is approved by the practice of those who use it, is sometimes observed as and takes the place of *lex*. For the authority of custom and long use is not slight.' See also P & M, n 173, vol 1, p 185 'Every manor will indeed have its own customs...'

⁴⁵⁴ See P & M, n 173, vol 1, pp 207-8.

The discovery of rich silver mines in central Europe led to huge amounts of bullion flowing into England in exchange for wool and other exports. Much of the silver returned to the Continent in the form of English short-cross pennies...Because of their sterling silver content (0.925 fine) English pennies were regarded as trustworthy money and rarely went into the melting pot; instead they circulated at their correct face value *vis-a-vis* local money in the Low countries, in Germany, and in fact, wherever debased native coins were not trusted.⁴⁵⁵

However, this volume was still insufficient to meet demand. In part, due to the rapid outflow of silver pennies to the Continent. Also, in part, due to the absence of small coinage. Fletcher noted:

In busy markets and fairs in the reigns of monarchs such as Henry III [1216-72] or Edward I [1272-1307] buyers and sellers often had only silver pence for their daily transactions. Most change consisted of fractional wedges cut from full pennies because mintages of round pennies and farthings⁴⁵⁶ never matched demand. At some periods even the scarce round fractions were halved and quartered, their small size making them very easy to lose.⁴⁵⁷

The result was that - as in previous times - tokens were likely used as small change - as well as being used as an *arra* (an earnest) to evidence that an agreement had been reached. It seems clear that tokens were also employed (as in Roman times) for religious purposes, as a form of pre-payment for board and lodging.⁴⁵⁸ All of these types of token would have been of nominal worth unlike legal tender which was '*valuable consideration*', the declared face value reflecting the silver content. That said, mutilation of legal tender - by cutting it into pieces - as well as a result of debasement, rendered this statement untrue in many cases.

In conclusion - in England c. 1250, when Bracton wrote - tokens were widely used in the absence of legal tender.

(b) Bracton - Contracts - Nudum Pactum

Like Glanvill, Bracton dealt with the pre-requisites for making a contract. However - while Glanvill did not refer to a '*nudum pactum*' as such - Bracton, writing c. some 50 years after him, did. Bracton may have taken his analysis directly from the Digest of Justinian or - more probably - from the glossator, Azo of Bologna (c.1150-1230), a law professor in Bologna⁴⁵⁹ - the glossators being medieval writers who glossed (expounded) Roman law. Bracton sought to distinguish between agreements which were actionable (enforceable)⁴⁶⁰ in the king's court and those that were not. He was not purporting to discuss the position in lesser courts. To Bracton, agreements - to be actionable in the king's court - required vestments (clothing) and those lacking such were naked (*nude*).⁴⁶¹ Thus, for him, the logical process was: (a) an agreement (*pactum*) was when the '*wills of two... parties*' were brought into '*accord*'; (b) an agreement required vestments (pre-requisites) to become a contract; (c) a vested agreement (contract) gave rise to an obligation(s) - a legal bond or tie - which was legally enforceable (actionable). Bracton stated:

An obligation may arise *ex contractu* [from a contract] in many ways, as from an agreement, by questions and answers [i.e. stipulation]⁴⁶² from a form of words which bring the wills of the two parties into accord, [*quae voluntates duorum in unum trahit consensus*] as agreements by way of pact, which sometimes are nude, sometimes vested. If they are nude no action follows, for an action does not arise from a nude pact [*ex nudo pacto non nascitur actio*]...A pact must therefore have vestments...⁴⁶³

⁴⁵⁵ Fletcher, n 149, p 14. He noted that such pennies had a disadvantage in that they could be clipped without cutting into the centre of the cross. In an effort to prevent this, from 1247, the royal mint began to issue long-cross pennies. Ibid, p 16.

⁴⁵⁶ Farthings were not introduced until 1270, after Bracton wrote, see **Appendix A**.

⁴⁵⁷ Fletcher, n 149, p 5.

⁴⁵⁸ E Fletcher, n 185, p 24 'By the beginning of the 14th [century] there were about 500 monastic establishments in Britain...the bones of Thomas a Becket, murdered in 1170, had by 1300 become a major attraction...Some of the faithful seem to have carried tokens as the equivalent of round-trip tickets that gave them access to hostels run by monks [that is, to inns - the precursors to public inns or hotels].'

⁴⁵⁹ See n 431 (with Maitland's text on Bracton and Azo).

⁴⁶⁰ Bracton, n 42, vol 2, p 282 '*What is an action?* It is nothing other than the right of pursuing in a judicial proceeding what is due to one.' Also, 'The words '*in a judicial proceeding*' are used to distinguish an action from matters we pursue not in a court but outside it...'

⁴⁶¹ He used this idea elsewhere in his book e.g. Bracton, n 42, vol 3, p 13 '[the civil action of] possession... is a naked intrusion...which is called naked because unprotected by any vestment; it has only the barest minimum of possession and nothing at all of right.' Also, 'We must first say something of that kind of possession which is completely naked and without a vestment of any kind, called an intrusion...'

⁴⁶² The question and answer formula goes back to the Roman stipulation about which Bracton also stated, n 42, vol 2, pp 285-6 'An obligation is [also] contracted by words, by a stipulation. A stipulation is a certain form of words which consists in question and answer, as where it is said, '*Do you promise?*' '*I promise.*' '*Will you give ?*' '*I will give.*' '*Will you do?*' '*I will do.*' '*Do you guarantee ?*' '*I guarantee*'.... That a stipulation and obligation may be created by a writing is obvious, because if it is written in an instrument that a person has promised, it is treated exactly as if an answer had been made to some proceeding question.' For the Roman law position, see n 285.

⁴⁶³ Bracton, n 42, vol 2, p 283.

It may be noted that - in respect of the maxim *ex nudo pacto non nascitur actio* - unlike Roman law, Bracton was only considering the *king's court*. He continued:

Since actions are born of obligations, we must first see what an obligation...is, how and by what words it may be contracted, by what persons it may be acquired and how it may be extinguished and destroyed [etc]...An obligation is a legal bond whereby we are constrained, whether we wish it or not, to give or do something...and it has four⁴⁶⁴ [actually 7, including capacity] ways by which it is contracted and several vestments. *It is contracted by a*

[i]	thing	[i.e. subject matter] ⁴⁶⁵
[ii]	by words	[i.e. orally][or]
[iii]	by writing	
[iv]	by consent	[i.e. consensus, agreement]
[v]	by traditio	[i.e. delivery]
[vi]	by conjunction.	

*all of which are termed the vestment of pacts...(italics and numbering supplied).*⁴⁶⁶

In respect of these vestments (what, today, we would call pre-requisites),[i]-[v] followed Glanvill. Further, Bracton also treated *capacity* as a pre-requisite - though he dealt with this elsewhere in his text.⁴⁶⁷ In respect of certain of these pre-requisites, Bracton stated:

- **Consent.** 'An obligation is also contracted...by consent, as in contracts based upon the good faith of the parties, as in purchases and sales, lettings and hirings, partnerships and mandates. Such obligations are said to be contracted by consent because neither a writing nor the presence of the parties is always essential...' ⁴⁶⁸ The latter statement of Bracton is a *non sequitur* since consent (agreement) did not arise as a result of the transaction being oral or in writing - or whether the parties were present or not - but as a result of *consensus* between the parties;⁴⁶⁹
- **Delivery (Traditio).** Bracton stated that 'Traditio is treated...in the title on gifts'.⁴⁷⁰ In this title ⁴⁷¹ he noted that, for a valid gift, there had to be: (a) agreement (*consensus*) between the donor and donee. One to give - the other to accept - the gift;⁴⁷² (b) words of gift;⁴⁷³ and (c) livery (that is, delivery) of *seisin* (possession) of the object of gift. In the case of the (c), Bracton stated:

It is also necessary that livery of the thing follow the gift, and do so in the lives of the donor and the donee, otherwise it will be regarded as a nude promise rather than a gift, and an action no more arises out of a nude promise [gift] than out of a nude pact. An incomplete gift is of no effect, neither the execution of a charter nor the taking of homage with every ceremony observed, unless *seisin* and livery

⁴⁶⁴ Why did Bracton say four? It may have been his error or he may have treated writing and words as formal requirements. Further, oral/writing may have not been intended to be exclusive. As it is, today, it is possible to effect a sale without either (e.g. pointing to goods and handing over the money in the shop or market). As for Bracton's *conjunction*, this was not, really, a pre-requisite as such but simply indicating that an agreement could be made orally or in writing by more than one statement or writing.

⁴⁶⁵ Bracton was, likely, referring to Roman law. Digest 18.1.8pr 'Pomponius, *Sabinus*, book 9: 'There can be no sale without a thing to be sold.' Certain things (such as non-existent ones or sacred ones) could not be sold. See Borkowski, n 252, pp 263-6.

⁴⁶⁶ Bracton, n 42, vol 2, pp 283-4 (*re, verbis, scripto, consensu, partitione, iunctura*). These pre-requisites were taken from Azo, see Maitland, n 431, p 143 (albeit he referred to *cohaerentia et rei interventus*). Cf. Simpson, n 4, pp 377-81 (6 vestments in the *Summa Rosella* (1484) and in the *Summa Angelica* (1486)). See also Simpson Innovation, n 65, p 251.

⁴⁶⁷ Ibid, p 286 (deaf mute, lunatics, infants etc).

⁴⁶⁸ Ibid, vol 2, p 287. Bracton also stated: 'One is also bound by a written instrument, as where one states in writing that he owes; whether the money was paid to him or not he is bound by the writing, nor will he be able to accept that he did not receive the money since he has stated in writing that he owes it.' By consent, Bracton clearly meant common (mutual) consent (*consensus ad idem*). Elsewhere, n 42, vol 3, p 178 (discussing the assize of novel disseisin) Bracton refers to the 'mutual agreement of the contracting parties, by common consent' (*de mutua voluntate contrahentium per communem consensum*).

⁴⁶⁹ This was better reflected in his statement in n 472 below.

⁴⁷⁰ Bracton, n 42, vol 2, p 287.

⁴⁷¹ Bracton noted, n 42, vol 2, p 49 'A gift is a disposition arising from pure liberality and without legal compulsion, that is, neither of civil or natural law, payment, duress or force playing a part. It proceeds from the full and free disposition of a donor [wishing] to transfer his property to another.'

⁴⁷² Ibid, vol 2, p 62-3 'A gift is of no effect unless there is mutual consent and agreement on the part of both the donor and the donee, that is, that the donor have the *animus donandi* and the donee the *animus recipiendi* [A bare statement in an account and a nude pact do not make anyone a debtor] [for] if I say 'I give you such a thing' and having no intention of giving it (and do not begin it by livery) the gift fails, as where I say, 'I give you the thing' and do not wish to hand it over, or suffer you to take it with you, or if it is a tree that is given, to cut it down, the gift is without effect, because the donor did not fully consent.' See also McBain Gift, n 209, p 183.

⁴⁷³ Ibid, p 62 'It is also necessary that certain words be used, as suitable to a gift as to stipulation, as where I say 'Will you give me a hundred?' and you reply 'I will give', for a question is of no effect unless followed by an answer appropriate to it, that is, 'I will give'. From such a question and answer an obligation at once arises.' See also McBain Gift, n 209, p 182.

[possession and delivery] follow during the life of the donor...Thus the gift is contracted as though [when] I say *'I give that you do.'* The matters dealt with above may be concisely expressed, as may be seen from these verses: By a thing, words, writing, consent, tradition [delivery] and conjunction pacts [agreements] take on their vestments.⁴⁷⁴

Thus, a gift could be oral as well as in writing. However, it was *nude* (legally unenforceable) unless accompanied by physical delivery.⁴⁷⁵ By the time of Bracton, if gifts had these pre-requisites, they were enforceable. The pre-requisites for contract and gift were the same,⁴⁷⁶ as in Biblical and Anglo-Saxon times, save for the intent⁴⁷⁷ expressed in the form of words employed. In the case of a contract, there was an intention to treat (trade). That is, to effect a business deal. In the case of a gift, the donor had no intention to trade. Instead the intention was to exercise generosity (liberality);

- **Conjunction.** Bracton stated: *'Conjunction, as where several pacts concerning the same thing are introduced into a stipulation. Several pacts, just as several things, may be brought into a stipulation, and, if they are added at once, when the agreement is made, they become parts of such agreements, impose a law upon them and fashion them; but if they are added after an interval of time it is otherwise.'*⁴⁷⁸ This statement was not cited as a pre-requisite by later writers. Justifiably so, since it is simply an observation that an agreement (especially a written one) could comprise various documents.

In conclusion, Bracton's pre-requisites for a contract to be enforceable in the king's court are the same as that of Glanvill (save in respect of a reference to conjunction).

(c) **Bracton - Sale**

Bracton dealt with sale in the king's court (where he noted, generally, that private agreements were not common).⁴⁷⁹ He stated:

There is [another] *causa* [reason/means]⁴⁸⁰ for acquiring [to acquire] the dominion of things which is called that of purchase and sale. When one sells his property to another, whether it is movable or immovable, the purchaser is liable to the seller for the price and conversely the seller is bound to deliver the thing to the purchaser, because, as may be seen above in the portion on gifts, without delivery dominion over things is not transferred. It is requisite that the thing sold be certain [and the price fixed for it certain, for there can be no purchase without a fixed price][for]⁴⁸¹ an unspecified thing may not be claimed.

A purchase and sale is contracted when the contracting parties agree on the price, provided the seller has received something in the name of earnest [*arrarum*], for what is given by way of earnest is evidence that a purchase and sale has been concluded.⁴⁸² *If a writing is to be made, the purchase and sale will not be complete until that has been delivered to the parties and executed.*⁴⁸³ So long as there is neither earnest nor writing, nor any delivery

⁴⁷⁴ Ibid, p 64. Also, pp 120-1 'Nor is it sufficient that the charter was made and sealed, unless it is proved that the gift was completed, [that is], that everything necessary for a gift was properly done and that livery followed, for otherwise the thing given can never be transferred to the donee. Homage may have been taken, the charter, genuine and authentic, properly drawn and formerly read and heard, but the gift will never be valid until livery has been made. Thus, the charter may be valid, but [the gift] since without seisin, nude.' See also McBain Gift, n 209, p 182.

⁴⁷⁵ This was not required (because not physically possible) in the case of incorporeal hereditaments.

⁴⁷⁶ Implicitly, in his pre-requisites for gift, Bracton also accepted the need for capacity and subject matter. See McBain Gift, n 209, pp 170-6. It is likely that, in Anglo-Saxon law (like Roman law) a gift was not treated as a distinct form of transfer, but the reason (cause, motive) for the same.

⁴⁷⁷ As Bracton noted generally, n 42, vol 2, p 23 'It is your *intent* that differentiates your acts...' (*italics supplied*).

⁴⁷⁸ Bracton, n 42, vol 2, p 287.

⁴⁷⁹ Ibid, vol 2, p 109 'the necessity of considering...private agreements is sometimes imposed upon the king's court, for it is not lawful for either of the parties to withdraw from agreements, since if one withdraws the other is aided by an action based on the agreement...'. McGovern Covenants, n 411, p 577 'We may assume...only more important matters would be brought in the king's courts.'

⁴⁸⁰ This reflects Glanvill, see n 425 (text).

⁴⁸¹ Thorne (the editor of Bracton) put '*for*'. It is asserted the word should be '*and*'. That is, Bracton was arguing that - for a sale - the subject matter of the sale also had to be specified (i.e. it was identifiable. It, also, had to be alienable).

⁴⁸² Cf. N Coureas, *The Assizes of the Lusignan Kingdom of Cyprus* (Nicosia, 2002) (*Assizes of the Court of Burgesses of the Kingdom of Jerusalem, c. 1250's*), p 93, art 26 'If two persons, the seller and the buyer, come to an agreement to effect a transaction, and the seller sells what is his and receives from the buyer part of what is due from the buyer, or even simply a copper coin (*cartzia*) [*arra*] as payment, the seller can no longer change his mind about the sale, that is if the buyer is unwilling to agree. Indeed he is obliged by rights and by the assizes to forfeit the article that he had sold, while the buyer is obliged to pay the balance of the sale price, so long as no other agreement existed between them.'

⁴⁸³ This wording appears to have been transposed since execution would have come prior to delivery. As to the meaning of execution, this could only mean a person marking (such as with a cross) or sealing it, since signatures were not used. Scrutton, n 88, p 102 said that Bracton

made, there will be room for reconsideration and the contracting parties may withdraw from the agreement without penalty. But if the price has been paid, or part of it, or delivery made, the purchase and sale will be complete and neither of the parties may afterwards withdraw from the contract, on the ground that the price was not paid, in part or in full, but the seller may proceed by a suitable action to recover what he is owed of the price, not to regain the thing itself.⁴⁸⁴ (*italics and underlining supplied*)

By '*fixed price*', Bracton meant that the price must be agreed. The words in italics above presage the advent of the legal concept of a deed. That is, a writing that was sealed and delivered - although a precise distinction between a writing (*charta or carta*) and a deed was not made until later (c.1308).⁴⁸⁵

- Delivery of the writing was essential since delivery of the underlying subject matter was essential when made orally - deliver of possession (*seisin*) being required. This applied whether the transaction was an exchange, a sale or a gift (and this was no different to Anglo-Saxon (and Biblical) law). Thus, the deed was, simply, a symbol (token) of physical delivery of the underlying subject matter.

The words underlined above, reflect the position as to a valid sale. However - being in separate sentences - they are not as clear as Bracton may have wished. A sale was complete when:

- (a) made in writing, when executed (sealed) and delivered; or
- (b) in an oral sale, when an earnest (*arra*) was delivered - confirming the parties were bound; or
- (c) in an oral sale, when there was delivery of the goods and the price (i.e. an immediate exchange); or
- (d) in an oral sale, when the full price (or part of it) for the goods was paid; or
- (e) in an oral sale, when the goods were delivered.

As to (a), this was understandable since the seal in the writing was an *arra* (also, the writing symbolised the subject matter, the goods); so it was treated the same as (c). As to (b), this was a very longstanding means of effecting a sale, the *arra* being the buyer's way of confirming that he was bound. As to (c), this was a completed transaction, goods exchanged for a price. As to (d), the same applied in the case of the full price and as to part payment - it was no different to (b), using an *arra*. As to (e), this followed Glanvill. The seller having done his part, the buyer must do his or else the seller would suffer a loss. There was one other requirement that Bracton specified for a sale, there must be an agreed (fixed) price. It would have been better if Bracton had combined this with *consensus*, providing that, in the case of a sale, the *consensus* must extend to a price instead of making it, as it were, a separate pre-requisite. The inter-relationship between *consensus* and a fixed price and delivery should also be noted - in terms of evidence:

- The fact that a person had paid a price (or agreed a price) - and the fact that a person had delivered on their side (the money or the goods or the writing) - were, both, good evidence of a *consensus* having been reached;
- Likely, Bracton's formulation is the pre-cursor to the pleading phrase '*quid pro quo*' since he, clearly, (like Glanvill and Anglo-Saxon law and Biblical law) saw contracts as a form of exchange (debt too) - '*this for that*' (i.e. as real) with delivery as essential - likely, to prevent fraud (as in ancient times). Thus, if a party gave '*quid*' it satisfied delivery on its part as well as was good evidence of a prior *consensus* having been reached. Thus, good reason for a court to hold that a contract had been concluded - and to require the other party to deliver '*quo*' on his side.

In conclusion, Bracton's pre-requisites for a sale to be enforceable in the king's court are the same as that of Glanvill.

(d) Bracton - Doctrine of Consideration

There was no mention of any doctrine of consideration in Bracton. Further, it would be incorrect to say that Bracton used in his text the word '*causa*' in a form similar to Roman law. That is, to designate certain categories of commercial transactions that were enforceable. Instead, he was manifestly using '*causa*' as a synonym for '*reason*', '*purpose (motive)*' or '*means*'⁴⁸⁶ - all of which concepts can be found in canon law in which the motive

was silent on this. However, it is suggested that Bracton - in his reference to '*executed*' - was referring to both sealing *or* marking. Cf. Fleta, see n 521(seal).

⁴⁸⁴ Bracton continued: 'When something by way of earnest has been paid before delivery and the buyer regrets his purchase and wishes to withdraw from the contract, let him forfeit what he gave; if it is the seller, let him give the buyer double what he received by way of earnest.'

⁴⁸⁵ Glanvill had referred to a writing (charter, *carta*) being sealed (executed) and Bracton to its being delivered. By the early 14th century, the concept of a deed came about. By Bracton's time, writing would have been much more common, including the use of chirographs. See Bracton, n 42, vol 2, p 109 'a chirographic charter, which is cut through in the middle, one portion remaining with one party, the other with the other.' See also P & M, n 173, vol 1, p 219 and vol 2, p 97.

⁴⁸⁶ Since Bracton is online, a word search of the use of '*causa*' in his text may be determined. Comparison may be made with matters across the Channel where it also appears to have been used as a synonym for '*reason*.' JA Everard (trans), *Le Grand Coutumier de Normandie* (c.

or reason of a person was important to determine whether they had committed a sin - and not in a distinct (technical) legal sense. Thus, there is no connection between the later doctrine of consideration and Bracton's use of the word *causa* - although, no doubt, later writers such as St German (see 18) and Plowden (see 20) used the term in the same manner as Bracton, at times.

(e) Pollock & Maitland on Bracton

Pollock and Maitland were critical of Bracton's analysis of contract. They stated:

Bracton makes a half-hearted attempt to engraft the theory of the legists upon the stock of English law. No part of his book has of late attracted more attention than the meager chapters that he gives to contract; none is a worse specimen of his work.⁴⁸⁷ It is a scholastic exercise poorly performed. Here and there half unwillingly he lets us see some valuable truth, as when, despite Justinian and Azo, he mixes up the *mutuum* and the *commodatum* and refuses to treat sale as '*consensual*.' But there is no life in this part of his treatise because there is no practical experience behind it. The main lesson that we learn from it is that at the end of Henry II's reign [1154-89] our king's court has no general doctrine [of contract].⁴⁸⁸

Why Pollock and Maitland were scathing about Bracton's reliance on the glossators was that Bracton was out of date, in their opinion. He was citing Roman law when English law was being influenced not by this but by *canon law* which held that an oral agreement⁴⁸⁹ without more was sufficient to create a valid marriage⁴⁹⁰ and that persons had a moral duty to comply with promises and agreements, even if they were '*naked*.' Pollock and Maitland concluded:

It is not a little remarkable that Bracton, in search for principles, preferred importing the system of the glossators, which at all events preached the sterility of the naked pact, to adopting the novel and [*sic*] ecclesiastical doctrine. His efforts ended in a sad failure. English law went on its way uninfluenced by Italian learning, but confirmed in its belief that pacts require vestments. The problem of constructing a general law of contract was not faced until a much later day, when the common-law system of pleading was mature, and what was then sought was a new cause and form of action which could find a place within limits that were already drawn.⁴⁹¹

This seems unfair since Biblical and Anglo-Saxon law had also required pre-requisites (vestments) to enforce contracts. Further, to exclude the need for delivery would have been to invite fraud on a grand scale. As it is - even in Anglo-Saxon (and Biblical) law - an oral agreement (even if accompanied by an oath, whether Christian or otherwise) without more ado would not have been enforceable in the commercial context. Further, *had* the secular courts permitted this at the time of Bracton, there would have been considerable problems in determining which of the contracting parties was telling the truth, especially, *whether* - and *when* - an agreement (*consensus*) had been reached. Further, Pollock and Maitland did not note that English law - by the time of

1254-8)(Jersey & Guernsey Law Review, 2009), p 370, ch 91 '*Agreement*', 'No one is constituted debtor from a promise unless lawful cause [*causa*] for promising existed. No one is bound to pay for anything done for a base cause...Neither also does a promise create any debt, unless the cause for promising was shown'. FRP Akehurst, *The Coutumes de Beauvaisis of Philippe de Beaumanoir* (c.1283)(Univ. of Pennsylvania, 1992), p 381 'All agreements must be kept...except agreements which are made for bad reasons.'

⁴⁸⁷ P & M refer to Salmond Essays, n 89, p 174 although Salmond, himself, made no criticism of Bracton.

⁴⁸⁸ P & M, n 173, vol 2, p 194. Cf. GR Elton, *FW Maitland* (Weidenfeld & Nicholson, 1986), p 44 'Maitland had to use the printed form of Bracton produced in 1569 and reprinted with defects in 1640; he knew very well how inadequate this was and several times called for a new edition.' Ibid, p 49 'His fundamental error over Bracton owed much to the fact that he had seen only some of the extant manuscripts...'

⁴⁸⁹ Ibid, p 195 'ecclesiastical law gained a foot-hold within the province of contract by giving a Christian colouring to the old formal agreement, the pledge of faith. This having been accomplished, the canonists began to speak slightly of ceremonies. The sacred texts, which teach that a Christian's yea or nay should be enough, may have hastened the change, but we believe that the motive force had its origin elsewhere. The law of marriage had fallen into the canonist's hand, and in the middle of the twelfth century, after long hesitation, he was beginning to teach that a bare interchange of words was sufficient to constitute a marriage...it could not but exercise a powerful influence outside the sphere of marriage law...If, not merely a binding contract to marry, but an indissoluble marriage can be constituted without any formalities, it would be ridiculous to demand more than consenting words in the case of other agreements. In the course of the thirteenth century the canonists were coming to this opinion, and could cite in its favour two sentences which had found a place in the Gregorian statute-book. Even the '*nude pact*' should be enforced, at any rate by penitential discipline.'

⁴⁹⁰ While correct, in practice, most marriages were (hard-headed) business transactions with much ceremony. As it is, both parties had to have capacity, to consent and there had to be delivery. The wedding (or engagement) ring was an *arra*. Strictly, the money given by the groom (at the church door, usually) the *dower*, was a gift since it did not have to be given (and the marriage was not vitiated by its absence). However, it was common (in Anglo-Saxon times, it was a morning gift - paid after consummation). So too, the *dowry* of the father. Thus, although marriage was (in law) not a sale, it would have been difficult to see much difference and since the selling of persons (slaves) was part of society, and the status of women not high, it might be thought that '*sale*' was, often, the right word. See also ns 24 & 26 and GC Homans, *English Villagers of the Thirteenth Century* (WW Norton & Co, 1975), ch 12 (*trothplight and wedding*). See also McBain Gift, n 209, p 179.

⁴⁹¹ P & M, n 173, p 196.

Bracton - was more relaxed about the pre-requisites for making a contract than Anglo-Saxon law. However, there are other grounds of complaint which may be levelled at Bracton, in respect of his analysis of contracts:

- (i) **Only King's Court**. Bracton failed to emphasize enough that he was only dealing with the actionability (enforceability) of a contract in the king's court. Not in other courts such as manorial courts (courts baron *etc*);
- (ii) **Arra**. Bracton referred to an *arra*. However, like Glanvill, he did not indicate what the king's court would have accepted as an *arra*. A God's penny, yes. But what about: (a) a handshake; (b) a drink to wet the bargain ?
- (iii) **Classification**. Bracton's classification of the pre-requisites of a 'vested' contract could have been improved. He held that - for a contract to be enforceable (to have vestments) in the king's court it needed: (a) a thing (a subject matter); (b) words; (c) writing; (d) consent (*consensus*, i.e. mutual agreement between the parties);⁴⁹² (e) delivery of the thing (*traditio*); (f) conjunction. Also, (g) capacity. However, (b) and (c) should have been stated to be alternatives and they were not exclusive (an act without words or writing should have been sufficient). Also, (f) was not a pre-requisite. In the case of (a) - Bracton cross-referred to a gift requiring an '*animus donandi*' (intention to give) and '*animus recipiendi*' (intention to accept) - being offer and acceptance - and he also made it clear that the pre-requisites for contracts and gifts were the same, save for the '*liberal*' intention in the case of the former.⁴⁹³ However, it would have been more helpful if Bracton had stated this when discussing contract. That is, that it comprised an intention to give and an intention to accept.

From Bracton (who, being a cleric, would have also known of the Biblical position) - however inelegantly put - derived the basic pre-requisites of a contract *viz.* (a) capacity of the contracting parties; (b) subject matter (identifiable and capable of alienation); (c) *consensus*; (d) delivery. Today, Bracton's requirement of '*delivery*' of the subject matter is no longer a pre-requisite (not even for sale) and, indeed, it was soon diminished by judicial acceptance that delivery of a deed (*seisin* in law) was sufficient delivery in some cases - which occurred by 1308-9,⁴⁹⁴ if not before.

(f) What did Bracton mean by a Naked Agreement ? (Nudum Pactum)

Regardless of his legal formulation, in practice, what agreements was Bracton intending to say were not enforceable in the king's court ? As noted, he did not elucidate on this, probably, because he was '*lifting*' much material from Azo of Bologna (not a noted English lawyer). And, possibly, because - being a cleric, he may have had his own view as to whether an oral agreement accompanied by an oath should be enforced in the secular courts. As to what Bracton might have called a '*naked pact*' (if asked) - for the purposes of the king's court - the following may be noted, with the proviso as well that Bracton (like the law before him) referred to:

- promise and counter-promise (stipulation);⁴⁹⁵
- offer and acceptance (intention to give and intention to receive);
- question and answer,⁴⁹⁶

without asserting that any of these - *alone* - constituted an agreement. They were simply ways (forms) in which a person contracted. This is unsurprising since even a stipulation couched in the form of what seems to be a clear promise could also be construed as an offer or, often, as a question.⁴⁹⁷ Thus, the key issue was whether '*consensus*' was reached. As it is, I have couched the position in terms of offer and acceptance for convenience below :

- **Oral Offer/Promise**. Bracton distinguished between a promise and a contract. The latter was bi-lateral, needing a counter-promise (or acceptance or answer) to effect *consensus*.⁴⁹⁸ Thus, an oral promise or offer ('*I will give you 5*

⁴⁹² As Bracton put it, the '*wills of the two parties*' must be in '*accord*'. See n 463 (text).

⁴⁹³ See n 472.

⁴⁹⁴ McGovern Covenants, n 411, p 604 citing *Wington v Wington* (1308-9), 17 SS 135 per Bereford J 'your writing [*escrit*]...witnesses that you received the tenements to hold of him' against an assertion of the lessor's failing to allege *seisin* of rent. Cf. Freehold land was different.

⁴⁹⁵ e.g. *Do you promise ? I will promise ?*, see n 462.

⁴⁹⁶ e.g. '*Will you give me a hundred ? I will give?*', see n 473. See also the Anglo-Saxon form, see n 341.

⁴⁹⁷ As pointed out in n 291, to promise ('*promittere*') contains the idea of a stretching out of the hand with it bearing something to offer.

⁴⁹⁸ Bracton, n 42, vol 2, p 285 'If the stipulator has one thing in mind and the promisor another, the stipulation is of no effect, no more than if there had been no reply to the question.' Scrutton, n 88, p 102. 'A simple stipulation....could not be sued on in the king's courts, as being incapable of proof.' In canon law, there was dispute as to whether a simple promise could give rise to an action. RH Helmholz, *Assumpsit and Fidei Laesio* (1975) 91 LQR 406 'There was controversy among canonists about whether a simple promise [i.e. not a sworn promise, one with an oath] ...gave rise to an action'. See also EW Kemp, *An Introduction to Canon Law in the Church of England* (1957), pp 21-3, see 18(c).

pence for your pig') was not even a contract - nude or otherwise (Roman law was the same, the stipulation of one party had to be answered by the other);

- **Offer & Acceptance Only.** It seems clear Bracton would not have held this actionable, being a *nudum pactum*. Thus, if X had said (in effect) to Y, orally '*I will give you 5 pence for your pig*' (a sale) or '*I will give you this sword for your pig*' (an exchange) - and this was accepted orally - even though there was: a subject of contract, capacity, words, *consensus* and a fixed price - this would not have been enforceable. Another pre-requisite for a contract was absent - delivery;
- **Oral Offer & Acceptance plus Oath.** This would, also, have been a *nudum pactum*.⁴⁹⁹ In the case of the oath, it is understandable why it began to drop out of the commercial process even as a supplement to other forms of evidence. There was no standard form. Further, by Bracton's time, there would have been many foreigners trading in England. Who could tell what their oath meant? In any case, a '*God's Penny*' (see below) took over from the concept of an oath - putting the contract under divine protection, just like an oath;
- **Oral Offer & Acceptance plus Payment (All or Part) or an Earnest.** Bracton would have held this enforceable and not a *nudum pactum*, since he stated: '*A purchase and sale is contracted when the contracting parties agree on the price, provided the seller has received [from the buyer] something in the name of earnest, for what is given by way of earnest is evidence that a purchase and sale has been concluded.*' The *arra* secured ecclesiastical approbation (as well as being the custom of merchants) since - when a coin - it was widely called a '*God's Penny*' (*denarius dei*)⁵⁰⁰ - even though it did not have to be a penny⁵⁰¹ or to be in English currency or to be legal tender. *Carta Mercatoria* (1303) confirmed that a God's Penny - when exchanged between merchants (or with a merchant) - constituted a binding contract (merchants were also a very wide category, embracing those who bought and sold on a professional basis);⁵⁰²
- **Oral Offer & Acceptance plus a Tally.** Bracton mentioned an *arra* but not a tally as such. It is asserted that - in his time (c. 1250) - the king's court would (probably) not have accepted as enforceable an oral agreement in which the *arra* was a tally - even if the transaction was between merchants (or one was a merchant) and even if the tally also had writing on it and was sealed. That is, they did not treat it as a writing (*carta*). Thus, this would have been a *nudum pactum*. The status of a sealed tally was to change by 1294 (see *Bandon's Case*, 14(c);
- **Oral Offer & Acceptance plus Handshake and/or Drink.** In Anglo-Saxon times, this would have been enforceable. As for Glanvill and Bracton, their view is unclear and - private agreements being uncommon in the king's court - this may have not been clarified. It is asserted, however, that a handshake/strike (handclasp) was an *arra*. Therefore, it is possible that Bracton would have accepted it - as well as a drink to seal the bargain (another form of *arra*, the buyer paying for the seller's drink).⁵⁰³ However, one suspects not. This, then, would have been a *nudum pactum*. Likely, the Catholic church was active in helping promote a God's Penny as an alternative to these ancient customs, since it was more universal and less problematic (it also helped people avoid getting drunk at fairs etc, when sealing the bargain);
- **Oral Offer & Acceptance and Transaction Witnesses.** Bracton - like Glanvill - did not mention the need for transaction witnesses (unlike Anglo-Saxon law) as a pre-requisite to a contract.⁵⁰⁴ However, an oral offer and acceptance - even before transaction witnesses - would not have been enforceable in the king's court, it is asserted, even if accompanied by oaths. Another pre-requisite for a contract failed - delivery. Thus, this would have been a

⁴⁹⁹ This, it is asserted, had applied since the Conquest. It was insufficient evidence of a contract, unless supplemented. In early times, a court would require it to be supplemented by: (a) ordeal; or (b) battle; or (c) compurgators (wager of law). Cf. the actionability of an oath in canon law. Helmholz, n 498, pp 408-9 'the presence of an [oral] oath took an agreement out of the area of the *nudum pactum*. And in practice an oath to fulfil the promise was always alleged.' Ibid, p 406 'It was a sin to violate one's sworn promise.'

⁵⁰⁰ P & M, n 173, vol 2, p 208 'All over Western Europe the earnest becomes known as the God's penny or Holy Ghost's penny (*denarius dei*). Sometimes we find that it is to be expended in the purchase of tapers for the patron saint of the town or in works of mercy. Thus the contract is put under divine protection.' W Maitland (ed), *Select Pleas in Manorial and other Seignorial Courts*, SS vol 2 (Fair of St Ives 1275, p 133, stated 'The tally and the God's Penny seem to have been regarded as specifically mercantile customs...The payment of a God's penny was effectual to bind a mercantile bargain.' However, this would appear to be incorrect with regard to the God's penny, since Bracton had specifically referred to an earnest. Thus, the earnest was a matter of common law, not the law merchant.

⁵⁰¹ In *Long v Geoffrey of Cam* (1291), H offered 27s for cloth and 'threw down a farthing as a God's penny'. See C Gross (ed), *Select Cases concerning the Law Merchant*, SS, vol 23, p 39. Also, Henry, n 149, pp 40, 231.

⁵⁰² For *Carta Mercatoria*, see McBain Law Merchant, n 134, pp 65-6.

⁵⁰³ See Lucke, n 236, pp 295-6 for examples of drinking to seal the bargain in later medieval times. Also, Maitland, n 500, p 139 (Fair of St Ives 1275), sale of a coffer (chest) for 6d, 'whereof he paid [the seller] 2d and a drink in advance' [both were an *arra* and 2d was also sufficiently large to comprise part payment]. In a fn, Maitland noted 'According to a common custom the bargain is bound by a drink. In French, if not English law, this solemnity seems to have had a legal force.'

⁵⁰⁴ However, Magna Carta 1215, c 38 provided 'No free man is to be put to his law [wager of law] or placed on oath on a mere plaint [complaint] and without trustworthy witnesses brought for that purpose.' This, strongly, encouraged the use of transaction witnesses. See also n 564.

nudum pactum. However, if delivery was also effected (or an *arra* given) this would have been enforceable in the king's court since Bracton expressly refers to it (see (c));

- **Written Offer & Acceptance**. Bracton held this enforceable if the writing (*carta*) was executed and delivered between the parties (the precursor to the deed).⁵⁰⁵ Bracton would have been referring to the parties executing the document by putting their seals to it. What, though, if neither party sealed it? Such was, later, termed a mere *escrow* and - since Bracton referred to '*executed*' - it would (probably) not have been enforceable in the king's court (even if it had been before).⁵⁰⁶ This would have been a *nudum pactum*. What if only one party sealed it? Probably, this would not have been sufficient evidence of '*consensus*'. This would have been a *nudum pactum*. What if - instead of a seal - there had been some other mark (the Anglo-Saxons used a cross)? This is unclear. However, it would (probably) have been sufficient since it was a time honoured way of executing a writing. Bracton did not assert that the writing had to be witnessed (although this would have been common).⁵⁰⁷ In the case of a sale, it is to be remembered that a fixed price also had to be agreed.

Thus, for Bracton - and for the purposes of the king's court only - various forms of evidence would have been insufficient to manifest *consensus*. In any case, besides *consensus*, delivery was required - of the subject matter, or something to represent it.

(g) Conclusion

There is no evidence of the doctrine of consideration in Bracton's time. Further, he used the word '*causa*' in his text - not to refer to a pre-requisite for a contract - but as a synonym for a '*reason*', '*purpose (motive)*' or a '*means*', following canon law usage. This was important in one case - it distinguished a gift from a contract (which had the same pre-requisites otherwise). If the intent (purpose, motive) of the donor was to exercise pure liberality - it was a gift.

In conclusion, there is no evidence of the doctrine of consideration in Bracton's time.

13. BRITTON (c. 1290) & FLETA (c. 1290)

Only dealing with the king's court also, Britton and Fleta - writing some 50 years after Bracton - followed him in his description of the pre-requisites for a contract, including for a sale. They are considered at this juncture - since they differed so little from Bracton - with a general review of the reigns of Edward I (1272-1307) being given later (see 14).

(a) Britton

Britton stated:

An obligation is a legal bond, whereby a person is bound to give or to do anything, and thus it is the parent of an action, and takes its origin from some precedent trespass or contract.⁵⁰⁸ An obligation by contract may arise in many ways by the united consent of the parties [*consensus*]; which consent is sometimes naked and without clothing, and sometimes clothed. From a naked obligation⁵⁰⁹ no action arises, except by common assent; it is necessary therefore in every obligation that it be clothed. *An obligation should be clothed by five incidents, by a [i] material thing [i.e. a subject matter], [ii] by words, [or] [iii] by writing, [iv] by unity of will, [v] by delivery, [vi] by relation.*⁵¹⁰ (*italics and numbering supplied*)

⁵⁰⁵ Thus, in the context of a contract of sale, Bracton stated (see n 483, text) 'If a writing is to be made, the purchase and sale will not be complete until that has been delivered to the parties and executed.' Invariably, the contracting parties (or their attorneys) would have been physically present when the writing was delivered.

⁵⁰⁶ Up to 1154, and some time thereafter, it may have been enforceable, see n 418. Salmond Essays, n 89, p 45 'In the earliest Year Books we find it settled that an unsealed writing is worthless' He cited YB 30 & 31 Edw 1, 158 (1302) (two writings indented but unsealed). Also, Fleta, see n 521 (writing '*will not alone suffice*' unless sealed).

⁵⁰⁷ The use of transaction witnesses - especially in market dealings and smaller transactions - would (likely) have remained common - not least, to help resolve matters and avoid litigation.

⁵⁰⁸ Britton, n 43, p 129.

⁵⁰⁹ Britton did not put it as well as Bracton since he referred to a '*naked obligation*' while Bracton referred to a naked agreement which, if vested, gave rise to an obligation.

⁵¹⁰ Ibid. As a footnote indicates, Britton did not further discuss what he meant by '*relation*' (*joyniture*). However, it seems to have been intended to be the same as Bracton's '*conjunction*'.

Britton referred to '*five incidents*' (pre-requisites). However, he cited 6. He also, implicitly, added another (like Bracton) - viz. (vii) the *capacity* of the parties - since he referred to it in the quote below. Analysing these incidents, Britton stated (*with underlining supplied to identify the vestments*):

It [i.e. a naked obligation] is clothed by a material thing, when anything is lent and borrowed, to be restored on a certain day⁵¹¹ ... The second kind of clothing is by words passing between the creditor and debtor, by which they come to an agreement by offers and stipulations.⁵¹² The next incident is by writing, which may be pure and simple, and without day or condition; in which case the creditor may demand the thing presently or whenever he pleases... The next incident is unity of will and consent [i.e. *consensus*]; and this is mentioned with reference to those who know not how or are not able to consent, as the deaf, and the mad, and mere idiots, and infants in their tender age, and lunatics and frantic persons during their fury, and married women, and persons in religion removable by their superiors of the same order, and those who are compelled to bind themselves, and pure villains. With such persons no contract or obligation is binding. The next incident is delivery, which is an induction of the thing into possession with the consent of the creditor, as shall be mentioned concerning such inductions in treating of purchases after gifts.⁵¹³

In conclusion, Britton followed Bracton in respect of the pre-requisites for a contract.

(b) Fleta - Contract

Fleta - who usually closely followed Bracton and also did so in this case - in respect of contract, stated (*with underlining supplied to identify the vestments*):

An obligation is a legal bond, whereby we are bound of necessity to give or do something: for example, where one person is bound and under an obligation to another for one thing and the other person is under a reciprocal obligation to him for something else. For an obligation is in the nature of a reciprocal bond and there are four species, according to the manner in which the obligation is contracted, and several vestments. For an obligation, which is the mother of an action, derives its own origin and beginnings from some precedent cause, whether from a contract or quasi-contract, or from a delict or quasi-delict. From a contract it can arise in many ways: from a covenant, by way of questions and answers or from a form of words bringing the wishes of two parties into complete accord, such as pacts of agreement, which are sometimes nude and sometimes vested. Should they be nude, an action will not arise therefrom, inasmuch as an action is not created by a nude pact. It is therefore essential for an obligation to be vested, and a case of this kind, arising out of a contract or quasi-contract, will always be civil in character. For an obligation is contracted under six vestments, all of which are said to be vestments of pacts, such as gifts.⁵¹⁴

For an obligation is contracted by a material thing (*res*), as in the granting of a loan which consists of things that have number, weight or measure, and when these things are weighed and counted or measured they are given expressly to become forthwith the property of those who receive them...⁵¹⁵

An obligation is, moreover, contracted by words, that is to say, by stipulation. For a stipulation is a certain form of words which consists of question and answer, as, for example, by saying: '*Do you promise?*' with the answer '*I promise*', '*Will you give?*' '*I will give*'; '*Will you perform?*', '*I will perform*'; '*Do you guarantee?*' '*I guarantee*'...

A stipulation and obligation can certainly be made in writing, for if it is written in an instrument that a promise has been made to someone, it will be just the same as though a reply had been made to some preceding question. But a lunatic cannot stipulate or conduct any business, because he does not know or understand what he is doing. Nor similarly can an infant or some who is almost an infant (for he does not greatly differ from a lunatic) unless what is done is to his advantage and with the authority of his guardian....Moreover, a person is bound by writing: for example, if one should state in writing that he owes money, he is bound by the writing, whether money has been

⁵¹¹ Britton n 43, continued 'and by such loans the debtors are bound to restore to the creditors the things borrowed in as good or better condition than they received them, or else their value, unless by accident of fire, water, robbery, or larceny, they have lost them; for against such accidents no one ought to answer for things lost, unless they happened by his own fault or negligence...'

⁵¹² The reference to '*stipulations*' indicates that a formula of words was still being used at this time (1290). Indeed, this seems to have carried on until the 15th century, at least, see n 353.

⁵¹³ Britton, n 43, pp 129-31.

⁵¹⁴ Fleta, n 44, vol 72, p 186.

⁵¹⁵ Ibid, p 189. Later, vol 72, p 201, Fleta stated 'Since a promise or obligation of something indefinite is regarded as a nullity in law, it is consequently necessary that the *subject matter* should be defined in a stipulation and promise. Similarly, it is essential that what should be promised should be certain, even though the fate of that thing be uncertain, and just as what is promised should be certain, so it is necessary, for the promise to be valid, that something should be promised in return, as if I should say '*I promise you this thing for your service*' or '*for homage*' or '*for such and such a thing*'. (*italics supplied*)

paid over to him or not, and against a written instrument the exception of money not paid will not be allowed, because he has written that he owes it...⁵¹⁶

An obligation is also contracted not only in writing or in words but by consent, as in contracts made in good faith, such as legacies, buying, selling, letting, hiring, partnerships and agendas.⁵¹⁷

Obligations may be linked together as, for example, where several pacts concerning the same subject matter are included in a stipulation. For several pacts may, like several things, be included in a stipulation, and if they are added together forthwith when a contract is first made, they are of the essence of such contracts and give them their legal force and form.⁵¹⁸

In respect of the pre-requisite of *delivery*, Fleta dealt with this in the context of gift.⁵¹⁹ Elsewhere in his text - referring to obligations and contracts - he stated, in respect of a written contract:

if a written instrument is introduced, the validity of the stipulation will be increased, nor will a promise of this kind be valid⁵²⁰ unless it has been confirmed in writing by mutual consent of questioner and answerer. For a bare statement of account and a nude pact bind no debtor. Therefore, in order that anyone may be bound by a promise to make payment, it is necessary that a written instrument, containing the terms of the obligation, should be introduced, unless that promise has been acknowledged in a court with power to record. *And a written instrument will not alone suffice unless it is confirmed by an impression of the stipulator's seal and by the testimony of trustworthy men then present...*⁵²¹ (*italics supplied*)

With reference to a sealed writing, in this passage, Fleta failed to mention that it must also be *delivered*. However, in a later passage (see (c) below) he noted this. Fleta also introduced uncertainty in the case of writing by asserting that it had to be '*confirmed...by the testimony of trustworthy men then present.*' This referred to transaction witnesses. However, while this had been a requirement of Anglo-Saxon law, this was not asserted by Bracton (or Britton or Glanvill) and their view prevailed over that of Fleta. A writing - to be valid - did not have to be witnessed by transaction witnesses (or for them to attach their seals) although, in practice, this often occurred.

(c) Fleta - Sale

Fleta also considered buying and selling. He stated:

Another cause of an obligation is that which is termed buying and selling. When a person sells to another something of his own, whether movable property or immovable, the buyer is liable to the seller for the price and conversely the seller is under obligation to hand over the thing concerned, as has been stated when dealing with gifts, because dominion over things is not transferred without delivery. And it is essential for this to happen that the thing sold should be defined and a definite price fixed for it. For there can be no buying where there is no fixed price and, furthermore, an undefined thing cannot be sued for [i.e. the subject matter must be identifiable]...

And buying and selling are contracted when a price has been agreed upon between the contracting parties, provided that something by way of earnest has been received by the seller, because what is given by way of earnest is evidence that the buying and selling have been contracted. And if a written instrument should be introduced, the buying and selling will be no contract until the writing has been handed to the parties and made absolute. *And when neither earnest nor written instrument enters into the matter and there is no subsequent delivery, there will be opportunity for reconsideration and the contracting parties can withdraw from the agreement with impunity.* But if the price is paid, or part of it, and there is subsequent delivery, the buying and selling will be complete, nor can any of the contracting parties afterwards recede from the contract on the ground that the price has not been

⁵¹⁶ Ibid, p 201 also stated: 'if a written instrument is introduced, the validity of the stipulation will be increased, nor will a promise of this kind be valid unless it has been confirmed in writing by mutual consent of questioner and answerer.' See also Jenks, n 91, p 163 (the writing Fleta refers to is that which is sealed). Jenks also stated, Ibid, that the statement that a man was bound by his writing 'is far away from all notion of consideration.'

⁵¹⁷ Ibid, p 190.

⁵¹⁸ Ibid, p 198. He continued 'If, however, they are added after an interval of time, it is otherwise, as, for example, if in the first pact a clause is inserted that a party is not to sue and subsequently there is a pact on the same subject matter allowing him to sue, the former pact is abrogated by the latter, not, indeed, in its own right but by means of an exception.'

⁵¹⁹ Ibid. 'The position regarding delivery is set out below ' referring to book 3, ch 15. In SS, vol 89, p 32, Fleta noted that 'Livery is the free transfer of corporeal property, belonging to another or to oneself, from one's own person and hand or that of another (for example that of an agent) into the hand of someone else.'

⁵²⁰ This probably means 'However, a promise of this kind will not be valid...'

⁵²¹ Ibid, p 201. See also Scrutton, n 88, p 102 and Jenks, n 91, p 163.

paid in part or in full. But the seller can sue for the recovery of what remains to be paid of the price by an appropriate action, not, however, to regain the thing itself...⁵²² (*italics supplied*)

(d) Conclusion

The law on contract - including sale - by 1290 had changed from Anglo-Saxon times. It had become simpler in respect of the pre-requisites for sale. Also, there was a greater volume of money in the system - albeit, it was still insufficient. Further, although goods were generally transferred by way of: (a) barter (goods for goods); (b) sale (goods for money); and (c) gift - in practice, (a) was giving way to (b). The Anglo-Saxon enthusiasm for 'gift giving' (prevalent in small communities) had probably also abated - especially mutual gift giving. That said, while a gift - in Anglo-Saxon times and up to c. Glanvill - was, probably, not legally enforceable, by the time of Bracton, it was if it fulfilled certain pre-requisites.⁵²³ As for contracts, following Bracton, the substantive pre-requisites for a valid contract were 4 - although Bracton, Britton and Fleta made them, in effect, 7. Since there was no distinction in those days between formal and substantive pre-requisites, they treated them the same. Further, they treated words and writing not as alternatives. And, they specified '*conjunction*' as a pre-requisite although it was simply an observation that a contract did not have to be in one document or one verbal interchange. These 4 pre-requisites were:

- (a) subject matter - identifiable and alienable;
- (b) capacity of the parties;
- (c) agreement (*consensus*);
- (d) delivery.

In the case of sales, an agreed (fixed, definite) price was also required. The major issue was (c) and the evidence required to show in court was that a *consensus* had been reached. As for the evidence required, this differed between the king's court (which was hearing more private transactions by 1290) and lesser courts. Since this position changed within the period 1290-1327, it is dealt with below. In respect of the doctrine of consideration, there is no evidence of it.

In conclusion, there is no evidence of the doctrine of consideration up to 1290.

14. REIGN OF EDWARD I (1272-1307)

Although Britton and Fleta wrote in the reign of Edward I, it was after they wrote (i.e. 1290), that the evidential requirements for showing '*consensus*' changed considerably as a result of the reception by the king's court of the law merchant and local custom. Thus - his reign in general is now considered - with special emphasis on them.

Edward I was an energetic king who was engaged in many wars to extend/protect his realm - for which he needed much money. As a result, he was favorably disposed towards financiers and merchants - especially foreign ones. They were (usually) more loyal and with greater financial acumen than his domestic ones. In respect of certain important events in the reign of Edward I for the purposes of this article, the following may be noted:

- ***Italian Financiers***. Up to 1290, Crown financing was undertaken by Jewish merchants to whom the laws of usury (taking interest on money lent) did not apply. They were expelled from England in 1290 (not returning until 1656).⁵²⁴ Thereafter, Edward I looked to the Lombards (Italians) in particular;
- ***London Ordinances***. Further, Edward I took the City of London '*into his hand*' (i.e. suspended its franchise) in the period 1285-98, appointing a Warden in place of the mayor. This enabled him to, more easily, pass London legislation, including an Ordinance of c. 1285 which clarified City customs on the probative worth of certain commercial instruments.⁵²⁵ The result was to enable (if not before) contracts to be enforced by merchants in London - as well as City residents - with a lesser degree of evidential formality than that required in the king's court;

⁵²² Ibid, pp 194-6. As to the earnest, Fleta continued 'Again, when anything has been paid over before delivery by way of earnest, if the buyer regrets his purchase and wishes to recede from the contract, he shall forfeit what he has given. If, however, it is the seller who regrets what he has done, he shall give the buyer double what he received by way of earnest, unless this conflicts with the custom of merchants, which lays it down, in accordance with the law merchant, that the seller in this case is either to deliver to the buyer the thing bought or to pay five shillings for every farthing of earnest money.'

⁵²³ See generally, McBain Gift, n 209.

⁵²⁴ See Adler, n 391.

⁵²⁵ See n 136 (*Liber Albus*) which contains it.

- **Improving the Currency.** Edward I also improved the poor state of the English currency - and the critical absence of small change - by issuing a new currency. However, demand still exceeded supply. Thus, the use of tokens (including private coinage) long continued. An Act of Edward I of 1292 provided that persons were only bound to accept legal tender.⁵²⁶ The effect of this may have been to prevent persons who had contracted using private currency from bringing actions in the king's court - a point not (it seems) previously considered.⁵²⁷ The effect would be that these persons would have resorted to lesser courts as well as employed other '*dispute resolution procedures*' - such as asking their guilds and others to arbitrate;
- **Public Policy - King's Court.** Both Glanvill and Bracton indicated that it was unusual for private agreements to be brought before the king's court. In the reign of Edward I, there may have been - at some stage - a '*policy decision*' to limit actions being brought before the king's court by requiring - as evidence - a sealed writing (a deed). This would have left actions involving, say, handshakes and other local customs to be dealt with by the local courts. Such a policy decision - if there had been one - would have been eminently sensible since the lesser courts would have greater experience of dealing with such matters, as well as been more expeditious. However, merchants were using (as was the Exchequer) tallies to evidence debts. Therefore, it seems clear that the king's court was - in the reign of Edward I - prepared to accept that a tally - while not being identical to a deed, even if with writing on it and sealed⁵²⁸ - was a special exception (a specialty) and that an action could be sustained on it on the basis of the law merchant. While this would have been limited to merchants at first (i.e. those buying and selling as a profession), it was extended to London citizens and - then - to citizens of many other cities and towns.⁵²⁹

As to these matters:

(a) Coinage

By the reign of Edward I (1272-1307), there were continuing, serious, problems with the coinage. There was not enough of it.⁵³⁰ Further, the silver pennies of Henry III (1216-72) were often counterfeited or clipped and there was no small currency. In 1279, Edward I issued new currency. Fletcher stated:

Edward introduced completely new coins in 1279. They included multiple, whole and - more importantly - fractional pence: groats [4d], pennies, halfpence and farthings. Millions of coins were struck at London and Canterbury where the public could take their old, underweight, short and long-cross pennies to the mints and exchange them for new coins of the correct weight and fineness. As in previous reigns, the new English coins were much admired on the Continent and extensively copied there, some in poorer silver. However, this only made Edward's coins more popular and severely drained the home supply of silver. As a result the export of English coins was forbidden in 1299; but that did not prevent circulation of the *pre-1279* English pennies on the Continent where the design was often imitated.⁵³¹

However, there were problems. Foreign imitations of English coinage - as well as debased foreign legal tender - still circulated in England (termed crockards, pollards, rosaries, brown sterlings, lushburgs *etc.*).⁵³² Although not legal tender, these foreign imitations were widely traded and - in effect - treated as legal tender by the populace, including merchants. Also, despite the issue of smaller silver coins by Edward I, they were still too expensive

⁵²⁶ See n 159.

⁵²⁷ In other words, if a sale had been contracted and payment had been made using a foreign coin or a cut English coin or a token, would the king's court have agreed to hear the matter (if they had, they were, effectively, allowing the undermining of the Crown's legal tender) ? For Elizabeth I's proclamation of 1600, see Pt 2, n 88 (text).

⁵²⁸ It was not treated as identical because it could be more easily erased, see n 594.

⁵²⁹ In the case of London, benefits in respect of tallies were provided by legislation (Ordinances). In the case of cities and towns, matters in respect of tallies would have been contained in their Custumal (Book of Customs). These customs may have been derived from the common law over a long period of time (local customs) or the right to stipulate them may have derived for their securing, by charter, rights similar to London. Unfortunately, few old Custumals now exist and the precise mechanism in which individual provisions came about have not been subject to detailed research. However, local customs in respect of tallies may have arisen by way of mercantile practice spreading out from London. As to the law merchant in the reign of Edward I [1272-1307], see McBain Law Merchant, n 134, chs 8 & 9. See also Hudson, n 315, p 812 who noted that 'urban charters of Henry II's reign [1154-89] relate to about 30 towns, those of Richard [1189-99] and John's [1199-1216] reigns to about fifty.'

⁵³⁰ Davies, n 148, p 144 'The increasing demand for low-denomination coinage - copiously confirmed by the persistence of the habit of cutting the penny in half or in quarters, at a time when a single penny was worth a full day's pay or would buy a sheep - had been resisted previously because, apart from the value of the metal, the cost of minting a farthing was practically the same as that for minting a penny. Edward [I] overcame this difficulty partly by making over to the minters a greater allowance, in effect sharing his *seigniorage*, and partly by making the farthing slightly, but not noticeably, lighter in weight than strictly a quarter of the weight of the penny.'

⁵³¹ Fletcher, n 149, p 16.

⁵³² Ibid, p 16 who notes 'from *circa* 1280, vast numbers of imitation sterlings were produced on the Continent, mostly in the Low Countries. These pieces were used for trade and are plentiful in English hoards.... Crockards - are those with a chaplet of roses across the forehead instead of a crown. Pollards - have a bare headed bust.'

for conducting small trades.⁵³³ However, to the Crown, there was a problem in issuing as legal tender non-silver coins - such as smaller denominations in copper or brass. Unlike silver coins - where the declared value reflected the silver content (assuming no defacing or adulteration, which likely occurred)⁵³⁴ - these would only have a nominal, not an actual, value. *Would this, then, not undermine the currency generally?*⁵³⁵ (in fact, when copper coins were finally issued under licence in 1613 - and by the Royal mint in 1672 - this did not prove to be the case, see 28).

In conclusion, private currency and tokens still widely circulated in England, all of (technically) no value.

(b) Jettons (including Tokens)

Also - in the reign of Edward I - English jettons appeared (many foreign ones also entered England, especially from Germany).⁵³⁶ They were brass counters which were used to balance accounts - being used in abbeys or other religious foundations. They were also used in board games. Although jettons were not coins, they looked like them and the only difference (apart from brass not looking like silver) was that they were pierced or indented.⁵³⁷ It is likely these jettons were used as private currency for smaller commercial transactions.⁵³⁸ As well as jettons, there were also produced a large quantity of tokens (usually of pewter or lead). Many of these were of an ecclesiastical nature. However, others - clearly - were for trade.⁵³⁹ Fletcher stated:

I turn to objects on which history remains almost silent about monetary status or value. All I can state with certainty is that tin and pewter tokens began to turn up as finds in Britain on sites where early 13th century coin and artifact discoveries suggest economic activity, perhaps as marketplaces, or riverside wharves, or locations where people met and congregated in those days....⁵⁴⁰ These early tokens have come from locations in England, Scotland and Ireland, with many discovered on medieval Church land. The use of pewter in their manufacture provides another link with religion because the ecclesiastical authorities had a monopolistic grip on pewter production in those days. The images of pilgrims strongly suggest use of tokens during pilgrimages. They may have been exchange-able for food and accommodation at certain places along pilgrimage routes; or used to pay ferrymen where the routes crossed rivers. Written evidence, mainly from France, also indicates the use of tokens as attendance tickets handed out to priests who celebrated mass at certain times of the day. But we have no information on how such tokens were later exchanged for payment or goods.⁵⁴¹

Having said this, Fletcher indicated that such tokens tended to crop up at sites such as Winetavern Street, London Wall and Bury St Edmonds, where the cult of the boy bishop (as elsewhere) prevailed.⁵⁴² He also stated:

⁵³³ T Snelling, *A View of the Copper Coin and Coinage of England* (London, 1766), *Introduction*, 'on account of their lightness [they, the smaller coins introduced by Edward I] were inconvenient in their use, and liable to be lost, which was the reason of the frequent complaints of their scarcity and of the petitions for new coinages of them, and also a principal cause of the base black coins of foreign countries, obtaining a currency among us, and we find by stat 1 H 4 [i.e. 11 Hen 4 c 5 (1409, rep)](gally half-pence shall not be current in payment in the realm)], that this deficiency of our small money prevented the laws made to prohibit those base coins from having the desired effect.'

⁵³⁴ Cf. Earl of Liverpool, n 132, p 30 'Edward I [1272-1307] in his 28th year [1300], first debased our silver coins.' Ibid, p 32 'he diminished the quantity or weight of sterling silver, in the silver coins of the several denominations made at his mint.' Ibid, p 134 'The [silver] coins of different denominations were indeed understood to contain and represent a certain weight or quantity of standard silver; but they did not contain so much as their names implied.'

⁵³⁵ Fletcher, n 149, p 19 'the reluctance of monarchs or governments to mint fractional coins with a nominal value lower than their intrinsic value, and to guarantee that they would be exchanged for whole units was never tackled in medieval times...'

⁵³⁶ That is not to say that the Exchequer were not using jettons (counters) much earlier, see Johnson, n 166, pp 6, 125. However, these may have been foreign and restricted to the Exchequer. See also Madox, n 166, vol 2, pp 261-2.

⁵³⁷ See Fletcher, n 149, ch 3.

⁵³⁸ Ibid, pp 5-6 'Their [jettons] primary function may have been as reckoning counters, then as gaming pieces; but given the desperate shortage of low denomination silver in medieval times, such attractive and well-made objects must have surely been pressed into use as small change in many local markets.'

⁵³⁹ Mathias, n 188, p 9 noted that 'token money was used for paying wages to labourers building castles in North Wales.'

⁵⁴⁰ Fletcher, n 149, p 28. He continued 'The tokens have a coin-like shape and size (although a little thicker), and usually have obverse/reverse designs resulting from casting in two-part moulds. The figures and emblems on many indicate strong ecclesiastical influence: mitred bishops, crosses, croziers, pilgrims; all generally boldly executed, though primitive to modern eyes. On some the decoration has a surrounding beaded border, lending an overall impression that - whoever designed most of these tokens - had the contemporary silver coinage in mind as a model.'

⁵⁴¹ Ibid.

⁵⁴² Ibid, 'The cult of the boy bishop had enthusiastic adherents throughout Europe in medieval times when many abbeys and larger churches elected a choirboy to act as the boy bishop during Christmas time. He dressed as a real bishop, preached sermons and handed out lead tokens to his congregations. In Britain this practice was confined mainly to East Anglia. Bury St Edmonds was the main centre but tokens from Ely, Sudbury and Ipswich have come to light. Bury's earliest found examples date from about 1480, but the ceremony probably goes back even further....Recipients could use them as alms to buy food and drink at local shops. The shopkeeper would have received reimbursement from the abbey. Boy bishop tokens have been found on East Anglian medieval market sites, evidence of their probable use as small change. This

The most probable explanation is that pewter and lead tokens of the 13th, 14th and 15th centuries were ecclesiastical money, pilgrim's tickets, fractions of sterling pennies in busy marketplaces, tallies for crop pickers and other casual workers, gaming counters for adults and playthings for children...⁵⁴³

One would agree and suggest that this was long-standing and went back to before the 13th century. In the absence of smaller legal tender, people were forced to resort to tokens as a form of '*private currency*' on manorial estates and other places. For the lords of the manor this also had benefits - it helped tie people to the soil. They, sometimes, also ensured that these tokens which they handed out to villeins and employees were used in alehouses, shops *etc* which they controlled. Finally - likely influenced by Italian merchants - BOE (formerly called '*letters of request*' or '*letters of exchange*' - the word '*bill*' simply being another word for a letter) were also being used in England in commercial transactions by the reign of Edward I (1272-85) since a proclamation of 1283 prohibited BOE which were drawn abroad on England (silver was, thereby, taken out of the country and none brought in).⁵⁴⁴ The use of BOE raised an issue for the courts in due course. *Not being deeds or tallies and not being sealed (i.e. specialties) - what was their evidential worth?* It due course (under the law merchant), like deeds, they were held to import consideration.

In conclusion, a large number of commercial transactions were effected using tokens - whether as private currency or as an arra. These, likely, included jettons.

(c) Contracts with Lesser Degree of Formality - Tallies

Bracton was describing the degree of evidential formality required to enforce a contract in the king's court and not purporting to describe the law merchant. However, by the reign of Edward I (1272-1307), there was greater evidential flexibility - doubtless, to encourage trade. London had always sought to favour mercantile activity. Thus, to ensure expedited legal process it seems to have had a piepowder style court as early as 1221, in order to benefit merchants. Also, although the common law required a person (usually) to deny a debt by his oath and that of 11 compurgators ('*wager of law*'),⁵⁴⁵ there were exceptions to this.⁵⁴⁶ More particularly, a debt between merchants could be proved, instead, by a tally. However, this was not limited just to merchants. In the case of London citizens, an Ordinance of c.1285 (contained in the *Liber Albus* and likely encapsulating earlier law)⁵⁴⁷ provided as follows:

- **Sealed Tally treated as Bond.** '*a sealed tally of debt, by usage of the City, is as binding as an obligation [i.e. a bond]; and in cases where plaint of debt is made, and such sealed tally is proffered in proof of the debt, the [D] shall not wage his law in proof that he owes nothing, or in fact any other matter, any more than against an*

is hardly surprising as their designs imitated pennies, half groats and groats, with the obverse usually depicting St Nicholas or a bishop's mitre.'

⁵⁴³ Ibid, p 34. Fletcher also noted 'There are references to medieval country folk calling pewter tokens '*abbot's money*'; this may indicate that labourers on ecclesiastical estates were paid in tokens, and that the tokens circulated locally as money. Use of pewter and/or lead discs as tallies to record work done, or crops picked, must also have occurred. Similarly, we cannot rule out the possibility that some tokens served as gaming pieces or perhaps as children's playthings.'

⁵⁴⁴ See McBain Law Merchant, n 134, p 107. For forerunners to the same in earlier reigns, see Ibid. It should be noted that the terms '*letters of request*', '*letters of credit*', '*letters of exchange*' and '*bills [i.e. letters] of exchange*' did not have the same specificity as in modern times. However, they had similar characteristics. Unlike loans, these letters were (generally) issued for: (a) general purposes, not a specific matter; (b) they were not long term, but were designed to cover current a/c shortfalls; (c) they were not related to a specific lender but (from an early stage) they had a degree of transferability and negotiability. However, unlike tallies (which were also being negotiated in England in the reign of Edward I [1272-1307]), these letters were easier to handle than sticks of wood and more '*tamper*' proof.

⁵⁴⁵ JS Rogers, *The Early History of the Law of Bills and Notes* (Cambridge UP, 1995), p 23 'Wager of law, or compurgation, was a standard means of defence in actions in debt on informal contracts. The defendant offered to '*wage his law*' that the debt was not due. The court set a time for the defendant to appear, along with his oath helpers, usually eleven, and swear a formal oath denying the debt. If all the compurgators swore the oath without slipping, the defendant won the lawsuit. See also Henry, n 149, p 51. G Jacob, *A Law Grammar* (1772), p 129 'Wager of law, is where an action of debt is brought against one, upon a simple contract, without either deed or record, and the [D] in the presence of compurgators swears in court, that he owes the [P] nothing, in manner and form as he had declar'd, and here wager of law has been allowed, because the [D] may have paid the [P] his debt in private, before witnesses who may be all dead, and therefore the law allows him to wage his law in his discharge, rather than it will suffer him to be charged by the bare allegation of the [P].'⁵⁴⁶ See also P & M, n 173, vol 2, p 214. Also, WM McGovern, *Contract in Medieval England: Wager of Law and Effect of Death* (1968), 54 Iowa L Rev 19 ('**McGovern Contract**').

⁵⁴⁶ Simpson, n 4, pp 138-44.

⁵⁴⁷ *Liber Albus*, n 136.

obligation.⁵⁴⁸ [i.e. no wager of law, if a sealed tally was produced]. The reference to this provision being 'by usage of the City' refers to a London custom. The effect was that a sealed tally was treated the same as a (sealed) bond;

- **Non Sealed Tally (i.e. Simple Tally)**, 'if it happen that between merchant and merchant, or citizen and citizen, there is a dispute as to a debt, and a tally is produced by one party, and such tally is disowned; then shall the party bringing such tally have his proof according to law merchant: provided that such proof is made by citizens and merchants, or other good and lawful men, and not by ribald persons.'⁵⁴⁹ [i.e. no wager of law, for citizens of London (or merchants in London) if a tally was produced. Instead, proof could be made by using transaction witnesses and an inquest].⁵⁵⁰ Although there is reference to the 'law merchant' in this provision - it also applied to citizens ('citizen and citizen'). Thus, it was a London custom - and one which may have arisen prior to 1277 - since a Leicester custom also refers to it and it is likely Leicester would have adopted a London practice;⁵⁵¹

The probative worth of a sealed tally also seems to have been accepted by the common law courts by 1294 since - in a case in that year - Metingham CJ stated:

He who demands this debt is a merchant; and therefore if he can give slight proof to support his tally, we will incline to that side [i.e. apply the law merchant] and we will take it... Every merchant cannot always have a clerk with him [i.e. a scribe to write down the terms of the contract]; therefore I will do as I have seen other justices before us do.⁵⁵²

This was also reflected in *Bandon's Case* (1312-3) where an unsealed tally was upheld by the common law courts according to the law merchant (both parties being merchants).⁵⁵³ Rogers stated as to this case:

a merchant brought an action of debt against another merchant by a writ in the usual form save that it ended with the words 'as the aforesaid John shall reasonably be able to show, according to the law merchant, that he ought to pay him.' The [P] produced a tally as evidence of the debt, and the [D] sought to wage his law. When the [P] objected that 'we are pleading at the law merchant which does not suffer any law to be waged in this case.', the [D] answered that 'we are here in the king's court where we ought to be led by the common law and not by the law merchant.' The [P] responded with the contention that 'although we be here at the common law, none the less the justices have power to plead all pleas as well according to the law merchant as according to the common law.' The court agreed and gave judgment for the [P] on the grounds that the [D] failed to respond 'to the proof which the [P] offers in accordance with the law merchant and the nature of his writ.' One could hardly imagine a clearer ruling on the point that the law merchant would be applied by the common law courts where it was applicable.⁵⁵⁴ (*italics supplied*)

The same may be said where local custom could be pleaded. Further, the use of a tally would have been common, as Fifoot noted:

⁵⁴⁸ Ibid, pp 189-90. A bond - which was under seal - was conclusive evidence of a debt (the bond being treated as an admission that the debtor owed money). In time, as Salmond Essays, n 89, p 14, pointed out, 'the rule of evidence that a bond was conclusive proof of a debt became the rule of substantive law that a bond creates a debt.' Ibid, pp 179, 180.

⁵⁴⁹ Ibid, pp 255-6. See also Henry, n 149, p 150 and *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife* (Cambridge, Ames Foundation, 1998), p 112.

⁵⁵⁰ Fleta, n 44, vol 72, pp 211-2 'in cities and fairs and among merchants... by grace of the prince [Edward I] it is granted that proof shall be the privilege of the party asserting the claim, in accordance with the law merchant, and merchants are permitted to prove, by witnesses and by a jury, tallies that are repudiated [disowned]. Indeed, the following custom holds among merchants. If a tally is proffered against another tally and it is alleged that the claim has been thereby met, and if the tally is repudiated by the opposing party, then he whose tally is repudiated will be adjudged to prove it in this way. He shall go to nine churches and swear upon nine altars that such-and-such a [P] made the repudiated tally in his favour by way of acquittance of the debt specified therein, so help him God and these holy relics; and when this has been accomplished, the [D] will be discharged thereof for ever, and the [P] will be amerced. See also Henry, n 149, pp 92-3.

⁵⁵¹ See n 560.

⁵⁵² Kiralfy, n 1, p 105 'In the fourteenth century the common law aimed to supercede all local customs, but merchants preserved the character of their law. Thus, in the reign of Edward I [1272-1307] a merchant who demanded a debt in a common law court was required to give only 'slight proof' in support of a tally against which by the custom of merchants wager of law was not allowed.' Kiralfy cited YB 21 & 22 Edw I (RS), p 456 (1294) and 20 Edw I (RS), p 68 (1292). For the 1292 case see Horwood (ed), *Yearbooks of the Reign of King Edward the First, Years XX and XXI* (Longmans, 1866), p 68 (note that by the law merchant one cannot wage his law against a tally; but if he deny the tally, the plaintiff must prove the tally). For the 1294 case, see AJ Horwood (ed), *Year Books of the Reign of King Edward I* (1863). Cf. Fifoot, n 3, p 224 (he cited the 1294 case although he put a different slant on things - saying that the tally was inadequate and that slight proof was needed to support it. This would not seem correct). See also Salmond Essays, n 89, p 48.

⁵⁵³ *Bandon's Case* (1312-3) YB 6 & 7 Edw II, Eyre of Kent, 27 SS 48. See also MJ Pritchard & DEC Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, SS, vol 108, p 55 (the text of M Hale, *Treatise on Admiralty* c. 1676); P & M, n 173, vol 2, p 215 and Henry, n 149, pp 150-1.

⁵⁵⁴ Rogers, n 545, pp 30-1.

in more than half of the cases of debt reported in the reigns of the first three Edwards [i.e. 1272-1377] the [P] relied upon a sealed instrument. He might produce either a writing or a tally.⁵⁵⁵

In conclusion, the king's court - from the reign of Edward I (1272) - was accepting a lesser degree of evidence (formality) to uphold contracts. They were doing this by reference to the law merchant or local custom - where this could be pleaded. The result was to encourage trade - doubtless, a policy of the Crown.

(d) Contracts with a Lesser Degree of Formality - Oral - Transaction Witnesses

One problem of simply looking at Bracton writing c.1250 - and his reference to the Roman maxim of *ex nudo pacto non oritur actio* - is that it gives a distorted picture. He only considered the king's court which rarely dealt with private contracts in his time. As it is, in the time of Bracton a sealed writing - or an *arra* such as a God's Penny⁵⁵⁶ - would have been sufficient evidence for the purposes of a contract in the king's court (although what restrictions on what the *arra* might be, are less clear). Then, by c.1285(or before) - for a London citizen - a sealed tally was treated as good as a (sealed) bond - it excluded wager of law. Further, by 1294, the king's court, accepting the law merchant and London custom (where it could be pleaded), treated a simple tally as excluding wager of law. *However, what if there was no sealed writing, no arra or no tally?* General law (as noted in Fleta, c. 1290) required proof by wager of law. However, it permitted a reduced wager, if transaction witnesses were provided. Thus, Fleta stated:

if the [P] produces suit, that is the witness of law abiding men who were present at the contract made between them, and if, after examination by a judge, they should be found in agreement...[D] can wage his law against the [P] and against the suit he has brought forward, in this fashion: if the [P] produces two or three [transaction] witnesses as proof, it is essential for the defence to be made by four or six sworn men, so that for every witness the [D] shall produce two sworn men up to the number of twelve.⁵⁵⁷

However, more user-friendly provisions reducing wager of law - or even avoiding it - where transaction witnesses were provided can be found in the case of London and other local customs. Thus, in London, the *Liber Albus* stated (reflecting the law c.1285):

in plea of debt, the [D] may wage his law, by usage of the City, [in proof] that he owes nothing to the [P]; that is to say, if he is a man enfranchised in the City or residing within such City, [he may wage his law] with the seventh hand himself named as one...if the [D] is a foreigner, a stranger, and non-resident in the City, he may wage and make his law with the third hand forthwith, himself named as one, [to the effect that] he owes nothing to the [P], and so shall he be acquitted...if he has not got two men ready to make the oath with him, then the [D], at the request of the [P], ought to go in keeping of a serjeant of the court to the six churches nearest to the Guildhall, and there swear that the oath that he made in the Guildhall was good. And then the [D] shall be brought back to the Guildhall and shall have his judgment that he is acquitted and the [P] shall be amerced.⁵⁵⁸

A mercantile custom avoiding wager of law when there were just two transaction witnesses, is reflected in an Ipswich custumal c.1291.⁵⁵⁹ And, a custumal of Leicester (c. 1277) referred to transaction witnesses and did not

⁵⁵⁵ Fifoot, n 3, p 223. Tallies were given not just when money was lent, but in sales, when only part payment had been made.

⁵⁵⁶ Henry, n 149, p 109 noted the fact that many medieval contracts used the God's penny and the inquest (based on the oaths of transaction witnesses). Thus, 'we seldom see a contract defended by wager of law.'

⁵⁵⁷ Fleta, n 44, vol 72, p 211. See also Salmond Essays, n 89, pp 23-4. Fleta continued 'And by this procedure, the burden of proof always lies upon him who denies. However, so that justice may be even-handed, the proof of the [D] is preferred to that of the [P]. But if anyone of those whom the [D] brings forward to be sworn refuses to take an oath or if he does not produce such as are credible, thereupon he will be held to have lost his case. And should the suit be found in disagreement, then the [D] will not be bound to wage his law against that suit but will be discharged from the case and the [P] will be amerced. And what is said about suit for proving a verbal statement can be said about suit produced to prove tallies, for, if they are put forward without suit, the simple oath of the [D] will be accepted against them (Fleta then referred to the exception for merchants, see (c) above).

⁵⁵⁸ *Liber Albus*, n 136, p 180. Ibid, p 256 'In plea of contract and of debt, when the plaintiff has neither writing nor tally, the defendant may defend himself by waging his law' (himself and 6 others). See also Bateson, n 180, pp 177-8; J Reeves, *History of the English Law* (2nd ed, 1787), vol 2, p 260-1 and Henry, n 149, pp 60-1. Cf. 38 Edw III stat I c 5 (1363)(any man may wage his law against a Londoner's papers, which suggests the London courts may have allowed other evidence apart from sealed writing). See also Jenks, n 91, p 169.

⁵⁵⁹ Ipswich custumal c. 1291, see Bateson, n 180, p 188 'if a merchant sells his merchandise to another merchant to pay on a near day or directly on the nail [probably, it refers to payment forthwith in the market] in which case it is not usual for merchants to make *writing or tally for the speedy payment*, if a plea arises afterwards between those persons in the said court of Ipswich for the non-payment of such merchandise, the merchant to whom the merchandise was thus sold shall not be allowed in pleading to defend by his law, saying that he does not withhold from the said merchant plaintiff the money for the merchandise sold to him as foresaid, provided that the sale or the delivery of the said merchandise can be proved or averred by *good inquest* according to merchant law in the form below written.' (*italics supplied*). This referred to 2 transaction witnesses, the same as the London custom where the defendant was a foreigner or stranger who was non-resident. See also Henry, n 149, p 69. Also, *William of Papworth v John of Kent* (1291), see n 501, SS, vol 23, p 39 (on the nail).

seem to need merchants to be involved; it covered all citizens.⁵⁶⁰ This use of transaction witnesses and inquest (suit, *secta*),⁵⁶¹ likely reflected the fact that wager of law was too complicated a form of proof. It militated against 'foreigners'.⁵⁶² Also, transaction witnesses were more reliable since they would have knowledge of the commercial transaction, being physically present.⁵⁶³

In conclusion, wager of law was reduced (or avoided) pursuant to mercantile law and some local customs. Proof by way of transaction witnesses would have avoided a contract being treated as a nudum pactum.

(e) Contracts with a Lesser Degree of Formality - Oral Agreement - Decisory Oath

What, however, if there was no writing, no arra, no tally and no transaction witnesses ? For example, a purely oral agreement (or one accompanied by an oath(s) ? The law, generally, was not in favour of a purely oral agreement without more, and Magna Carta 1215 reflected this:

No free man is to be put to his law [i.e. wager of law] or placed on oath on a mere plaint [complaint] and without trustworthy witnesses [i.e. transaction witnesses] brought for that purpose.⁵⁶⁴

That said, if the transaction was effected with a handshake or a drink to seal the bargain (or both), it is likely that a lesser court (but not, probably, the king's court) would have treated this as an *arra* and sufficient. Further, these forms of being bound would (generally) have been effected in the presence of transaction witnesses (the drink including them, to thank them for acting as such). Otherwise, a purely oral agreement - without more - would have been held to be a *nudum pactum* even in a lesser court, such as the court baron.⁵⁶⁵ Further, it could be denied by a single oath of the defendant (without the need for compurgators) - as evidenced in later medieval customs such as those of Hythe (1483-5) and Romney (1498).⁵⁶⁶ Also, that of Fordwich (c.15th century) which provided:

if he [i.e. P] pleads by his nude parol [*per simplex verbum suum*], without suit of sight and hearing [i.e. transaction witnesses] by which he would prove his count, the [D] may acquit himself by his sole oath if he chooses, and be acquitted by nude parol against [P's] nude parol.⁵⁶⁷

This reference to an oath would appear to be to the decisory oath.⁵⁶⁸ The customs of London also appear to have had it.⁵⁶⁹ It was a sort of '*last chance*' method of seeking to prove an oral agreement (or one with an oath) in a secular court where the P (or the court), effectively, demanded the D to tell the truth on oath.

⁵⁶⁰ Leicester customal, 1277 'whereas it was heretofore the custom that the [D] could not answer any other thing to the [P's] plaint except to admit everything or to say fully a thwart-nay, and when he had said the nay, he had to be at his law the sixth hand....it is provided first that in a plea of debt, if the [D] denies it and the demandant has *proof of his debt by writing, tally, or word of mouth*, let him first swear and then his [transaction] witnesses whom he brings, and let witnesses be examined by sight and hearing, if they were at the taking of the debt or the making of the tally, or if they were at the place where the debt or the tally was confessed, and according to what they prove, let him recover or his lose his debt.' (*italics supplied*). See also Henry, n 149, p 37. For Romney, see *Ibid*, p 40.

⁵⁶¹ Reeves, n 558, vol 2, p 259 'a *secta*, that is, the testimony of certain lawful men who were present at the contract...'. The oaths of the transaction witnesses were similar to those in Anglo-Saxon times, see Henry, n 149, p 76. The transaction witnesses had to have been physically present when the transaction was concluded, '*seeing and hearing*' what went on. *Ibid*, pp 77-90.

⁵⁶² This refers not just to persons from foreign countries but also to non-residents. See also Henry, n 149, pp 39, 61, 71.

⁵⁶³ Henry, n 149, p 56 (explaining the need for so many compurgators, usually 11) 'It was probably felt that the testimony of compurgators who perhaps knew nothing of the facts was worth less than that of witnesses who did know them.'

⁵⁶⁴ Magna Carta 1215, c 38 cited by Fleta, n 44, vol 72, p 211. Salmond Essays, n 89, p 22 'By Magna Carta the necessity of the production of the *secta* was expressly declared.' He also noted '*Ibid*, the *secta*, or suit...were originally examined by the court their testimony was sufficient to raise a *prima facie* presumption, the other side lay under no obligation to produce any of the recognised forms of disproof...But the examination of the *secta* was probably never much more than a mere form, and at an early period it ceased to take place except at the special request of the opposite party. Finally, in the reign of Edward III [YB 17 Edw III, 48 pl 14 (1343) - see 17 Edw 3 pl 14 RS 73-5 (1343), see Seipp no 1343.154rs] the judges refused to examine the suit in any case, and henceforth its production was a mere fiction.' See also Baker & Milsom, n 118, pp 212-3 (reporting the case as *Anon v Warren* (1343)).

⁵⁶⁵ See n 451.

⁵⁶⁶ M Bateson, *Borough Customs*, SS, vol 18, p 183. e.g. 'if the debt amounts to less than 10s, a freeman shall prove by his sole hand against a freeman.' See also Henry, n 149, p 20, n 1.

⁵⁶⁷ *Ibid*. See also *Ibid* (*Dover customs*, 15th c). See also Henry, n 149, pp 19-20. See also the court of *sola manu* (the defendant could clear himself by single oath. Also, the plaintiff, if called to prove, could prove by the same). *Ibid*, p 64.

⁵⁶⁸ Salmond Essays, n 89, p 31 'a man could not in general testify in his own case. But either party might, if he chose, stake his case upon the oath of his adversary. A party doing this was said to offer the oath *jusjurandum deferre*, to his opponent. If the latter accepted the offer, his oath was absolutely decisive, whether in his own favour or in that of his adversary. Naturally this expedient was seldom or never resorted to except when the party offering the oath was unable to establish his case by any other evidence. As a last resource [sic], he threw himself on

In conclusion, an arra - such as a handshake or a drink to seal the bargain - avoided a contract being treated as a nudum pactum in a lesser court.

(f) Conclusion

The reign of Edward I (1272-1307) was a time in which there was great growth in trade. This was reflected by an increase in fairs and markets as well as in foreign and local merchants acting as financiers in London - especially Lombards in place of Jewish financiers who were expelled in 1290. Doubtless, the king was keen to encourage this trade. Thus, a law merchant was accepted. It was part of the common law, but more flexible and designed to benefit 'merchants' - those who bought and sold as a profession. This law merchant was then extended to London citizens as well to as those of many other towns by way of local custom. These merchants (especially foreign ones), doubtless, brought with them practices such as a greater use of writing as well as tallies.⁵⁷⁰ They also sought - and obtained - a speedier judicial service in piepowder (fair) courts as well as in courts operating in market towns and ports. Parties could also resort to arbitration⁵⁷¹ and - if guild members - guilds would (likely) have been active in such matters, also, ostracizing dishonest merchants among their number.

- Further, the law of evidence was becoming simpler and more efficacious. Proof by way of battle (as well as by way of ordeal, which the church denounced in 1215) had gone, in practice, by the time of Edward I. And proof by wager of law which was unsatisfactory - not least because the compurgators were not witnesses to the transaction - was being displaced by sealed writing, tallies, transaction witnesses and the inquest. Indeed, it seems clear that London and other cities were doing what they could to get rid of wager of law for their merchants and citizens (who would not have had it, anyway, in many lesser courts - such as the court baron and the piepowder court);⁵⁷²
- Thus, although the maxim of 'nudum pactum' taken from Bracton existed, in practice, it would have been rare. Business people were not foolish and it could be avoided easily - by writing, tallies, transaction witnesses or an arra. Further, in the lesser courts at least, an arra in the form of a handshake or a drink to seal the bargain would have been accepted. Therefore, there is a danger in over-emphasising the nudum pactum in medieval times. Especially, when most commercial disputes would have avoided the king's court as expensive and time consuming.

In all this - as can be seen - what was important was evidence to show there had been 'consensus' between the parties. Tokens, seals, tallies, handshakes, transaction witnesses etc comprised that evidence. There was no doctrine of consideration, however, in this period.

In conclusion, there is no evidence of the doctrine in the reign of Edward I (1272-1307) up to 1290.

15. EVIDENCIAL HIERARCHY: 1290 - 1327

(a) Hierarchy

By the reign of Edward I (1272-1307) the courts had developed the rudiments of a law of evidence. This included a hierarchy of proof afforded by various instruments. In the case of contract for the purpose of determining whether an agreement ('consensus') had been reached between the parties, the hierarchy appears to comprise (top down):

- (a) royal charter;⁵⁷³
- (b) instruments of record;⁵⁷⁴

the honour or superstition of his adversary.' Salmond referred to Bracton, n 42, vol 3, p 342 'There is an oath tendered by one party to the other in court, or by the judge to a party, upon which no conviction follows, for it is sufficient that they await the vengeance of God.'

⁵⁶⁹ Ibid, p 33. See also Henry, n 149, p 65.

⁵⁷⁰ Henry, n 149, p 135 'The extensive use of the stick tally was...due to there not being anything better commonly available for the purpose. Many of the merchants could not write; neither did they carry pen, ink, and parchment with them; nor were such materials readily available. The services of a scrivener were often difficult to secure, and the merchants might not care to incur such expense, or that for materials. Persons who could not read would naturally not like to trust a document to state the obligation correctly, whether they were creditors or debtors.'

⁵⁷¹ For an arbitration in 1287 mentioned in the records of St Ives fair court, see Henry, n 149, p 94.

⁵⁷² Salmond Essays, n 89, p 25 'Compurgation, or wager of law, was...allowed in but few cases, while even in these it almost disappeared in consequence of the use of new forms of action...as [it] decayed, that by jury, or *per pais*, flourished and grew strong, till it became practically the only representative of the old class of proofs by parol evidence. So the old threefold division became that of matter of record, matter in writing, and matter *in pais*.' In this, he was referring to the displacement of trial by ordeal, by battle and compurgation.

⁵⁷³ These were interpreted by the courts. However, the rules of interpretation were more favourable to the monarch than in the case of deeds. See McBain Deeds, n 35, p 18.

⁵⁷⁴ English courts were distinguished between courts of record (being the king's court) and those not of record. In the king's court, instruments (including deeds and debts) could be enrolled and become part of the record. Once enrolled, the possibility of the rolls being

- (c) deeds not of record;⁵⁷⁵
- (d) instruments under seal (i.e. specialties, including sealed tallies);⁵⁷⁶
- (e) instruments under hand (i.e. simple contracts);⁵⁷⁷
- (f) simple tallies (i.e. unsealed tallies);
- (g) handshake;⁵⁷⁸
- (h) drink to seal the bargain;
- (i) escrow (unsealed writing);⁵⁷⁹
- (j) oral agreement, accompanied by an oath;
- (k) simple oral agreement;
- (l) oral promise/offer.

The above could be in the presence of transaction witnesses. However, even in the case of a sale (unlike Anglo-Saxon law) - this did not have to be by 1290 (and, likely, by the time of Glanvill (c.1189) or before). Also, evidence of being bound could be effected by an *arra*. Indeed, all of (c)-(h) were *arras* - that is, a seal, a tally, a handshake, a drink to seal a bargain (delivery of the goblet/payment of the liquor being the *arra*), making a mark (sign, signature) *etc.*

(b) Courts

The king's court - as evidenced in Bracton - preferred (and, probably, promoted by way of public policy) (b) and (c). Thus, a wise merchant would have used these in the case of contracts of greater value. However, the king's court was prepared to accept a sealed (and, later, a simple) tally on the basis of the law merchant. Not least, because tallies were widely used, they were relatively simple to effect and they helped trade. As for (g)-(k), these were devices, often, used for contracts involving smaller sums. Ones the king's court did not wish to deal with generally. These were left to lesser courts. All of (c)-(h) could be '*enhanced*'. Thus, their evidential value could be improved if accompanied by: (i) transaction witnesses; (ii) an *arra*; (iii) a combination of matters. Thus, a sale could be effected by a handshake, an *arra* and an oath. Or, a handshake in the presence of transaction witnesses - everyone then drinking to '*seal*' the bargain, as well as witness it.

- As a result, in practice, of the vast volume of commercial transactions made in the medieval period, relatively few would have fallen into the category of (i)-(l). In their case - although temporal courts might not have assisted - a canon law court probably would have. However, even if all the above was in place, a pre-requisite for a valid contract (including a sale) was *delivery*. Even a sealed writing had to be delivered. If not, it was a mere '*escrow*' and of little evidential worth.

tampered with was much reduced. As a result, considerable judicial reliance could be placed on them. Because of the presumed accuracy of recorded instruments, an expedited species of trial - trial by record - arose. Where a matter of record was pleaded the court ordered the record to be produced and the issue was decided on that point alone. No jury was required. This category of instrument effectively disappeared when instruments were no longer enrolled in court records, a practice which was discontinued from the 1870's in the case of most deeds (deed polls on a change of name being an exception). See McBain Deeds, n 35, p 18 and Salmond Essays, n 89, pp 60-3.

⁵⁷⁵ Until the advent of compulsory land registration and the Bills of Sale Act 1853, deeds and debts did not, generally, have to be recorded. Though still deeds, these instruments were soon accorded by the courts with an evidential value scarcely less than that of enrolled deeds and debts. See McBain Deeds, n 35, p 18. For the registration (enrollment) of debts, see also Exchequer of the Jews 1194, see McBain Law Merchant, n 134, p 49. For the Statute of Acton Burnell 1283 and the Statute of Merchants 1285, see Ibid, pp 63-5. For the Statute of the Staple 1353, see Ibid, pp 83-7.

⁵⁷⁶ Any instrument (and later, if on parchment or paper) which was sealed and delivered was, *ipso facto*, a deed (as W Sheppard, *The Touchstone of Common Assurances* (last ed 1826) ('*Sheppard Touchstone*'), vol 1, p 50 put it (throughout its editions) 'every agreement...in writing, sealed, and delivered, becomes a deed.' An instrument could only not be a deed if not on parchment or not delivered. Thus, a sealed tally was not treated as a deed because it could be more easily erased (see n 594). In the 19th century the courts began to widen the category of instruments under seal which were not deeds on the basis that they did not pass an '*interest or property*' - such as a letter of ordination, certain awards, certificates *etc.* Thus, the number of instruments under seal that were not deeds, increased, see 35(d). See McBain Deeds, n 35, p 18.

⁵⁷⁷ Until people began signing instruments from the time of Henry VIII (1509-47) this category hardly existed. With the great expansion of credit after 1660, instruments such as BOE and promissory notes were signed, as opposed to being sealed (early BOE and promissory notes in the form of letters of request issued by kings (see n 544) would have been sealed). These were treated as debts by way of simple contract and their existence (as well as the matters contained therein, if disputed) had to be tried, and determined, by a jury. Any requirement that an instrument be in writing but that it need not be by way of deed arose from statute or contract only, not the common law. See McBain Deeds, n 35, p 18. A tally which had writing on it but which was unsealed seems to have been treated as (f) not (e).

⁵⁷⁸ (g) and (h) were often coupled and (likely) accompanied by an oath.

⁵⁷⁹ Pre-Glanvill an unsealed charter might have had some probative worth. However, by the time of Glanvill this is dubious (cf. n 421) and, like today, it would have been treated as a mere draft).

(c) Local Custom

A problem with texts such as Glanvill and Bracton - which looked at the king's court - is that they did not consider the law merchant or local custom. Yet, in practice, these would have covered the majority of commercial transactions entered into. Also, local custom had many variants. Further, traders in many towns would have accepted the simplest means of evidencing a contract since they trusted each other. A Grimsby charter of 1259 states:

no one shall make bargains [i.e. sales] by hand-clasp for herring or other fish, or for corn, except burgesses of the said town; and that hand-clasp contracts shall hold unless the merchandise for which hands were clasped are of worse quality than was agreed, and of this a reasonable estimate shall be made by men worthy of credit.⁵⁸⁰

Similarly - although writing was generally required for land transactions - by local custom, the sale of a house (or land) in London could be made orally.⁵⁸¹

(d) Increasing Evidential Simplicity

A point often overlooked is that commerce in 1290 (like commerce today) was changing rapidly. There was much more of it and even kings thought that trade was good. Thus, the courts were under pressure to accommodate. And they did, by recognising the law merchant as well as local custom. Thus, reaching an enforceable agreement was less a *via crucis* than might otherwise be supposed by reading Bracton, Britton or Fleta. In this period, the common law developed the concept of the *deed* - a new legal concept. One which made life easy for merchants as well as for those who could read and write. Further, the common law accepted the tally. As to evolving matters of evidence:

- **Writing - Deeds.** When a document was in writing, Bracton said that it had to be sealed (executed) and delivered. Although he was describing a '*deed*', when it - as such - developed is uncertain. It was, probably, early in the 14th century - possibly, as early as c.1308-9.⁵⁸² A deed was different from a mere writing (*escrow*). In time, it also had to be on parchment (which would have been the most common form since paper did not appear in England until the 14th century).⁵⁸³ However, this requirement may have not been strictly enforced until later⁵⁸⁴ (it was possible to write on stone, papyrus and leather - some countries sought to limit this, for obvious reasons).⁵⁸⁵ Bracton had observed that - having a writing witnessed was advisable - although he did not say it was a pre-requisite (essential). His view prevailed since a deed did not legally require it as a pre-requisite (although the practice of witnesses sealing continued to be common).⁵⁸⁶ Delivery of the deed also, symbolically, represented delivery of the underlying subject matter⁵⁸⁷ in the case of personal chattels and incorporeal hereditaments, but not corporeal hereditaments (i.e. land) where livery of seisin was still required, unless local custom otherwise prevailed or other devices (such as uses, bargain and sale *etc*) were employed.⁵⁸⁸ That a deed - when sealed by the parties - was

⁵⁸⁰ See also n 180.

⁵⁸¹ Coke, n 47, vol 2, p 675.

⁵⁸² FW Maitland (ed), *Year Book 2 & 3 Edward II*, 19 SS 84(1309) at p 85 'We say that you yourself leased the house *etc.* and by your deed bound yourself to warrant and defend'. See also MS Arnold, *Fourteenth-Century Promises* (1976) CLJ, pp 321-34 at p 334, n 18.

⁵⁸³ Paper making did not occur in England until the 14th century. See also Clanchy, *From Memory to Written Record* (rep 2005), p 120

⁵⁸⁴ Coke, n 47, vol 2, p 672 noted that the Statute of Enrolments 1536 (27 Hen VIII c 16) required the bargain to be 'written in parchment or paper, and not upon wood, stone, lead, or other material.' He cited *Stile's Case* (1596) 5 Co Rep 20b (77 ER 80). Coke also stated, p 673, 'And so much is implied [that it be on parchment] when the inrolment is in any of the king's courts of record at Westminster...'. See also McBain Deeds, n 35, Pt 1, pp 23, 42.

⁵⁸⁵ See e.g. JM Powell (trans), *The Liber Augustalis* (Constitutions of Melfi promulgated by Frederick II for the kingdom of Sicily in 1231), p 50 'We also desire and decree that the aforementioned public documents should be written in the future only on parchment. For, since it should be hoped that their trustworthiness will last for many years in the future, we consider that it is right that they should not succumb to the danger of destruction from old age. No proof at all should be taken in court or outside of court from documents written on papyrus paper [*charta bombacyna*] or in some other manner...unless they are receipts for debts or the payment of debts.'

⁵⁸⁶ Henry, n 149, p 154 'It continued to be customary as it is to-day to have witnesses to sealed writings, and to name the witnesses therein.'

⁵⁸⁷ See also P & M, n 173, vol 2, p 220 'The sealing and delivering of the parchment is the contractual act'. One would agree. It satisfied the pre-requisites of '*consensus*' - the parties delivering their part to the other bound them, by reflecting their consent (assent) to the terms within. Also, of delivery - by way of delivery of the parchment. As to why such a rule (restriction) did not apply to the action of debt, it would have excluded the tally (which, even when sealed and with writing, was not treated as a deed) which was extensively used as proof of a debt (not least by the Exchequer). This would have been too exclusionary.

⁵⁸⁸ Salmond Essays, n 89, pp 53-5. However, by 27 Hen 8 c 16 [the Statute of Enrolments 1536] conveyance by bargain and sale avoided the need for seisin. As Sheppard, n 55 p 283 stated 'And [by bargain and sale] lands may pass without livery of seisin or attornment, so as it be by deed indented, sealed and inrolled, either in the country where the land lies, or in one of the king's courts of record at Westminster, within 6 months next after the date of the same writing indented, according to the statute of 27 H 8 cap 16.' From 1845, the conveyance of land was by way of grant, see 34.

evidence of agreement (*consensus*) is reflected in a case such as the *Waltham Carrier* (1321).⁵⁸⁹ Finally, while no deed was required for an action on the covenant in a local court (such as the Mayor's court in London),⁵⁹⁰ it was (generally) required in the king's court.⁵⁹¹ Why this higher standard of proof was imposed may have been a public policy decision to leave more minor commercial transactions to the local courts - they would have better experience of such things, with witnesses being more readily available, any requirement in respect of the venue being met *etc.*⁵⁹²

- **Seals.** By 1290, most important people and merchants (business people) had their own seals. In the absence of this, merchants and others could avail themselves of a guild or other corporation seal or that of another person.⁵⁹³ This, doubtless, helped propagate the sealing of writing and tallies;
- **Tally.** Early in the 14th century, the common law courts were prepared to accept that a sealed tally was as good as a deed (i.e. no wager of law or transaction witnesses required) - it being treated as a specialty - although Bereford CJ in 1313 was not prepared to treat a written, sealed tally as *identical* to a deed.⁵⁹⁴ Further, even if the tally was unsealed - if made with a merchant or a London citizen (or a citizen of certain other towns) the law merchant or local custom could be pleaded and the requirements of wager of law reduced or precluded.⁵⁹⁵ Since the common law courts enforced the law merchant and local customs - if expressly pleaded - they would uphold this.⁵⁹⁶ Thus, in 1294, as previously noted, Metingham CJ indicated that a person producing a tally - if a merchant - only had to provide '*slight proof*' for the common law court to enforce it. However, if a person was not a merchant or a citizen, this benefit was not available.⁵⁹⁷ That said, in some places such as Waterford (c. 1300) a tally could be proved

⁵⁸⁹ *Anon* (1321), *Yearbooks of Edward II*, 86 SS 286 *per* Herle J 'Covenant is none other than the assent of the parties that lies in specialty.' (p 287 'A covenant is nothing but an agreement in words between parties, and it cannot be proved except by specialty...'). See also Baker Covenants, n 118, p 1115; AKR Kiralfy, *A Source Book of English Law* (1957), p 180 and Ibbetson Words and Deeds, n 121, p 89.

⁵⁹⁰ Baker Covenants, n 118, p 1122 'the Mayor's Court...continued for centuries afterwards [i.e. after the 14th century] to allow actions of covenant without a deed.' See also Ibbetson Words and Deeds, n 121. Also, McGovern Covenants, n 411, pp 580. Also, 608 (*assize for rent*). Also, p 611 'Despite the rule that an action of covenant would not lie without specialty, some oral covenants, all of which involved land in some way, were enforceable in the king's court before the writ of *assumpsit* appeared in the second half of the 14th century.' The court baron seems to have also accepted a simple tally, see Ibbetson Words and Deeds, n 121, p 87. Actions under the Statute of Labourers 1349 also required no deed.

⁵⁹¹ *Ibid*, p 1107-8. Baker noted that the requirement of a deed was not essential in the action of covenant until after 1290, with an invariable rule after 1321. He also noted, p 1108 'the rule was never applied in London or other local courts, where covenant retained its pristine informality without fear of error. It cannot therefore have been part of the substantive English law of contract, but was a rule of procedure or evidence applied only to proceedings commenced in the central courts and eyres.' See also P & M, n 173, vol 2, p 220 'The sealing and delivering of the parchment is the contractual act'. One would agree, it satisfied the pre-requisites of '*consensus*' (the parties delivering their part to the other bound them, by reflecting their consent (assent) to the terms within) and delivery of the subject matter. As to why such a restriction did not apply to the action of debt, it would have excluded the tally (which, even when sealed and with writing, was not treated as a deed) which was extensively used as proof of a debt (not least by the Exchequer). This would have been too exclusionary

⁵⁹² McGovern Covenants, n 411, p 612 who also noted, p 614 'as [the] king's court expanded its jurisdiction in the later Middle Ages, the rule barring enforcement of oral covenants was circumvented by the rise of the action of *assumpsit*.' See WM McGovern, *The Enforcement of Informal Contracts in the later Middle Ages* (1971) 59 *Californian LR* 576 ('**McGovern Informal Contracts**'), p 1154 'A question of great importance in the middle ages was the place where the cause of action arose...in medieval law, since the jury was supposed to speak of its own knowledge, it had to be drawn from the neighbourhood where the claim arose.'

⁵⁹³ McBain Deeds, n 35, p 26. Cf. Sheppard Touchstone, n 576, vol 1, p 56 'about the time of E 3 [Edward III, 1327-77] all men began to use sealing of deeds.' For the use of the seal to *evidence* a sale in Jewish medieval law - which, likely, had some influence on the importance of the seal under English law - see MR Cohen, *Maimonides and the Merchants* (Univ. of Pennsylvania Press, 2017), ch 8 (procedure of *siumta*).

⁵⁹⁴ *Anon v Anon*, Eyre of Kent, SS, vol 27, p 57 *per* Bereford CJ 'a tally is not a pure deed as is a writing; for what has been inscribed on a tally can be shaved off and something different from what was there before can then be put in its place at the will of the custodian of the tally, without anyone being able to detect it, which is not the case with a writing.' Henry, n 149, p 147 who also noted 'In the written tally under seal...the law merchant and the common law met. The contract jurisdiction of the central courts was largely one with written instruments under seal. Most of the debt cases were brought with such documents, and the covenant jurisdiction was confined to those under seal. There was no question about the enforceability of a written tally under seal against anybody in the royal courts, or before the justices on *eyre*.' Also, *Ibid*, pp 154,177. Cf. Salmond Essays, n 89, p 49 and A Fitzherbert, *New Natura Brevium* (6th ed, 1718, the 1st ed was in 1534), 122 I ('an obligation ought to be made in writing in parchment or paper, and not written upon any piece of wood, as a tally is.'). See also Baker & Milsom, n 118, pp 254-5, referring to *Anon* (1378), see also Seipp no 1378 .008am (tally marked with notches). Also, Seipp no 1370.080.

⁵⁹⁵ Henry, n 149, p 154.

⁵⁹⁶ Henry stated generally, n 149, p 177 'A tally not under seal quite as much as one under seal barred the defence of law [wager of law], and likewise gave the holder the right to prove. The trial of a sealed tally in writing differed little from the trial of witness proof. In both cases the court examined the proof; in the one case it was the oaths of witnesses; in the other, a writing and a seal, which took the place of oaths. And if the trial of the sealed writing is compared with that of the unsealed tally there is hardly any difference at all.'

⁵⁹⁷ See ns 552 & 595. Cf. Henry, n 149, p 149 'unless both parties were merchants, or both citizens of a borough where local law clearly enforced tallies, there was a possibility of a tally not being worth anything before such a court. And the same was true if the action was brought in the central courts at Westminster.' In respect of the first statement he cited SS, vol 27, p 49.

without transaction witnesses, by the sole oath of the plaintiff.⁵⁹⁸ In short, it seems that the common law courts - quickly - accepted tallies and that they were treated the same as a deed, if sealed. And, even if not, a simple tally precluded wager of law in most cases;

- **Arra.** The *Carta Mercatoria* (1303), which comprised legislation, indicated that a God's penny - exchanged between merchants (or where one was a merchant) - bound them⁵⁹⁹ (although Bracton and Fleta had made it clear that an *arra* bound, uncertainty must have arisen around this time).⁶⁰⁰
- **Private Currency.** The use of private currency long continued - helped by the poor quality of legal tender.⁶⁰¹ There were further debasements (devaluations) of the latter by Henry IV in 1412 and by Edward IV in 1464/5.⁶⁰² As well as debasements, there was an insufficient amount of legal tender issued to meet demand and, as a result, private currency and tokens were generally used in trades such as the agricultural trade and, possibly, in ferrying river passengers.⁶⁰³

(e) Conclusion

The law of evidence in the reign of Edward I - and subsequently - continued to evolve. This evidence went to the issue of whether '*consensus*' had been reached. Further, the courts and the Crown were, generally, '*user friendly*' to merchants and citizens.⁶⁰⁴ There is no indication of the doctrine of consideration (or even hints of it) up to the end of the reign of Edward I (1307). In respect of the position thereafter, it is appropriate to summarise the many theories on the origin of the doctrine. This is now considered.

16. ORIGIN OF THE DOCTRINE - THEORIES

From Blackstone (writing his Commentaries in the period 1765-9) onwards, legal writers propounded various theories on the origin of the doctrine.⁶⁰⁵ These are summarised with the *caveat* that it is immaterial whether they are correct or not for the purposes of this article, since it considers whether the doctrine is necessary today. Other *caveats* should be expressed. No court has ever authoritatively opined on which theory is correct. Nor, when the doctrine originated in English law. Also, much of the early writing on the doctrine lacks the objectivity of today's legal writing. In particular, many Victorian academics had a theory. They then (often) only cited legal material to support their theory. Many of these jumped from Roman law to later English law with little attempt to trace the intermediate chronology and ignoring relevant factors such as the law merchant, Biblical law, Anglo-Saxon law, the use of tokens (including the *arra*) etc. The result tended to be a marked tendency to indulge in subjective legal re-construction (as well as an ardent desire to prove other academics wrong). Fifoot noted:

⁵⁹⁸ Henry, n 149, p 152 quoting SS, vol 18, p 203.

⁵⁹⁹ For cases referring to a God's penny see e.g. Henry, n 149, p 14 (a case in 1317 where L bought in the booth at J at St Ives fair a bale of plume alum for 16s and 9 pence and a God's penny). Also, *Barton v Bishop* (1291)(contact and delivery of a God's penny for fish at St Ives fair in 1291), Ibid, p 35.

⁶⁰⁰ See McBain Law Merchant, n 134, pp 65-6.

⁶⁰¹ Davies, n 148, p 165 'the weight of the penny, which had remained almost unchanged for 200 years, was slightly reduced by Edward III [1327-77] in 1344 and reduced more substantially by him in 1351, the total reduction of the silver content of the coinage over those seven years being 19 per cent.'

⁶⁰² However, Davies asserted that debasement was not a real problem before the 16th century and the reign of Henry VIII (1509-47) after the success of his father, Henry VII (1485-1509), in maintaining the quality of coinage. This '*Great Debasement*' started with an issue of '*Irish harps*' in 1536 containing roughly 90% of the silver content of their English equivalents. See Davies, n 148, p 171 ('debasements by weight, for the silver penny and the gold noble and their subsidiary coins, were carried through by Henry IV [1399-1413] in 1412 of 17 per cent and by Edward IV [1461-83] in 1464/5 of 20 per cent. On average all the devaluations in England over the whole of the previous two centuries amounted to only one-fifth of one 1 per cent per annum, which was hardly more than the ordinary loss of weight through normal circulation. The effects on the value of sterling were therefore relatively small. In short, debasement was not really a problem in England before the sixteenth century'). Ibid, p 194 (he quoted Sir Charles Oman (1931), p 244) that this was a move from 'the finest, the best executed and the most handsome coinage in Europe' to 'the most disreputable looking money that had been seen since the days of Stephen [1135-54] - the gold heavily alloyed, the so-called silver ill-struck and turning black or brown as the base metal came to the surface.' Ibid, pp 198, 200 ('The process of physical debasement from the original pure sterling silver standard reached 75 per cent silver by March 1542, 50 per cent by March 1545, 33 1/3 per cent by March 1546, and reached its nadir of 25 per cent under the young King Edward VI [1547-53] in 1551.').

⁶⁰³ E Fletcher, n 185, p 37 'London finds [of coins] from Gravesend to Teddington show that there was a need for tokens on rivers, perhaps used as change when giving/taking fares on boats and ferries. Farm workers throughout rural England, whether employed by monks or secular landlords, needed pay and change; and they must have wanted just as eagerly to record their daily toils in the fields by accepting leaden chits or tallies. Surely, no working man, woman or child in 15th century England failed to come into contact with leaden tokens and tallies at least once a week?'

⁶⁰⁴ McGovern Covenants, n 411, p 586 'in certain respects medieval law was surprisingly liberal in allowing parol evidence, notwithstanding the rule that '*covenant lies in specialty*'.

⁶⁰⁵ See also Kiralfy, n 1, ch 14.

The revival of historical interest among Anglo-American jurists in the later years of the nineteenth century naturally directed attention upon the central feature of their law of contract. In the dearth of direct evidence as to the origin of the doctrine of consideration, it was perhaps equally natural that they should have indulged in intelligent reconstruction.⁶⁰⁶

As it is, one would assert that these writers were looking in the wrong place(s). As to various theories:

(a) Doctrine - Theories

In chronological order, the theories advanced by various legal writers were as follows:

- **Blackstone (1766)**. He proposed a Roman origin and quoted the civil division of innominate (nameless) contracts. He also asserted that '*our law has adopted the maxim of the civil law, ex nudo pacto non oritur actio*',⁶⁰⁷
- **Pollock (1876)**. In his *Principles of Contract* (1876) he proposed that the Court of Chancery introduced the doctrine into contracts, deriving it from the law on uses (trusts),⁶⁰⁸ although its origin he linked to Roman law (*causa*).⁶⁰⁹ However, Pollock later (possibly, by 1881) doubted this and considered Holmes' theory (below) more tenable;⁶¹⁰
- **Holmes (1881)**. He proposed (following the US academic Langdell) that the doctrine originated from the requirement of *quid pro quo* (exchange, '*this for that*') in the action of debt,⁶¹¹ stating that '*the requirement of consideration in all parol contracts is simply a modified generalisation of quid pro quo to raise a debt by parol.*'⁶¹² However, other legal writers such as Ames,⁶¹³ Salmond,⁶¹⁴ Barbour,⁶¹⁵ Kiralfy⁶¹⁶ and Fifoot⁶¹⁷ doubted this theory (it is to be remembered that debt was treated as real, not consensual, in earlier times),⁶¹⁸

⁶⁰⁶ Fifoot, n 3, p 395.

⁶⁰⁷ Blackstone, n 49 (see 31). Scrutton, n 88, p 146 'he...asserts, as we have seen erroneously that 'our law has adopted the maxim of the civil law, *ex nudo pacto non oritur actio*, whereas the two laws give *nudum pactum* a different meaning.'

⁶⁰⁸ Noted by Scrutton, n 88, pp 100-1. See also Jenks, n 91, p 209 ('seems to be little evidence for the influence of Chancery').

⁶⁰⁹ Pollock, n 75, p 149 'it seems very possible that the English consideration may be directly descended from the Roman *causa*.'

⁶¹⁰ Swain, n 102, p 217 'In the first edition of his treatise [Pollock, n 75, (1876)] he argued that '...it seems very possible that the English consideration may be directly descended from the Roman *causa*.' Pollock would later reject this view as historically unsound [by the 3rd ed, 1881] and treat consideration as a purely home-grown doctrine. The fact that a parallel with *causa* was even drawn may reflect the extent to which consideration was seen as evidence of a contract seriously intended by this time.' See also Duxbury, n 75, pp 205-6 (in 1888, Pollock told Ames that this was a 'discredited spook'). In the last edition of his work in which he was involved, Pollock, n 75 (10th ed, 1936), pp 170-1, Pollock gravitated towards the theory of Ames.

⁶¹¹ See Holmes Common Law, n 87, p 181 'Consideration originally meant *quid pro quo*...'. Also, p 253 'I am not aware that consideration is distinctly called cause before the reign of Elizabeth [I] [1558-1603]; in the earlier reports it always appears as *quid pro quo*.' Cf. Jenks, n 91, p 212. See also, Holmes Equity, n 87. Holmes defined consideration as 'the promisee has either conferred a benefit on the promisor, or incurred a detriment, as the inducement to the promise.' See also Holmes Common Law, n 87, p 253.

⁶¹² Holmes Equity, n 87, vol 2, p 717. Scrutton, n 88, p 101 'Mr Holmes had traced the origin of '*consideration*', as essential to an agreement not evidenced by deed, to the fact that such an agreement, to be enforceable at all, must be proved by witnesses, whom he traces to the '*transaction witnesses*' before the Conquest, the *secta* after it. These witnesses would swear to what they had seen and heard, which, in an action of debt, would be the actual transfer of property, or money; and they were in Saxon times only required to be present when there was such a transfer. He therefore suggested that originally a debt not arising from a deed or covenant could only be proved where witnesses had seen a *quid pro quo*, or consideration actually pass; and that this rule of procedure developed into a rule of substantive law that no contract was actionable where consideration had not passed, unless it was in writing; and in that case it was suggested that every deed importeth a consideration. This seems the more probable origin of the English doctrine of consideration and *nuda pacta*; and if true it shows the Roman law to have done little more than supply the terms '*nudum pactum*' and '*causa*' which acquired a distinctively English meaning.' See also Ames History, n 90, vol 3, p 259.

⁶¹³ Ames History, n 90, vol 3, pp 259, 278. See also Ames Lectures, n 90, p 129.

⁶¹⁴ Salmond History, n 89, vol 3, pp 336-7 'based on a mistaken view of the original contents of the idea of consideration.' See also Salmond Essays, n 89, p 222.

⁶¹⁵ Barbour, n 93, p 60-1.

⁶¹⁶ Kiralfy, n 1, pp 188-9 'This explains many common cases including *indebitatus assumpsit* but hardly explains *special assumpsit* with its tortious antecedents. *Quid pro quo* was a benefit received by the [D], while consideration in *special assumpsit* was essentially a detriment suffered by the [P]. On the other hand almost all the old cases of *special assumpsit* plead some form of payment for the [D's] services, and lawyers do not plead immaterial points. Possibly something analogous to *quid pro quo* was vaguely assumed, but without its precise limitations.'

⁶¹⁷ Fifoot, n 3, p 395-6 'The decisive objection to the thesis is that the most prominent feature in the modern doctrine of consideration - the binding character of mutual promises - was foreign to the very nature of debt. Debt was '*real*', assumpsit '*consensual*', and the latter epithet represents, not a modification of the former, but its antithesis. The inconsistency which Holmes confessed and sought to avoid was in truth fatal to his views; and, once admitted, the rest of his reasoning was a *non sequitur*.'

⁶¹⁸ Holdsworth, n 95, vol 8, p 1 'It was essentially proprietary in its nature.' Salmond Essays, n 89, p 175 (debt treated as a chattel). A debt later became accepted as contractual in nature. Ibid, p 178.

- **Salmond (1887), Barbour (1914), Simpson (1975)**. Salmond proposed that the doctrine was not a logical development from the action of *assumpsit* (i.e. the action of trespass on the case upon *assumpsit*). Instead, it received its first applications from the court of Chancery, where it formed part of the doctrine of uses.⁶¹⁹ While rejecting the idea that equity, itself, derived this directly from Roman law,⁶²⁰ Salmond thought that the Lord Chancellors (until the reign of Henry VIII, almost invariably, clerics) took it from canon law⁶²¹ and, prior to that, Roman law (*causa*).⁶²² Barbour proposed a similar view.⁶²³ Ames as well as Fifoot doubted the propositions of Salmond and Barbour.⁶²⁴ For his part, Simpson argued that consideration meant '*motive*' - akin to *causa* at canon law;⁶²⁵
- **Ames (1888)**. He proposed that the doctrine evolved from the detriment to the promisee⁶²⁶ on which the action of *assumpsit* was originally founded. However, this was doubted by Kiralfy and Fifoot.⁶²⁷ That said, Ames also asserted that '*it seems impossible to refer consideration to a single source*.'⁶²⁸ However, he did not doubt that consideration was home grown;⁶²⁹
- **Jenks (1891)**. He proposed that the doctrine was linked to the increasing preparedness of the courts to enforce oral (parol) contracts.⁶³⁰ More specifically, he asserted that the requirement of *quid pro quo* - which had become connected with proof by suit in the action of debt⁶³¹ - was carried over into proof by suit in the action of *assumpsit*. Thus, what had once been a mere rule of procedure became embodied as a principle in the incipient law of simple

⁶¹⁹ Salmond History, n 89, vol 3, p 329 'little doubt that the idea of consideration received its first applications from the court of Chancery, where it formed an essential part of the equitable doctrine of uses.' See also Salmond, *History of Contract* (1887) 3 LQR 166, 178 'a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law.' See also Kiralfy, n 1, p189 ('The third theory, advanced by...Salmond, was that the doctrine was not a logical development from within the action of *assumpsit*, but a ready-made principle imported from outside:'). See also Ames History, n 90, vol 3, p 259 and Fifoot, n 3, pp 397-8. The problem with this theory is that the law of use was a common law, not canon law, development, see Baker Doctrine, n 2, p 1193 ('the law of uses was the creation of the common-law courts, not (as so many have assumed) of canonist chancellors.').

⁶²⁰ Ibid, p 334.

⁶²¹ Ibid, p 336 'May we not conclude then that when the Chancellors, who till the reign of Henry VIII [1509-47] were almost invariably ecclesiastics, sought a basis on which to found their equitable jurisdiction in contract, they adopted a principle lying ready to their hands in a system of law with which they were familiar?.'

⁶²² Ibid, p 334. See also Barbour, n 93, pp 63-4.

⁶²³ See Barbour, n 93.

⁶²⁴ Ames History, n 90, vol 3, p 279. See also Fifoot, n 3, p 398 (he thought Salmond and Barbour were 'victims of their own enthusiasm').

⁶²⁵ Simpson, n 4, ch 7, especially p 485 'Basically a consideration meant...what Periam J called 'a moving cause or consideration precedent, for which cause or consideration the promise was made' (quoting *Sidenham and Worlington's Case* (1584) 2 Leon 324 (78 ER 497) (see also 23(c)). Simpson Equitable, n 100, p 36 'The basis of the doctrine...is the idea that the factor which motivated the promise should be treated as determining the legal effect of the promise.' He thought that the doctrine derived from the use as interpreted in Chancery. Cf. Baker Covenants, n 118, p 1103 'Consideration, according to Simpson, means '*motive*' and is therefore akin to the *causa* of the common law; it is the motive for the promise, rather than the presence of synallagmatic [exchange] elements, or damage, or recompense. He pursues the *summae* of the canonists at length...but the evidence does not enable him, any more than it enabled Barbour, to establish that the canon law played any direct part in English decision-making.'

⁶²⁶ He took the idea of detriment only to the promisee and no need to show benefit to the promisor from Langdell, another US academic. Ames Lectures, n 90, p 323 'Langdell has pointed out the irrelevancy of the notion of benefit to the promisor and makes detriment to the promisee the universal test of consideration. The simplified definition has met with much favor. It is concise, and it preserves the historic connection between the modern simple contract and the ancient *assumpsit* in its primitive form of an action for damage to a promisee by a deceitful promisor.'

⁶²⁷ Ames History, n 90, vol 3, chs 59 & 60. Cf. Kiralfy, n 1, p 189 'Ames' view is supported by some sixteenth-century cases, but one must be careful to point out that consideration as a detriment *induced* by a promise is not the same thing as damage suffered through a breach of promise, though they may often coincide in fact. It is also difficult to reconcile this theory with the intermediate stages in the development of consideration in the seventeenth and eighteenth centuries, when it included moral obligation, and precedent debt in *indebitatus assumpsit*, neither of which was properly a detriment.' See also Fifoot, n 3, p 396 and Barbour, n 93, pp 61-3. Cf. Salmond Essays, n 89, pp 223-4 and Barton, n 113, p 373 (who said Ames asserted the doctrine evolved from the action on the case of deceit).

⁶²⁸ Ibid, p 259. See also Ames Lectures, n 90, p 129. See also Barton, n 113, p 390 'hardly possible...to assign the doctrine...to any single 'origin'.

⁶²⁹ Ames Lectures, n 90, p 147 'Consideration in its essence...is a common-law growth.'

⁶³⁰ Jenks, n 91, p 220 'the enforceable parol [oral] contract, without which no modern society could exist for a day, made its appearance in English law. For if a man could get compensation for damage which accrued to him by breach of a parol undertaking, he could, practically, enforce a parol contract. And thus it was that the parol contract, when it did appear, appeared as the innominate '*assumption*', or undertaking, not as the sale, the hiring, or other specific arrangement. And so English law acquired a scientific theory of simple contract.'

⁶³¹ Ibid, p 189. As to *quid pro quo*, 'The suggestion is, that the doctrine of *quid pro quo* was in some way connected in its origin with the subject of evidence.' Also, p 191. Kiralfy, n 1, p 180 'The factual requirement of a *quid pro quo* existed long before the enunciation of the theory by the courts; the generalisation first appears in a report of 1338'. He cited *Anon* (1338) YB 11 & 12 Edw III (RS) 586 (writ of debt for unpaid attorney fee, not in a deed). Scharshulle (Shareshull JCP) 'here you have his service for his allowance...and you have *quid pro quo*'. (the attorney had delivered a service pursuant to the agreement). See also Cheshire & Fifoot, n 79, p 4 and Stoljar Contract, n 101, p 11.

contract. Being an elastic and sensible principle, it commended itself to the appreciation of a society which was becoming more imbued with commercial ideas. It took root in English law about the end of the 15th century. The practical amalgamation of the actions of *debt* and *assumpsit* which took place in the middle of the 16th century, did much to bring the theory of consideration to its present condition - especially by establishing the rule that detriment to P was equally sufficient with benefit to D. From that time the doctrine became an essential part of the law of contract.⁶³²

- **Holdsworth (1888)**. He, basically, followed Ames, but stressed the nature of detriment more.⁶³³ He also accepted that the doctrine had evolved over the centuries and that the 19th century version of the doctrine had changed from that in the 16th century.⁶³⁴
- **Law Revision Committee (1937)**. The Committee asserted that the 16th century doctrine, effectively, derived from the action of *assumpsit*. Thus, the Committee noted that:

(a) before the end of the reign of Edward I (1272-1307), the king's court was enforcing - by *action of covenant* - written agreements which were sealed and delivered. Other promises not so formally made were enforced by actions of *debt*, *detinue* and *account*. However, the medieval mind resisted the enforcement of promises made informally;

(b) progress was made from the 15th century by extending the action of trespass on the case to cover non-feasance (the failure or refusal of the D to carry out a duty he had assumed (*quare assumpsisset*)).⁶³⁵ This led to the development of the action of *assumpsit* - a variety of trespass on the case - to cover breaches of contract in general;⁶³⁶

(c) towards the end of the 16th century, the facts which had to be established before a remedy could be sought by means of the action of *assumpsit* came to be known as the '*consideration*';⁶³⁷

⁶³² Jenks, n 91, p 222-3. He noted that debt and assumpsit had been practically rendered equivalents in 1557, citing *Norwood v Read* (1557), 1 Plow 180 (75 ER 277). FW Maitland, *The Forms of Action at Common Law* (1936), p 70 'in 1602, *Slade's Case* (4 Rep 92b) decides that *assumpsit* may be brought where debt would lie, and thenceforth *assumpsit* [i.e. *indebitatus assumpsit*] supplants debt as a means for recovering liquidated sums.' See also Ibbetson *Slade*, n 121.

⁶³³ Holdsworth, n 95, vol 8, pp 2-11. At p 7 'Consideration...acquired its technical meaning in the common law mainly in relation to the action of *assumpsit*. It became the compendious word used to express the conditions under which that action would lie, and therefore the condition precedent for the validity of all those contracts which could only be enforced by that action. Hence...the leading characteristics of consideration...originate in the rules for the competence of this action.' See the criticism of Fifoot, n 3, pp 396-7.

⁶³⁴ Ibid. 'But we have seen that the lawyers, in extending the action of assumpsit to cover the field of simple contracts, used analogies taken from the action of debt; and that they were fully aware of the analogy existing between the *quid pro quo* which the [P] must prove in order to succeed in an action of debt, and the consideration which he must prove in order to succeed in an action of assumpsit. It is not surprising therefore that ideas derived from the *quid pro quo* should have some permanent influence on the law of contract, and that its influence should still be apparent, not only in the sixteenth but also in the definition of consideration accepted in our modern law. Similarly...the term consideration had developed a different technical meaning in equity. As the relations between the court of Chancery and the common law courts were close, it is not surprising that the meaning attached to the term in equity should have influenced indirectly the meaning attached to it by the courts of common law. The result is that, though the main principles of the doctrine of consideration have been developed as logical deductions from the conditions for success in the action in *assumpsit*, other influences have made themselves felt; and in the eighteenth and nineteenth centuries, some of them seemed likely to give the doctrine a shape very different from the shape it was taking in the sixteenth and seventeenth centuries, when it was being developed mainly from the procedural basis in assumpsit. During the nineteenth century a return was made to this procedural basis. But the result has been that the final shape of the doctrine has not been settled until quite modern times.'

⁶³⁵ The concept was that of a duty (undertaking) that a person had assumed (taken upon himself, *assumpsit super se*).

⁶³⁶ Law Revision Committee, 6th Interim Report (1937, Cmnd 5449)('LC-6'), p 13 'it was possible gradually to extend the action of trespass on the case, which offered a remedy for actionable wrongs of this character so as to cover broken promises, a development which is sometimes described in the following manner. First, a remedy was given for cases of malfeasance, i.e., the causing of damage by a deliberate and wrongful act. The next stage was the extension of the writ of trespass on the case to cases of misfeasance, a term which comprised the wrong of negligently or imperfectly doing what the defendant had promised to do. But it was not until the fifteenth century, and not without help from another form of action (the writ of deceit) that the action of trespass on the case came to cover non-feasance, i.e. the failure or refusal of the defendant to carry out a duty which he had assumed (*quare assumpsisset*). It was thus that the so-called action of *assumpsit* came into being, as a variety of action for trespass on the case, which could be adapted to provide a remedy for breaches of contract in general.'

⁶³⁷ Ibid 'The gist of the action was that the defendant had '*assumed*' or undertaken a duty and it was therefore natural to ask why he had '*assumed* it'. The answer was that the [P] must be able to point to an '*occasion*' or a '*cause*' or a '*consideration*' for the [D's] undertaking, these terms being used at first inter-changeably and in a non-technical sense to denote the act or other circumstances leading up to, or constituting the motive for, a given transaction which it was sought to enforce by one of the existing forms of action...Towards the end of the sixteenth century the facts which had to be established before a remedy could be sought by means of the action of *assumpsit* came to be known as the '*consideration*'. They usually consisted of some detriment incurred by the person to whom the promise was given or of the simultaneous exchange of promises.'

(d) thus, the doctrine came into being more or less fortuitously as a means of determining when persons injured by a breach of a promise were to be permitted to bring an action.⁶³⁸ Soon, this means became a (rather rigid) rule of contract law;

- **Kiralfy (1958).** He proposed that the doctrine was, principally, the outcome of rules governing the action of *assumpsit*, modified and varied by the particular principles of: (i) *quid pro quo* in the action of debt; and (ii) *causa* as applied to contract by the Court of Chancery;⁶³⁹
- **Stoljar (1975).** He considered the 'essential 'story' of consideration was to adapt to service promises 'the synallagmatic [exchange] elements of mutual benefit or bargain, elements always and inevitably contained in a contract of sale';⁶⁴⁰
- **Milsom (1981).** While warning against trying to find any single source for the doctrine⁶⁴¹ he proposed that 'consideration...had its beginning in *assumpsit* conceived as a reliance remedy'.⁶⁴²

In essence, these theories ascribed the origin of the doctrine to the following:

- **Roman Law.** Blackstone proposed a Roman origin, looking to consensual contracts, and Barbour looked to the Roman concept of *causa*. However, this is not tenable. As previously noted (see 7(b)), although the maxim 'ex nudo pacto non oritur actio' and 'causa' - clearly - are terms which derive from Roman law, what they meant under Roman and English law, was quite different - a point trenchantly made by Scrutton.⁶⁴³ Further, it is unarguable that Roman law did not have a *pre-requisite* of consideration in respect of the enforceability (actionability) of a contract;
- **Court of Chancery.** Pollock (at first) and Salmond thought that it derived from the law on uses and the Court of Chancery, with Pollock also tracing it back to Roman law, although he later doubted this. This is untenable since the law on uses had a common law - and not a Chancery - origin;
- **Canon Law.** Salmond and Barbour thought that the Court of Chancery (the Lord Chancellors) took the doctrine from canon law and Barbour thought that canon lawyers had previously taken it from Roman law. Simpson also looked to canon law, and the cause (reason) for upholding a promise (via the law on uses in the Court of Chancery). However, it seems clear that canon law was using words such as 'cause', 'consideration', 'profit', and 'loss' in different senses to the common law since it looked to the moral basis (including the motive) of a person performing certain acts in order to determine whether his conduct was sinful. Contrariwise, secular law looked to whether an agreement satisfied certain legal pre-requisites and, thereby, became actionable (enforceable);
- **Action of Debt.** Holmes thought the doctrine derived from the requirement of *quid pro quo* in the action of debt. So did Jenks and that this requirement was carried over to the action of *assumpsit* (the practical amalgamation of the actions of *debt* and *assumpsit* in 16th century doing much to bring the doctrine to its present condition). However, the doctrine was not limited to debt. It was applied to contracts generally. Also, the terms *quid pro quo* and 'consideration' are not the same;

⁶³⁸ Ibid 'It thus came about that a doctrine, which was originally no more than a test by which it could be ascertained whether the breach of a promise was actionable or not in *assumpsit*, developed into a definite rule of law which requires that something of material value shall be given, or some other detriment shall be sustained, by the recipient of a promise in order to make that promise enforceable. In other words a device designed to provide a test for the enforceability of simple promises by one particular form of action, *assumpsit*, has become a fundamental rule of the law of contract.'

⁶³⁹ Kiralfy, n 1, p 190. He also stated 'the term [consideration] only gradually acquired a technical significance capable of evolving a general theory.'

⁶⁴⁰ Stoljar Contract, n 101, p 38. See also Baker Covenants, n 118, p 1099. However, this is saying little more than that sale (and service) contracts required 'consensus' and 'delivery', the pre-requisites of Bracton. See also Stoljar, Ibid, p 198 'Consideration primarily ensured that the parties' undertakings or promises entailed mutual benefits and burdens...Indeed this synallagmatic [exchange] theme was carried through with remarkable consistency. It lay behind the distinction between past and present consideration, between the requirement that a forbearance had to be for the promisor's benefit, as well as behind the notion that a contractual debt of liability could not be discharged by a bare agreement but required a 'novel' bargain, in the form of an accord or satisfaction or compromise, a notion which so actively survived in the doctrine of *Pinnel's Case*.'

⁶⁴¹ SFC Milsom, *Historical Foundations of the Common Law* (2nd ed, 1981), p 357 'as with the 'origins' of trespass and case, it would not be right to look to single pre-existing entities like *quid pro quo* or the civilian and canonist idea of *causa*. But they are not necessarily irrelevant...'

⁶⁴² Ibid. He continued 'The most typical sixteenth century *assumpsit* report will say that in consideration of something or other the defendant made the faithful promise for the breach of which the [P] is suing; the [D] will plead *non assumpsit*; the jury will find for the [P]; and the [D] will move in arrest of judgment on the ground that the promise was not made for a sufficient consideration.'

⁶⁴³ See text to n 297. See also Baker Doctrine, n 2, p 1193.

- **Action of Assumpsit or a Mixture.** Ames (with Holdsworth, basically, following him) thought that it derived from the detriment to the P on which the action of *assumpsit* was originally founded⁶⁴⁴ but that it was impossible to refer to a single source. The Law Commission and Milsom also went for *assumpsit* - although the latter also warned against a single source. Kiralfy thought that it was (principally) the outcome of the rules governing the action of *assumpsit*, modified and varied by the particular principles of *quid pro quo* in the action of debt as well as *causa* as applied to contract by the Court of Chancery.⁶⁴⁵

Of the above, the only one that holds a degree of water is that the doctrine derived in some manner from the action of *assumpsit*. However, as will be seen, it is also asserted that the doctrine was, at first, a pleading point - providing *evidence* that a '*consensus*' had been reached (including *consensus* as to the price, in the case of sales or *consensus* as to what payment was to be made, in the case of contracts of service). In this, it was not different to an *arra* - which comprised evidence that the parties intended to be bound, with its delivery meeting the pre-requisite of the same. Further, it is clear that the above writers were, often, labouring under cross-purposes, as well as missing out areas of otherwise relevant law. In particular:

- **Different Definitions.** In respect of how the above writers defined the doctrine, their definitions were not the same. And, at times, their definitions lacked even an internal coherency. Thus, Blackstone used the word '*consideration*' to refer to different things, viz. to: (a) reason; (b) exchange; (c) price; (d) motive; and (e) compensation. Yet, these are not synonyms.⁶⁴⁶ Holmes defined consideration as: (a) the promisee conferring a benefit on the promisor; or (b) the promisee incurring a detriment as the result of the promisor's inducement;⁶⁴⁷ while, for example, Jenks defined it as:⁶⁴⁸ (a) benefit given (or promised) to the promisor; or (b) a loss (or liability) incurred by the promisee in return for the promisor's promise.⁶⁴⁹ Yet these are not the same thing. For his part, Kiralfy did not define consideration as such⁶⁵⁰ while Simpson treated '*consideration*' to mean a moving (or material) cause in the sense of motive⁶⁵¹ without much further elucidation, albeit, he also accepted there was no coherent description of the doctrine;⁶⁵²
- **Only the King's Court.** All the above writers concentrated on what transactions were actionable (enforceable) in the king's court - not the lesser courts. However, it is manifest that the *evidence* of '*consensus*' to enforce in the latter was less - not least, since trade could not have been carried on otherwise. Also, the form of pleading in the latter was much simpler;
- **Cherry Picking.** Much early (and some later) analysis on the origin of the doctrine consisted in cherry picking various Yearbook and other cases, while ignoring others that were (or might) be inconvenient. Also, in analysing in depth certain forms of action while ignoring the pre-requisites for making a contract. In true academic fashion, this has tended to over complicate (and over intellectualise) the origin of the doctrine - as well as fail to explain *why* it might have been needed when English law had got on with perfectly well without it since Roman times;
- **Actual Trade Practice - Arra.** No writers considered in detail the history of the *arra* and the major role it played in contracts from time immemorial to confirm that *consensus* had been reached. Nor that, when the *arra* became a legal fiction, '*consideration*' came on the scene.

(b) Conclusion

For the purposes of this article, it is irrelevant which theory as to the origin of the doctrine is correct. However, Victorian theories which looked to Roman (or canon) law or to the Court of Chancery or to the action of debt

⁶⁴⁴ Ames History, n 90, ch 60. Cf. Kiralfy, n 1, p 189 'Ames' view is supported by some sixteenth-century cases, but one must be careful to point out that consideration as a detriment induced by a promise is not the same thing as damage suffered through a breach of promise, though they may often coincide in fact. It is also difficult to reconcile this theory with the intermediate stages in the development of consideration in the seventeenth and eighteenth centuries, when it included moral obligation, and precedent debt in *indebitatus assumpsit*, neither of which was properly a detriment.' See also Fifoot, n 3, p 396 and Barbour, n 93, pp 61-3.

⁶⁴⁵ Kiralfy, n 1, p 190.

⁶⁴⁶ See 31(c).

⁶⁴⁷ See n 612.

⁶⁴⁸ E Jenks, *The Book of English Law* (6th ed, 1967), p 317 'the classical form of the doctrine, that a valuable consideration is a benefit given or promised to the undertaker, or, some loss or liability incurred by the promisee, in return for the promise given by the undertaker.' Cf. Salmond Essays, n 89, p 196 'The rule as to consideration, accordingly, may be thus stated: A promise is not binding unless the promisee has suffered a detriment by acting in reliance thereon in the manner intended by the promisor.' Ibid, p 199 'The detriment so incurred by the promisee in reliance on the promise and with the consent of the promisor, is what is known as the consideration for the promise.'

⁶⁴⁹ Cf. Ibid, p 318 'A contract, then, is an agreement or undertaking, entered into by at least two parties, and enforceable by an action for damages, wherein one or more of the parties promises, expressly or by implication, to do or refrain from doing certain acts at the request, or for the benefit, of another party; the promise being either given for valuable consideration or embodied in a particular form.'

⁶⁵⁰ See Kiralfy, n 1, pp 188-93. Also, **Appendix A.**

⁶⁵¹ See n 625.

⁶⁵² See n 3.

seem to be dis-credited. Today, the general theory tends to be that the doctrine was '*home grown*' - deriving from *assumpsit*. And, that it developed - and evolved - organically. Thus, to point to one particular case as the origin of the doctrine is, probably, a lost cause. As it is, it is asserted that the doctrine was a pleading point - a matter of evidence. One which, unfortunately, became a pre-requisite. Albeit, this was unnecessary. It is also important to note that *some* of the vocabulary employed in the doctrine of consideration may have originated from theological writing - which vocabulary entered *canon* law. Such vocabulary, then, became used in the secular courts. However, with a different *meaning* and sense. This is now considered.

In conclusion, while the doctrine may have developed from the action of assumpsit in the king's court, this is not the whole story.

17. CONTRACT - THEOLOGICAL VOCABULARY

The Catholic church had always been interested in what, today, may be termed '*business ethics*'. That is, the morality of commercial transactions. This resulted not only in a detailed analysis of the law of usury (the taking of interest on loans), many theologians also analysed the morality of making a financial profit. Further, they reflected on what contracts were inherently wrongful (unjust) - such as gaming contracts or those in respect of prostitution. Some of the vocabulary used by theologians seeped into secular legal writing and influenced it. As a result, consideration is given to the observations of clerics such as Thomas Aquinas (1225-74), Duns Scotus (c.1266-1308) and Nider (1478). However, these people, themselves, when considering the morality of commercial contracts often borrowed from more ancient writings - especially Aristotle - to develop their theories. Thus, he is also considered.

(a) Aristotle (384-322 BC)

Aristotle, in his *Ethics*, looked at the morality of human conduct. When considering the meaning of justice, he observed the following:

- **Unjust Commercial Acts.** An unjust man was not only one who broke the law, but one who took advantage of another (i.e. that is, acted unfairly) - including in respect of goods.⁶⁵³ Thus, when a man took more than his share, what activated him was injustice⁶⁵⁴ and this included acts in respect of money such as selling *etc.*⁶⁵⁵ The result was a lack of balance (dis-proportion),⁶⁵⁶
- **Rectificatory Justice.** Aristotle developed the idea of rectificatory justice as the means of remedying a disproportion between parties.⁶⁵⁷ In unjust transactions, a judge tried to equalize (remove) the injustice by means of a penalty, to achieve a mean (a balance) between the gain (profit) or loss which derived from '*the process of voluntary exchange*'.⁶⁵⁸ Thus, the judge acted as a mediator, to restore equality. To determine the nature and extent of injustice, money was the measure of value⁶⁵⁹ - the means by which all commodities could be compared, to

⁶⁵³ Aristotle, *Ethics* (trans JAK Thomson, Penguin Classics, 1984 rep), p 172 'Let us begin, then, by taking the various senses in which a man is said to be unjust. Well, the word is considered to describe both one who breaks the law and one who takes advantage of another, i.e. acts unfairly. Then evidently also both the law-abiding man and the fair man will be just. So just means lawful and fair; and unjust means both unlawful and unfair, and since the unjust man takes more than his share, he will be concerned with goods - not all goods, but with those that make up the field of good and bad fortune: things that are always good in themselves, but not always good for the individual.'

⁶⁵⁴ Ibid, p 175 'when a man takes more than his share...what actuates him is certainly some kind of wickedness (because we blame it): viz. injustice.'

⁶⁵⁵ Ibid, p 177 'One kind of particular justice...is that which is shown in the distribution of honour or money or such other assets as are divisible among the members of the community (for in these cases it is possible for one person to have either an equal or an unequal share with another); and another kind which rectifies the conditions of a transaction. This latter kind has two parts, because some transactions are voluntary and other involuntary. Voluntary transactions are e.g. selling, buying, lending at interest, pledging, lending without interest, depositing, and letting'

⁶⁵⁶ Ibid, p 179 'What is just...is what is proportional, and what is unjust is what violates the proportion. So one share becomes too large and the other too small. This is exactly what happens in practice: the man who acts unjustly gets too much and the victim of injustice too little of what is good.'

⁶⁵⁷ Ibid, 'rectificatory [justice] occurs in transactions, both voluntary and involuntary...But what is just in transactions is a kind of equal (and what is unjust a kind of unequal) - in accordance, however....with arithmetical proportion.'

⁶⁵⁸ Ibid, pp 180-1. 'These expressions '*gain*' and '*loss*' are derived from the process of voluntary exchange. In that process to have more than one's own share is called gaining, and to have less than one had at the start, losing; for example in buying and selling and all other transactions in which the law gives immunity [i.e. provides no redress]; but when neither party has too much or too little but both have exactly what they gave, they are said to '*have their own*', and there is no question of gaining or losing.'

⁶⁵⁹ Ibid, p 184 'all products that are exchanged must be in some way comparable. It is this that has led to the introduction of money, which serves as a sort of mean [i.e. medium of exchange], since it is a measure of everything, and so a measure of the excess and deficiency of

determine if a transaction was unjust or not.⁶⁶⁰ For there to be a determination of justice, therefore, every exchange had to have a fixed monetary value.⁶⁶¹

- ***How a Man should Act.*** Justice was a state in virtue of which a just man acted so as not to give more to himself and less to his neighbour but to assign to each what was proportionately equal.⁶⁶²

From Aristotle's observations (likely) came ideas such as: (a) contracts (including selling) comprising a voluntary exchange (and, hence, 'voluntary', referring to consensus); (b) contracts should not be unfair (i.e. unjust) and dis-proportionate contracts were so; (c) according all commercial transactions (exchanges) a fixed money value enabled a determination of whether a contract was dis-proportionate (unjust) or not.

(b) Aquinas (1225-74)

Aquinas, in his *Summa Theologiae* (written from 1265)⁶⁶³ - when considering the nature of justice - borrowed much from Aristotle while adding a Christian element and making it more specific. Thus, to follow Aristotle (above), he stated in a chapter on 'Unfair Trading':

- ***Unjust Acts in Commerce.*** Aquinas indicated that to sell something for more than its just price was a sin - one of fraud.⁶⁶⁴ Thus, contracts should be based on an equality of material exchange.⁶⁶⁵ Following Aristotle, he held that the balance of justice was upset if the price exceeded the value of the goods or they, the price. To sell for more or to buy for less than a thing was worth was - therefore - unjust (illicit - that is, a sin).⁶⁶⁶
- ***Rectificatory Justice.*** To Aquinas, divine law was not the same as human law.⁶⁶⁷ Thus, a failure to keep a due balance in contracts of sale was always contrary to divine law - and restitution should be made to the loser.⁶⁶⁸ However, Aquinas accepted that it was not always possible to fix the 'just price precisely'.⁶⁶⁹ He concluded - like Aristotle - that the paramount consideration in commutative (i.e. rectificatory) justice was to secure the equality of things.⁶⁷⁰

value...Apart from this formula there can be no exchange and no association and the formula cannot be applied unless the products are somehow equated.'

⁶⁶⁰ Ibid, 'There must...be...one standard by which all commodities are measured. This standard is in fact demand, which holds everything together (for if people had no needs, or needs on a different scale, there could be no exchange, or else it must be on different lines); but by a convention demand has come to be represented by money. This is why money is so called, because it exists not by nature but by custom, and it is in our power to change its value or render it useless.'

⁶⁶¹ Ibid, p 185 'What money does for us is to act as a guarantor of exchange in the future: that if it is not needed now, it will take place if the need arises; because the bearer of the money must be able to obtain what he wants. Of course money is affected in the same way as other commodities, because its purchasing power varies; nevertheless it tends to be more constant. That is why everything must have its money value fixed, because then there will always be exchange, and if exchange, association. So money acts as a measure which, by making things commensurable, enables us to equate them. Without exchange there would be no association, without equality there would be no exchange, without commensurability there would be no equality. ...So there must be some one standard, and that on an agreed basis (which is why money is so called) because this makes all products commensurable, since they can all be measured in terms of money.'

⁶⁶² Ibid, pp 186-7 'Justice is that state in virtue of which a just man is said to be capable of doing just acts from choice, and of assigning property - both to himself in relation to another, and to another in relation to a third party - not in such a way as to give more of the desirable thing to himself and less to his neighbour (and conversely with what is harmful), but assigning to each that which is proportionately equal; and similarly in distributing between two other parties. Injustice, on the contrary, is a state that chooses what is unjust, i.e. excess and deficiency, in defiance of proportion...'

⁶⁶³ M Lefebvre, *St Thomas Aquinas Summa Theologiae* ('Aquinas'), vol 38 (*Injustice*).

⁶⁶⁴ Aquinas, n 663, p 215 'To practise fraud so as to sell something for more than its just price is an outright sin in so far as one is deceiving one's neighbour to his detriment.' He quoted Cicero, n 172, book 3, 15 'Contracts are to be free of lies: the seller is not to plant a sham-bidder or the buyer somebody who undercuts the sale price.' Aquinas also indicated that fraud was committed when goods were sold with a defect or were underweight or of poor quality. Ibid, p 219.

⁶⁶⁵ Ibid, 'the value of consumer products is measured by the price given, which as Aristotle pointed out, is what coinage was invented for.'

⁶⁶⁶ Ibid, 'the balance of justice is upset if either the price exceeds the value of the goods in question or the thing exceeds the price. To sell for more or to buy for less than a thing is worth, is, therefore, unjust and illicit in itself.' This reflected a more general proposition of proportionality of his that laws were unjust 'when burdens are imposed unequally on the community'. See also St Thomas Aquinas, *Treatise on Law* (Gateway editions, 1988).

⁶⁶⁷ Ibid, p 217 'Human law ...holds it permissible for a seller to over-charge and for a buyer to under-pay, unless there is either fraud or a gross disparity...'

⁶⁶⁸ Ibid. 'Divine law...leaves nothing contrary to virtue unpunished, so that any failure to keep a due balance in contracts of sale is counted to be contrary to divine law. He who profits is, therefore, bound to make restitution to the party who loses out, provided the loss is an important one.'

⁶⁶⁹ Ibid. 'we cannot always fix the just price precisely; we sometimes have to make the best estimate we can, with the result that giving or taking a little here or there does not upset the balance of justice.'

⁶⁷⁰ Ibid. 'The paramount consideration in commutative justice is the equality of things...'

- **Exchange**. Aquinas indicated that business (merchandising) involved exchange⁶⁷¹ - especially with regard to the desire to make a profit. However, commerce had something shameful about it to the extent it was not intrinsically calculated to fulfill right - or necessary - requirements.⁶⁷² That said, Aquinas accepted that profit could be justified if deriving from an activity that was necessary or even right.⁶⁷³

Aquinas added a definite Christian element to his analysis of business although he accepted (more than Aristotle) that, sometimes, making a profit was not such a bad thing (possibly, because the church was, often, doing precisely that).

From Aquinas' observations (following Aristotle in many instances) came ideas such as: (a) contracts (including selling) involved an exchange - goods for money; (b) contracts were unjust if they were not based on 'an equality of material exchange'; (c) money enabled a fixed value to be ascribed to property, permitting a determination whether a contract was just or not; (d) justice was a state in virtue of which a just man acted so as not to give more to himself and less to his neighbour but to assign to each what was proportionately equal⁶⁷⁴ - although Aquinas accepted there was a divergency between human and divine law.

(c) **Duns Scotus (c. 1266-1308)**

John Duns Scotus (John Duns, the Scot) was (possibly) born at Duns in Berwickshire, Scotland c.1266. He became a Franciscan friar, spending time in Oxford and lecturing at the University of Paris. In his *Ordinatio* (c. 1302)⁶⁷⁵ he considered, *inter alia*, the nature of commercial transactions. He did this in the context of the sacrament of penance - whether restitution was required where a person had effected an unjust (illicit) commercial transaction.

- **Consensus**. In the context of a gift, Duns Scotus noted that there must be a will to give and a will to receive.⁶⁷⁶ So, too, in the case of a loan.⁶⁷⁷ Without free will it would not be just. Further, when a person made a transfer expecting something equivalent in return, this was called a '*contract*' because the wills were contracted (literally, '*drawn together*').⁶⁷⁸ Thus, he perceived contracts to be, *per se*, commercial exchanges (bargains);
- **Just Contract**. Some contracts comprised the exchange of goods (barter). Others were an exchange of goods for money (buying and selling) and others were of money for money (a loan).⁶⁷⁹ The ownership of things was justly exchanged if equality of value was achieved and there was no deceit or fraud (as to description, substance, quantity

⁶⁷¹ Ibid 'What men are in business for is the making of exchanges...'

⁶⁷² Ibid '[exchange just to make a profit] feeds the acquisitive urge which knows no limit but tends to increase to infinity. It follows that commerce as such, considered in itself, has something shameful about it in so far as it is not intrinsically calculated to fulfil right or necessary requirements.'

⁶⁷³ Ibid 'this is the way in which commerce can become justifiable. This is exemplified by the man who uses moderate business profits to provide for this household, or to help the poor; or even by the man who conducts his business for the public good in order to ensure that the country does not run short of essential supplies, and who makes a profit as it were to compensate for his work and not for its own sake.'

⁶⁷⁴ Aquinas quoted St Matthew (ch 7, v 12), p 215 'whatever you wish that men would do to you, do so to them.' That is, the '*neighbour*' principle.

⁶⁷⁵ AB Wolter, *John Duns Scotus' Political and Economic Philosophy* (1989) ('**Duns Scotus**'). As Wolter, p 9, pointed out in his *Introduction*, usury in Roman times was a damage claim (for compensation suffered because a borrower failed to return the loan on time) and not a payment for the use of money. 'It retained this meaning until the 15th century, when the notion was extended gradually to legitimize a surcharge for any loss the lender might have to bear for making the loan due to change in the fair price of market commodities. Eventually it came to have its present meaning of a charge or price for loanable funds. But interest in this modern sense was practically equivalent to what usury meant at the time of Scotus, whereas usury today refers exclusively to an exorbitant charge of interest.'

⁶⁷⁶ Scotus, n 675, p 47 'The owner of something...can give his property to another willing to receive it.' Ibid, p 49 'it is clear what is required for a donation to be just, for a free transfer on the part of the donor and the will to receive on the part of the recipient, together with freedom on the part of both, of this one to give and that one to receive, and no prohibition...by a higher law.'

⁶⁷⁷ Ibid, p 49 'a free loan...has similar laws to ensure that the loan is just. For it requires free will on the part of both the lender and the recipient who wants to receive the things loaned for his use.'

⁶⁷⁸ Ibid, p 51 'where the one making the transfer expects something equivalent to what he transfers...this is properly called a contract, because here the wills are literally contracted (that is '*drawn together*'). For this person agrees or contracts to transfer something to another in return for some advantage that he or she expects to be transferred to themselves.'

⁶⁷⁹ Ibid 'Some contracts in which ownership is transferred concern the direct exchange of things destined for immediate use, such as wine for grain, and this exchange is called barter ('*I give that you may give*' or '*I give, if you give*'). In others coins are exchanged for something useful or *vice versa*. The reason for this is that it was difficult for usable things to be exchanged immediately and therefore a means was devised, called a coin or piece of money, whereby such an exchange could take place. This exchange of coins for some usable things is called *buying* and the converse is called *selling*. A third type of exchange, coins for coins, is called *loaning money* or *borrowing money*.'

or quality).⁶⁸⁰ However, 'equality of value' for the purpose of commutative justice had a considerable latitude which was, sometimes, only ascertainable by reference to positive law or custom.⁶⁸¹

Duns Scotus confirmed that a contract was voluntary - based on free will. It was also founded on consensus - the drawing together of wills. He also accepted (in effect) that commutative justice was, probably, best left to law and custom.

(d) Nider (1468)

Johannes Nider (1380-1438) was a German Dominican friar and professor of theology in the university of Vienna. His work, *On the Contracts of Merchants (De Contractibus Mercatorum)*, was published c.1468 in Cologne and went through eight editions prior to 1500.⁶⁸² It has been described as a moral guide to those buying and selling, reflecting the views of the Catholic church.⁶⁸³ Thus, Nider referred to a gift⁶⁸⁴ and, in the context of 'consent', he stated:

We say 'consent', because every transfer of possession depends primarily and chiefly on interior acts of the will...We say, 'gratuitous consent', to show the difference from a non-gratuitous consent, which intends an equivalent or some other temporal consideration...An additional aspect of voluntary or involuntary transfer occurs in that the recipient of the giving must give his consent to the act also, and he must have the passive capability of receiving.⁶⁸⁵

Nider's statement on gift he also applied to contract viz, it also had the pre-requisites of:

- (a) capacity of the parties; and
- (b) consent (*consensus*) as reflected in their intentions.⁶⁸⁶

Nider also noted that there had to be, (c) a transfer of possession (delivery) - although this did not have to be immediate.⁶⁸⁷ In such matters, gift and sale were the same. However, Nider noted that purchase and sale (also, called exchange) was different to gift - since it was not gratuitous. Thus:

The second kind of transfer of possession is that of exchange, which is not made simply and gratuitously but as a result of an agreement of giving one thing for another. In common parlance this is called purchase and sale. This type of transfer is accomplished in two ways: in one the ownership is not reserved in the property, and such a transaction has no special name but is called '*purchase and sale*'. It is describable as follows: purchase is the act of giving a thing as the price in return for another thing; sale is the giving of a thing for another thing, the latter being the price.⁶⁸⁸ (*underlining supplied*)

⁶⁸⁰ Ibid, p 53 'The ownership of things is justly exchanged if in the things exchanged equality of value according to right reason is observed and there is no fraud involved...'

⁶⁸¹ Ibid, p 55 'equality of value must be observed...there is great latitude in this mean that commutative justice regards or looks to, and within this latitude one does not attain an indivisible point of equivalence between one thing and other, because so far as this is concerned, it is impossible to as it were to bring about an exchange [that is precisely equivalent] and it becomes just in any degree between these extremes. But what this latitude is and to what extent it extends is known sometimes through positive law, and other times through custom. For the law rescinds a contract where the one contracting is deceived about an average price that is far above what is just. But if it is so far below what it should be that an injustice is done, restitution must be made. At times, however, it is left to those making the exchange that, after weighing their mutual needs, they decide as to what equivalent must be given here and there. For among men it is hard for contracts to exist where the contracting parties do not intend to set aside something of that exact or indivisible justice owed to one another, so that to some extent a donation accompanies every contract. And if this is the manner in which these persons engage in the exchange, based, as it were, upon this law of nature: *Do to another as you would wish done to you*, it is sufficiently probable that that when they are mutually satisfied, if there is any deficiency in regard to what justice requires, they mutually intend to waive the difference.'

⁶⁸² CH Reeves (trans), J Nider, *On the Contracts of Merchants* (University of Oklahoma Press, 1966) ('Nider').

⁶⁸³ Ibid, n 608, p viii. Nider indicated, p 3, that he had referred to the teachings of: Aquinas, Duns Scotus and Matthew of Cracow (c. 1335-1410. The latter was a professor at Heidelberg and bishop of Worms from 1404, see generally M Danys, *Master Matthew of Cracow* (Semper, 1995)).

⁶⁸⁴ Ibid, p 4 'free or gratuitous cession, donation or gift, which in practice involves the gratuitous consent of one capable of transferring an article to another, that it be or become, always or without limitation, really the property of this said other person in the same manner in which it was not his [the recipient's] before the consent herein described.' Also 'a gratuitous donation is one which is made freely in this way: where the giver does not intend or hope for obligation or recompense on the part of the recipient of the gift.'

⁶⁸⁵ Ibid, pp 4-5.

⁶⁸⁶ This Nider summarised, p 18, 'in the giver be both the will to give, or consent, [i.e. the intention] and similarly the power [i.e. the capacity], and in the receiver the will to receive and the power so to do.'

⁶⁸⁷ Ibid, p 4 'sometimes the good is not at once the property of another, but ownership is transferred later.'

⁶⁸⁸ Ibid, p 6.

Nider also noted that a contracting party must act in good faith (*bona fide*) since the content (terms) of the agreement must be lawful and:

it is required that whatever enters into a lawful agreement be preserved in good faith.⁶⁸⁹

To Nider 'lawfulness' included a 'just price'. By this, he referred to a price not being excessive⁶⁹⁰ as well not involving deceit or fraud.⁶⁹¹ Nider also referred to a seller 'offering' his goods⁶⁹² and (following Duns Scotus), he noted there were 5 ways in which property might be transferred viz. free donation (*donatio mere libera*), exchange (*permutatio*),⁶⁹³ purchase (*emptio*), sale (*venditio*) or lending (*mutuatio*).⁶⁹⁴ He then stated:

Donation is a purely free act, but in the other manners of transferring property rights...the voluntary quality is qualified. A transfer is truly voluntary [i.e. a gift] when the transferring party does not expect any legal return of the debt. A conditionally voluntary situation exists when for that which is transferred one expects something else to be given back...⁶⁹⁵

Also,

Exchange (*permutatio*) is a contract by which titles of possession (*dominia*) of things are transferred, as of a useful thing directly for another useful thing, of wine for standing grain and the like. And we say exchange of things, meaning, 'I give that you may give'. For such exchange to be just, it requires, first, that the party transferring be the owner of the object and that all the conditions described for just donation be present except the first one, namely, voluntary transfer. For in exchange, purchase, and sale, and corresponding relationships there is not found a purely voluntary or gratuitous transfer. For there [i.e. exchange, purchase, and sale] the transferor expects in return something *equivalent in value* to that which is transferred. For this reason a proper contract may be said to exist because the wills and the price are attracted to the same place at the same time. For the one person is drawn to transfer property to a second person by the advantage which he expects from the latter. He expects, that is, that a return advantage will be transferred to him.⁶⁹⁶ (*italics supplied*)

This '*equivalent in value*' reflected the moral premise that it was unlawful (morally) for a person to make an excessive profit - thereby, imposing (in effect) an excessive loss on another - since the Biblical requirement was to treat one's neighbour as oneself. This concept of '*equality*' of value⁶⁹⁷ reflected the views of Aristotle (without the Christian moral element), Aquinas and Duns Scotus. The result of this logic flow was that all property had to have a '*value*' in money or expressible as a money equivalent, to enable all contracts to be assessed as to whether they were '*just*' ('lawful'). However, Nider (following Duns Scotus) accepted that '*equality of value*' for the purpose of commutative justice was not easily ascertainable.⁶⁹⁸ As for the *quantum* of profit and loss permitted - in the moral context of whether the contract in question was '*just*' - Nider stated:

⁶⁸⁹ Ibid, p 9. Also, 'whatever enters into a contract is or must be lawful.' Also, 'To the extent that anyone does not keep agreements of this sort in good faith, to this extent he receives unjustly.'

⁶⁹⁰ Ibid, p 11 'it is required that a man selling his own property not knowingly sell it in excess of its value or dearer than he ought. The buyer, too, should not give too little for a thing, but pay for an article as much as it is worth...in every contract equity ought to be preserved. By '*equity*' is meant nothing other than a reciprocal appraisalment, voluntary and made in good faith, in which inequity is neither intended nor recognised to be present.' In respect of the calculation of a contract to determine whether it was equitable, Nider noted that 'a merchant ought to receive with caution a profit reasonably proportioned to the nobility, seriousness, and usefulness of the care, exertions, industry, and costs which he undertakes, as well with thought to the size, number, and value of the services which he performs for men.' In ch 2 of his text Nider considered the conditions by which it might be known the value of goods to be sold.

⁶⁹¹ Ibid, p 10 'to accomplish a just sale, or any other transfer or exchange of property of whatever amount, there is required the giving or receiving of a price not knowingly unjust but in good faith, with deceit put aside, in order that one may neither believe nor have cause or reason for believing that he is receiving anything as the consideration for selling beyond a just price or the proper value of the thing.' In respect of what constituted fraud, Nider made it clear that this covered: (a) misdescription; (b) quantity (false measure); and (c) quality. Ibid, p 12 'fraud, committed either in selling the property or in its description.' Also, p 13 'Fraud may be committed in terms of quantity or false measure.' Also, 'Aside from quantitative fraud there may be fraud committed in terms of quality.'

⁶⁹² Ibid, p 22.

⁶⁹³ Ibid, p 57 'Exchange (*permutatio*) is a contract by which titles of possession (*dominia*) of things are transferred...we say '*exchange of things*' meaning 'I give that you may give'. As to coinage, he stated, p 58 'Because it is difficult to exchange objects of use directly, a medium of so doing was found to ease the problem of exchange. This is called coinage. And the exchange of coin for a useful object is called '*purchase*', or from the opposite point of view '*sale*'.

⁶⁹⁴ Ibid, p 55.

⁶⁹⁵ Ibid, p 56.

⁶⁹⁶ Ibid, pp 57.

⁶⁹⁷ Ibid, p 57 'it is required that the owner of the property, operating without fraud, preserve an equality of value according to right reason in the things exchanged.'

⁶⁹⁸ Ibid, p 58 'The equality of justice does not consist in an indivisible essence, but there is present, says [Duns] Scotus, in commutative justice a mean and a great breadth...'

Both under a barter contract and where money enters into the transaction, it is lawful for the seller to weigh his loss but not the gain of the purchaser or person with whom he is exchanging values. This view with respect to selling or exchanging on dearer terms I understand to hold properly as follows: if anyone in great need of his own property is induced to sell or exchange it for something else through the great insistence of another, where he could otherwise preserve himself without loss, and when as a result of this sale or exchange he [the seller] undergoes [or would undergo] great loss, it is proper that he sell for a higher price than if the loss referred to were not a factor.⁶⁹⁹

Even if the buyer achieves a great advantage or gain from the things sold or exchanged, he [the seller] cannot, however, demand a higher rate just because it is evident that the buyer is going to make a large gain. The justification of this point is that the greater advantage which arises under these circumstances to the buyer makes my property, as it was neither more valuable in itself nor better for me. Therefore, I should not expect my property when sold to bring a greater price just because the buyer in turn may profit largely [greatly]. If things are otherwise, I may suffer a loss.⁷⁰⁰

These propositions were somewhat convoluted and not very coherent.⁷⁰¹ Indeed, they reflected a flaw in the theory of trying to determine whether a contract was morally 'just' by viewing every contract:

- as a form of exchange; then,
- seeing if it balanced (was 'proportionate') by according a monetary value to what each party exchanged; then,
- establishing what was a permissible profit and loss.

Such a theory to determine sinfulness in commerce was too general and simplistic to work practically - which is why the Catholic church discarded it in due course, by letting it fall away.⁷⁰²

Nider is useful since his general observations on the nature of a contract align in terms of pre-requisites with Bracton in various matters (viz. capacity, consent, delivery) as well as the need for an agreed price in the case of sale (because it is exchanged in 'return for another thing'). Also, in distinguishing a contract from a gift.

(e) Conclusion

While the vocabulary employed by these canonists had (likely) some effect on the doctrine of consideration as developed by common law lawyers, it was (probably) less than might be supposed. The points of these clerics may be compared to Bracton and his pre-requisites for a contract.

- **Consensus**. Bracton as well as Aquinas *etc* accepted that an agreement required the voluntary (free) will of each party and that they must agree. Thus, there was no difference between them on *consensus*. As Duns Scotus put it, a contract required the wills of the parties to be 'drawn together',⁷⁰³
- **Exchange**. The canonists tended to view all contracts as an exchange (*quid pro quo*, 'this for that'). There is a logic to this since, for centuries, barter, sale and loan (money for money) comprised an exchange of one thing for another. However, for Bracton, exchange was even more central. Delivery of possession (*seisin*) - was a pre-requisite for a contract as it had been for the Anglo-Saxons. Albeit, an *arra* could symbolise the subject matter and delivery of the *arra*, the transfer of the same;
- **Bona Fide**. To the canonists, a person who concluded an unjust contract was not acting *bona fide* and, thus, was sinful.⁷⁰⁴ This included where a person was fraudulent, deceitful or usurious. The common law also accepted this - although making a profit - even if considerable - was not unlawful - albeit, certain trade practices often producing it (forestalling, regrating *etc*), comprised common law crimes. Further, Equity developed the concept of parties to

⁶⁹⁹ Ibid, p 59. The rationale seems to be that it is not unjust to sell at a higher price, to avoid personal loss.

⁷⁰⁰ Ibid. The rationale seems to be that it is unjust to sell at a higher price, to prevent a person making a considerable profit.

⁷⁰¹ The argument as to profit and loss was better put by Aquinas. This issue of making a profit (resulting in a loss to someone else, one's neighbour) being unjust also needed to be viewed against the backdrop of the Catholic church viewing: (a) profits deriving from usury, gaming or prostitution as sinful; (b) profits deriving from trafficking (merchandising) in goods or money (*viz.* commercial exchange, *commutatio negotiativa*) when not linked to reasonable needs - as being 'pecuniary' or 'lucrative' (sheer moneymaking) - and, as such, 'potentially' sinful.

⁷⁰² Nider, n 682, p 37 implicitly accepted this to an extent when he concluded 'the proper value of a thing depends upon the ways buyers or sellers may think about prices. 'Also, p 34 'Sometimes, however, it is left to the contracting parties themselves or the communities involved, after weighing their mutual necessities, to calculate the amount they will give and receive from each other.' For how the analysis developed see the German jurist, Christian Thomasius (1655-1728), *Institutes of Divine Jurisprudence* (1688, ed T Ahnett, Liberty Fund, 2011), ch 10.

⁷⁰³ See n 678.

⁷⁰⁴ The concept of '*bona fide*', itself, was older than canon law. Cicero, n 172, pp 138, 142.

contracts having to act in good faith. Indeed, this is (probably) where canonists, and canon law, had their greatest influence;

- **Equality of Value**. To the canonists - for a contract to be just - there must also be '*equality of value*', which involved seeing things in terms of profit and loss. This was not, generally, a matter for the common lawyer. Nor the need for an '*equality of value*';
- **Money or Money's Worth**. The concept of '*equality of value*' - as developed by Aristotle and taken up by the canonists - was predicated on it being possible to value every kind of property in money or in money's worth (the money equivalent). The latter was also present in the doctrine of consideration (benefit and detriment), but in a different sense to the theological one (thus, it was not for the purpose of determining sin).

In conclusion, theological writing provided a mélange of ideas and vocabulary, some of which were also present in, or found their way into, English law. However, the latter used such ideas and vocabulary in a different fashion.

18. ST GERMAN (1460-1540)

St German (German) was a barrister of the Middle Temple. He wrote a text, *Doctor and Student* (1528),⁷⁰⁵ which considered the relationship between the common law and conscience (equity).⁷⁰⁶ He did this in the form of a hypothetical dialogue between a doctor of divinity and a barrister. Having a good knowledge of canon law and writing when he did, St German's observations on matters of contract are important. Not least, in that he used the words '*cause*' and '*consideration*' frequently in this text. However, it seems clear that St German used these words in a flexible and everyday sense and not in a technical, legal, one. Thus, in the case of the word '*consideration*', St German used it in a variety of ways throughout his work, viz. in the sense of:

- (a) a '*reason*' or '*ground*',⁷⁰⁷
- (b) a '*purpose*' or '*motive*',⁷⁰⁸
- (c) a '*price*', '*payment*', '*recompense*' or '*reward*'.⁷⁰⁹

The context in which St German used the word '*consideration*' also tended to reflect whether he was analysing the canon law or the common law. Thus, he tended to use the word in senses (a) and (b) in the context of the canon law position and (c) in the context of the common law position. Further, it seems clear St German was not using the word '*consideration*' as identical to - or the same as - *quid pro quo*.⁷¹⁰ The latter he treated as similar to a word such as '*exchange*' ('*this for that*'), the same as Nider (see 17(d)).

⁷⁰⁵ C St German, *Doctor and Student* (1528), SS, vol 91.

⁷⁰⁶ Ibid, pp 3-4. 'The present dialogue shows what are the principles or grounds of the laws of England, and how conscience ought in many cases to be formed in accordance with those same principles and grounds. It likewise discusses briefly the question of when English law ought to be rejected or not on account of conscience....So when Augustine says that the sin is not remitted unless the thing taken is restored, English law tells us which taking is just and which unjust; and so the law is the best guide whether restitution is due or not.'

⁷⁰⁷ Ibid, p 59 'most commonly there be assigned [some reasons or] consideration why such maxims be reasonable and ought reasonably to be observed as maxims'. Ibid, p 113 'does not for some reasonable consideration punish him'. Ibid, p 119 'there are many other considerations [*considerationes*], which I must omit for the present, where human laws are not to be followed in all points.' Ibid, p 159 'there be many considerations to prove that the said statute was not made of such a presumption.' Ibid, p 183 'these forfeitures were ordained by the law upon certain considerations'; Ibid, p 207 'to assign a reason or consideration why the maxims..were first ordained.' Ibid, p 223 'is all upon one consideration after the cause and intent of the gift, fine or recovery as aforesaid.' See also Baker Doctrine, n 2, p 1195 (referring to *Lucy v Walwyn* (1561), see also 19). See also Baker & Milsom, n 118, pp 485-7.

⁷⁰⁸ Ibid, p 147 'upon what consideration was the statute made...that the right of lands and tenements might be more certain known...'. Ibid, p 223 'it...should put away the consideration whereupon the law of reason was grounded before the statute made.' Ibid, p 229 'though there be no consideration of worldly profit that the grantor has...'. The stress on motive (*cause*) was also to be found in canon law, see Helmholz, n 498, p 415. See also P Vinogradoff, *Reason and Conscience in Sixteenth-Century Jurisprudence* (1908) 24 LQR 373.

⁷⁰⁹ Ibid, p 125 'when the donor has given the land of his mere motion or voluntarily, without any recompense or consideration' [*consideratione*]. Ibid, p 168 'if the said feoffment and gift had been made in consideration of any recompense of money or for any matrimony'. Ibid, p 220, 'no consideration nor recompense'; p 229 'if his promise be so naked that there is no manner of consideration...'

⁷¹⁰ Ibid, p 135 'If contracts are made according to law and accompanied by *quid pro quo* [exchange, delivery], then by the law of reason they ought to be fulfilled...'. See also the general observation of Swain, n 102, p 15 'By the fifteenth century *quid pro quo* had a [did he not mean, no ?] precise technical meaning but it represented a simple idea that the binding force of a contract was derived from reciprocity or exchange.'

- St German also used the word 'nude' as a synonym for 'bare' or 'naked.'⁷¹¹ Thus, a 'nude paroll' was the same as a 'bare promise'. Further, his references to 'nude paroll' (a naked promise) were not the same as to a 'nude contract' (that is, both parties making oral promises). Thus, he drew a distinction between a (unilateral) promise and a (bilateral) contract as Bracton and Fleta had done.

(a) Contract - Sale - No Price Agreed

The Student - that is the common law lawyer - discussed the nature of a contract. St German stated (I have inserted words and punctuation in square brackets since it is unclear):

it is to be understand [understood] that contracts be ground upon a custom of the realm and by the law that is called (*ius gentium*) and not directly by the law of reason for when all things were in common it needed not [i.e. was not necessary] to have contracts but after property was brought in they were right expedient to all people so that a man might have of his neighbour that [which] he had not of his own and that could not lawfully [acquire] but by his [i.e. but by way of] gift [,] by way of lending[, or] concord [,] or by some lease [,] bargain [,] or sale and such be called contracts and be made by [the] assent of the parties upon agreement between them of goods or lands for money or other recompense but of money usual for money [not] usual⁷¹² is no contract ...⁷¹³

Thus, St German saw *consensus* (the '*assent of the parties*') as the heart of a contract. St German continued (I follow Baker and Milsom's wording since it is easier to read):

It is not much argued in the laws of England what diversity [difference there is] between a contract, a promise, a gift, a loan, a bargain, a covenant, or such other; for the intent of the law is to have the effect [substance] of the matter argued and not the terms. And a nude contract is where a man maketh a bargain or a sale⁷¹⁴ of his goods or lands without any recompense [price/payment] appointed for it, As, if I say to another, '*I sell thee all my land (or all my goods)*', and nothing is assigned that the other shall give or pay for it, that is a nude contract and (as I take it) it is void in the law and conscience. [i.e. at common and canon law].⁷¹⁵

This reflects Bracton (as well as Fleta and Britton) that a pre-requisite (vestment, incident) for a sale was that the price had to be agreed. Thus, '*consensus*' had to include agreement on the price. There also had to be delivery, but St German does not refer to this - although a *Reading on Uses* (c. 1490) does which he may have been aware of. It states:

four things are requisite to a bargain: a vendor, a buyer (*achatour*), a thing [i.e. subject matter] and a price.⁷¹⁶ There must be a price or else the bargain is void....A bargain where the sum and the day are expressed but no money is paid, is void; for part must be paid in earnest..⁷¹⁷

In conclusion, like Bracton, it was asserted by St German - for a sale to be valid - a pre-requisite was that a fixed price had to be agreed.

(b) Promise - Nude - No Payment Agreed

⁷¹¹ Ibid, p 77 'nude paroll and by a bare averment'. Ibid, p 79 'a bare word.' Ibid, p 226 'a nude or bare grant.' Ibid, a 'nude or bare grant'. Ibid, p 227 'a nude promise.' Ibid, 'it is called in the law a nude or a naked promise.' Ibid, p 228 'a nude contract or a naked promise'. Ibid, 'a nude contract...a nude or naked promise.' Ibid, p 229 'naked or nude promises.'

⁷¹² The wording seems corrupted since it (probably) seeks to indicate that the money must be legal tender and, if not, there is no contract.

⁷¹³ SS, vol 91, p 228.

⁷¹⁴ St German appears to have used the words '*bargain*' and '*sale*' as synonyms. The former was a word of uncertain etymology and of wide import. It (likely) derived from the old French *bargainier* - to haggle or negotiate in a commercial transaction of some sort. Onions, n 129, (*bargain*), noted that - from the 14th to the 17th century - it had the connotation of to fight or to dispute. In the commercial context a synonym would be to '*haggle*'. The earliest reference to it in legislation would appear to be an Act of 5 Ric 2 stat 1 c 4 (1381, rep) '*the seller of the same wines in bargain ('bargayn') to the said buyers*'. Other references are to: (a) 10 Ric 2 (1386, rep) '*bargained and sold*'; also '*sale or bargain of tallies*'; (b) 11 Ric 2 c 2 'gift, grant, or feoffment of any other by bargain or in any other matter'; (c) 21 Ric 2 c 2 (1397-8) '*bargained and sold*'; (d) 23 Hen 6 c 13 (1444-5), s 13 '*without lawful bargain betwixt the said buyers or officers*'. See also Statute of Enrolments 1536 (27 Hen VIII c 16) and *Mildmay's Case* (1584) 1 Co Rep 175a (76 ER 379), p 381 note (B) 'A bargain and sale...is a species of contract operating under the Statute of Uses [1536], without transmutation of possession, to which some valuable consideration (though nominal in amount) is essential, as money, rent, or services incident to tenure.'

⁷¹⁵ SS, vol 91, p 228. McGovern Informal Contracts, n 592, p 1190-1 'Despite the differences...among the various forms of action used to enforce informal agreements in the later middle ages, the law of contract came to be regarded as a single entity. In the 16th century St German wrote that 'it is not much argued in the laws of England what diversity is between a contract, a concord, a promise, a gift, a loan, or a pledge, a bargain, a covenant, or such other. For the intent of the law is to have the effect of the matter argued, and not the terms.'" See also Jenks, n 91, p 131.

⁷¹⁶ Both parties also had to have capacity, see Bracton (see 12) although the Reader does not mention this.

⁷¹⁷ Baker & Milsom, n 118, p 482 (*Gregory Adgore's Reading on Uses* (c. 1490)).

Moving from a sale, invalid because the price has not been agreed, St German continued (the Student speaking):

a nude or naked promise is where a man promiseth to another to give him certain money [on] such a day [i.e. a loan]⁷¹⁸ or to build him a house, or to do him such certain service, and nothing is assigned [agreed] for the money, for the building,⁷¹⁹ nor for the service. These be called naked promises, because there is nothing assigned [agreed] why they should be made [i.e. no payment is agreed]. And I think no action lieth in those cases, though [if] they be not performed.⁷²⁰

This example reflected a promise, but no *consensus*. Thus, it was invalid. Two further stages were required - agreement on the: (i) price/payment; and (ii) delivery. The first of these was reflected in an example with respect to the building of a house given by Fyneux CJCB in a case in 1505/6 where the price was agreed and paid. Fyneux stated:

if I covenant with a carpenter [house builder] to build a house and pay him twenty pounds for the house to be built by a certain day, now I shall have a good action on my case⁷²¹ because of payment of money, and still it sounds only in covenant, and without payment of money in this case there is no remedy...⁷²² (*underlining supplied*)

This example of Fyneux CJCB was in accordance with Bracton - delivery was a pre-requisite. It also accorded with an observation of Moyle J in *Anon* (1458):

if I retain a carpenter to build me a house, and he is to have 40s for doing it, he shall have a good action of debt against me if he builds the house, and yet this sounds purely in covenant [before he does so], for if he will not build the house I shall [not] have an action against him without specialty, because it sounds in covenant; but when he has done the thing this action [i.e. he has built the house there] accrues to him to demand what is owing. For once the thing is done it suffices for him to demand what is owing.⁷²³ (*underlining supplied*)

That said, doubtless, Fyneux CJCB would have accepted that an *arra* would have been sufficient payment, which also reflects the Reading on Uses (c. 1490) quoted above ('*a bargain where the sum and the day are expressed, but no money is paid, is void; for part must be paid as earnest*').(*underlining supplied*).

In conclusion, the example given by St German was designed to show that a promise was not the same as a contract.⁷²⁴ Further, (probably) he was seeking to indicate that a service contract should be treated the same

⁷¹⁸ This could refer to a gift. However, since the context also refers to '*such service*' and '*nothing is assigned for the money*', it would seem it refers to a loan. Cf. *Southwall v Huddelston* (1522), SS, vol 119, p 155, per Fitzherbert J (in the context of a sale) 'Where no day is appointed...nothing is certain.'

⁷¹⁹ See also Baker Doctrine, n 2, p 1198 referring to *Bracebridge's Case* (1583 ?) per Beaumont, counsel 'In every bargain there must be *quid pro quo* or else it is *mudum pactum* and no perfect bargain. If I bargain with a carpenter that he will build me a house, and he *agrees* to do it, but it is not agreed what he will have for his labour [i.e. the price], this is a void bargain unless the money be paid immediately, or a day of payment appointed, or earnest given'. (*italics supplied*). The reference to '*agrees*' is essential. The parties are agreed on some matters. However, there is insufficient *consensus*, since a major issue is still not agreed - the price.

⁷²⁰ Cf. Simpson, n 4, p 388 stated on the basis of this quotation 'A naked promise is defined as one which lacks a *cause*' (*italics supplied*). However, St German was not saying that a promise to lend money or to build a house required a reason, motive or purpose, but that it did require the payment to be determined, to be enforceable. Thus, Simpson reads (it is asserted) too much into the word '*why*' used by St German.

⁷²¹ Cf. in a deed, there would have been estoppel (assuming the deed was also delivered). Cf. *Feriby v Wyke* (1425) YB 3 Hen VI fo 36 pl 33 per Martin J 'He promised him to do something, which has not been done, in which case a good writ of covenant would have lain if he had specialty.'

⁷²² Cited by Salmond Essays, n 89, p 211. See also Keil 77 pl 25 (72 ER 239). Also, YB 21 Hen 7, pl 66, fo 41 (see Seipp no 1505.066). See also, Baker & Milsom, n 118, p 410, n 12 who also cite, p 401, a *Dictum in Gray's Inn* (1499) Note...if a man bargains with me that I shall have his land unto me and my heirs for £20, and that [man covenants] that he will make an estate to me according to me [as I choose] if I pay him the £20, and he does not make an estate to me according to the covenant, I shall have an action on my case and need not sue out a *subpoena*. (*underlining supplied*). See also Kiralfy Action, n 97, p 228. See also *Southwall v Huddelston* (1522), see SS, vol 119, p 159, per Pollard J 'if there is a communication [negotiation] between you and me that I should have £20 for my horse, and I agree, if you do not pay the money at once this is no bargain, for my agreement is in return for the £20 and if you do not pay it at once you are not acting in accordance with my agreement.' Ibid, per Fitzherbert J at p 155 'even if there is communication concerning an exchange between you and me, it is not perfect unless it is executed by both parties, even though we are fully determined.' Ibid, per Broke J at p 156 'in the case of one chattel for another, whether it be by words of sale, bargain or grant, nothing passes from either party until there is perfect communication: that is each of them has the thing agreed upon.' See also Cheshire & Fifoot, n 79, p 13 and Ames Lectures, n 90, p 142.

⁷²³ Baker & Milsom, n 118, pp 238-9. In this example, neither payment of money - nor building the house - has been made. Hence, although there was *consensus*, there was no delivery.

⁷²⁴ Roman law had also made such a distinction. Cicero, n 172, p 154 'Are compacts and promises always to be kept...'. Ibid, p 18 'A promise, as a paction...'.

as a sale contract - a price had to be agreed in the case of both.⁷²⁵ He was doing this by indicating that lack of agreement on a price was indicative of there being no consensus.

(c) Promise at Canon Law

St German then sought to show the position under canon law, where the situation was *different* to that at common law. Here, a promise could be enforced by an ecclesiastical court. However, prior to analysing what St German said, it is important to have regard to the general position of promises and contracts (and oaths) at canon law. A promise, a (Christian) oath and a contract were different legal creatures at common law. However, in canon law, the church had a tendency to conflate the three and to hold it a sin for a party to breach any of them. That said, there was dispute about the enforceability of promises in particular until general ecclesiastical agreement on the matter was reached in the 15th century. Kemp summarised the position and it is worth quoting this at length:

The principle of the Roman civil law was that a contract could not be enforced by an action at law unless it was couched in the proper legal forms, a *pactum vestitum*. A simple promise, referred to sometimes as a *nudum pactum*, would not do. The canonists, with their great emphasis upon morality, taught emphatically that promises ought to be kept, but they differed among themselves for some time about the question of enforcement. Some of whom the most prominent was Pope Innocent IV [1195-1254], author of a commentary on the decretals in the middle of the thirteenth century, did not allow that a proper legal action could arise from a *nudum pactum*. He held that the only way of dealing with a man who refused to carry out an agreement which rested on a simple promise was that laid down in the gospel according to St Matthew 18. 15-17, and generally referred to as the *denunciatio evangelica*.⁷²⁶

... A contemporary canonist, Joannes Teutonicus [Johannes Teutonicus Zemecke], who died in 1245/6, took a different view.⁷²⁷ ...[he] takes speech as equivalent to promises and deduces that no distinction is to be made between full-dress oaths or contracts and simple promises, and that therefore *ex nudo pacto non oritur actio*.⁷²⁸ ...By the end of the fourteenth century the view that an action arises from a *nudum pactum* has become the *communis opinio canonistarum*, though its full application is held to be restricted to clerks and to laymen who are under the temporal jurisdiction of the church.

In the fifteenth century Cardinal Zabarella [1360-147] attacked this view, maintaining that the civil law ought to be followed unless the canon law expressly derogated from it, and arguing that in this case the canonical texts had been misinterpreted. John of Imola (died 1436) inclines towards Innocent IV and Zabarella, but he recognises that the opposite view is the *communis opinio* and that it will be followed by the courts. The *communis opinio* is followed by the leading canonist of the fifteenth century, Nicholas de Tudeschis [Nicolo de Tudeschi, 1386-1445]. A canonist of the turn of the fourteenth and fifteenth centuries, Anthony de Butrio (1338-1408), has an interesting comment. He observes that in the civil law if a *nudum pactum* has been confirmed by law, then an action does arise, and he argues that every *nudum pactum* is in fact confirmed by the natural law that men ought to keep their promises and that this is a divine law. In consequence the canon law grants an action in support of those promises. The difference is to be explained by the different ends pursued by the two laws: *Dico quod ideo, quia ius civile*

⁷²⁵ That said, there were exceptions created at an early date in respect of common innkeepers *etc.* He did not have to give a fixed price as such since his prices were regulated by legislation (and, likely, because he was obliged to accept all travellers and some would have stayed for considerable periods, foreign merchants for up to 40 days *etc.*). Thus, an Act of 1349 (23 Edw 3 c 6, rep) provided that '*hostelers*' as well as '*other sellers of all manner of victual*' were bound to sell the same for a '*reasonable price*' having regard to local prices and mayors and bailiffs of towns were empowered to impose fines for breach. There were also London regulations. See generally, McBain Innkeepers n 34. In the case of common carriers, their prices were also regulated to a considerable extent, see McBain Carriers, n 34, p 550 (Order of 1396). In London, standings for carriers (carrooms) appear to have been fixed from 1479 with prices (likely) also fixed, Ibid, p 550.

⁷²⁶ Kemp n 498, p 23 continued 'This required four stages, first personal rebuke, then rebuke before witnesses, then complaint to the church, and, finally, if the offender proved obdurate, excommunication. The aim of the whole process was penal and remedial. It was concerned primarily with the moral state of the offender and only secondarily with any question of reparation for the damage resulting from his failure to carry out his promise.'

⁷²⁷ Kemp continued 'He found in one of the *Causae* in the *Decretum* of Gratian a passage from St John Chrysostom to the effect that the Lord wishes there to be no difference between our oaths and our speech, so that as therefore should be no perjury in regard of our oaths so there should be no lying in regard of our speech. The whole passage is based upon our Lord's teaching about oaths in the Sermon on the Mount.'

⁷²⁸ Kemp continued 'The great Hostiensis [Henry of Segusio, 1200-74] takes a similar view, but bases it rather on grounds of equity. They were followed by most of the leading canonists of the fourteenth century. Guido de Baisio [Baysio], who died in 1313, has an interesting comment on the difference between the civil and canon laws on this point when he says that the motive of the difference is *canonica aequitas* and that the canon law tends to apply equity in relations between individuals and does not occupy itself with the subtleties of the civil law.'

*principaliter non insequitur finem iuris divini sed finem publicae utilitatis.*⁷²⁹[it is not the chief aim of civil law to attain the end of divine law, but primarily to pursue the end of public utility].

As it is, the basis for holding one way or the other in the dispute as to the enforceability of a promise at canon law was tenuous - based on quoting different passages in the Bible and examples of no great relevance taken from the *Decretum* of Gratian (c. 1140).⁷³⁰ To return now to the text of St German. The Doctor (of theology) asks the Student about naked (nude) promises and what common lawyers opined about a promisee being bound in conscience [i.e. at canon law] to perform although he could not be legally obliged [i.e. he was not bound at common law].⁷³¹ The Student 'bats' this back by saying that English law said little on the matter and he invited the Doctor to state the position at canon law. St German then continued (the Doctor speaking):

there is a promise that is called an advowe [oath] and that is a promise made to God and he that does make such a vow upon a *deliberate mind intending to perform it* is bound in conscience to do it though it be only made in the heart without pronouncing of words and [i.e. so too] of other promises made to man upon a certain consideration if the promise be [is] not against the law. (*italics supplied*)

The Doctor continued:

As [i.e. for example] if A promise to give B £20 because he has made him [built him] such a house or has lent him such a thing or such other like I think him bound to keep his promise. But if his promise be so naked that there is no manner of consideration [price/payment] why it should be made then I think him not bound to perform it for it is to suppose that there was some error in the making of the promise.⁷³²

Here, St German is considering the situation at canon law.

- At canon law, a person was bound because - having reached agreement on the price or other payment - it was clear that he had arrived at a '*deliberate mind intending to perform it*'. Absent this, it could not be said that he had made up his mind (i.e. he was still vacillating). Therefore, it could not be categorised to be a binding promise and, thus, sufficient for him to be sinful by not performing it. In this way, both common and canon law agreed - a promise without an agreement on price/payment was not binding under either common or canon law (possibly, St German was following Cardinal Zabarella on this, see above). However, if the sum was agreed, canon law would uphold it, even though the common law would not (because no delivery, as Fyneux CJCB pointed out).

St German went on to make it clear that purpose/motive did not affect whether a person was bound at canon law. Thus, even if the purpose (motive) of a promisor was charitable or his act was intended for the public good (that is, without an intent to secure a '*consideration of worldly profit*'), at canon law, a person was bound providing there was had been an intent to give (a '*deliberate mind intending to perform it*').⁷³³ Thus, a promise (albeit a charitable one, that is, a gift) was sinful, if broken.

⁷²⁹ Kemp, n 498, p 23. See also W Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune* (ca. 1500-1650)(Legal History Library, 1983), p 118.

⁷³⁰ As to these, Kemp noted, n 498, pp 23-4 'One of the texts used [the Sermon on the Mount he referred to] I have already quoted and there are six others which figure prominently in the discussions. Three of the [texts quoted to support the enforceability of promises] are from the *Decretum*. They are a letter from pope Gregory I [540-604] in which he says that he is going to perform a promise which he had made to the predecessor of a certain bishop; a canon of the fourth council of Toledo (AD 633) ordering a bishop to pay what he had promised to a workman; and a letter of Nicholas I (858-67) insisting on a voluntary element in marriage. The remaining three are from the Decretals of Gregory IX. Here we have a canon of the Council of Carthage c 348 ordering two bishops to observe an agreement which they had made about the boundaries of their dioceses; another letter of Gregory I saying that people ought to try to perform what they have promised; and a letter of pope Lucius III (1181-4) ordering the bishop of Ely and the archdeacon of Norwich to inquire into the case of a clerk who had gone surety for some of the London clergy and they had defaulted so that he had had to pay up. The bishop and the archdeacon are required to see that he is reimbursed by the original debtors. It is obvious that none of these texts clearly supports either view in this branch of the law, and that, I hope, illustrates sufficiently the importance of the canon law teachers in building up a body of law in the Middle Ages. I hope that it also illustrates the extent to which in doing so they were moved by the desire to give practical effect to the principles of the Gospel.'

⁷³¹ Ibid, p 229 'But what opinion hold they that be learned in the law of England in such promises that be called *naked* or *nude* promises whether do they hold that they that make the promise be bound in conscience to perform their promise [al]though they cannot be compelled thereto by the law or not.'

⁷³² Ibid. Cf. Simpson, n 4, p 389.

⁷³³ Ibid 'but if such a promise be made to a city to the church to the clergy or to poor men of such a place and to the honour of God or such other cause like as for [the] maintenance of learning of the commonwealth [or] of the service of God or in relief of poverty or such other then I think that he is bound in conscience to perform it though there be no consideration of worldly profit that the grantor has had or intended to have for it and in all such promises it must be understood that he that has made the promise *intended* to be bound by his promise for else commonly after all doctors [i.e. generally all doctors of law assert] he is not bound unless he were bound to it before his promise.' (*italics supplied*)

In conclusion, St German was likely seeking to reconcile canon law with the common law in respect of oral promises - at least, to an extent.

(d) Promise at Common Law - Motive/Purpose

The issue then was - did motive/purpose affect the issue at common law ? For example, a charitable purpose. Was it a factor in respect of the enforceability of a contract ? St German stated, following the case law (those learned in the laws of the realm):

after divers that be learned in the laws of the realm, all promises shall be taken in this manner, that is to say: if he to whom the promise is made shall have a charge [financial loss] by reason of the promise, which he hath also performed, then in that case he shall have an action for the thing that was promised, though he that made the promise have no worldly profit by it. As, if a man say to another '*Heal such a poor man of his disease*', or '*Make such a highway, and I shall give thee this much*', and if he do it I think an action lieth at common law.⁷³⁴

Since the price was agreed ('*I shall give thee this much*') and B (the doctor) had done his part, then St German - following caselaw⁷³⁵ argued that B could recover for this loss. A's (the promisor's) motive was irrelevant (as it was in canon law, if broken it was sinful even if the motive was charitable). Thus, the promisee could recover the unpaid sum owed ('*the charge*') in an action of debt. This also applied where the subject matter was a spiritual one (*viz.* marriage). St German stated:

though the thing that he shall do shall be all spiritual, yet if he perform it I think an action lieth at the common law. As if a man say to another, '*Fast for me all the next Lent and I shall give thee £20*' and performeth it, I think an action lieth at the common law. As, in like wise if a man say to another '*Marry my daughter and I will give thee £20*', upon this promise an action lieth if he marry his daughter. And in this case he cannot discharge the promise, though he thought not to be bound thereby; for it is a good contract and he may have *quid pro quo* [exchange] - that is to say, the preferment of his daughter - for his money.⁷³⁶

The latter example - in effect, an oral promise to pay a dowry - was (likely) a reference to a case in 1477 in which the Master of the Rolls (Dr John Moreton) asked the justices of the common bench a question:

if a man promises a certain sum of money to another to marry his daughter or his servant, and the other marries her accordingly, would he have an action of debt at common law for the money or not ?⁷³⁷

Choke and Littleton, Justices, agreed with the Master of the Rolls that no action lay since marriage (on which the promise was based) was a spiritual thing that could not in any way be sold. Thus, in effect, they held that such a contract would not be enforced on what, today, we would call public policy grounds. However, St German did not agree with them. Nor with the opinion of Townshend (a bencher of Lincoln's Inn) who opined that an action for debt would not lie.⁷³⁸ Instead, he agreed with two other judges, Rogers and Sulyard, who are reported as opining as follows:

Rogers and Sulyard to the contrary: and as to what is said, that this is only a bare promise, that is not so; for he has advanced *quid pro quo* inasmuch as his daughter or friend is taken to be advanced by the marriage; for if I

⁷³⁴ Ibid, p 231. See also Baker & Milsom, n 118, p 484. Jenks, n 91, p 136 stated: 'We notice also the clear recognition of the doctrine that the detriment to the promisee is just as genuine a consideration as the benefit to the promisor. The examples given are interesting [he cited St German]. 'If a man say to another, heal such a poor man of his disease, or make a highway, and I shall give thee thus much, and if he do it, I think an action lies at the common law.' See also Ibid, p 132.

⁷³⁵ This was a reference to YB 17 Ed fo 4 pl 4 (Seipp no 1477.021), see n 737 below. Cf. Where a deed was involved, see Jenks, n 91, p 167 'in the 45th year of Edward III [1371], a man brought the action of debt on a covenant by which the [D] promised to give him £100 if he would marry the [D's] daughter. The [D] raised the much-disputed question of jurisdiction, but he was overruled, on the ground that he could not go behind his deed.' See 45 Edw III pl 30 fo24a, Seipp no 1371.053. See also Ames Lectures, n 90, p 104.

⁷³⁶ Baker & Milsom, n 118, p 484. See also SS, vol 91, p 231. See also *Southwall v Huddelston* (1522), see SS, vol 119, p 156, *per* Broke J 'a condition upon a condition is perfect at once, albeit that in some cases he shall not have an action before the condition is performed. For example, if I grant you £20 if you marry my daughter, you shall not have an action before you marry her, even though the grant is in writing.' See also Jenks, n 91, pp 132-3.

⁷³⁷ YB 17 Ed fo 4 pl 4 (Seipp no 1477.021). See also *Southwall v Huddelston* (1522), see SS, vol 119, pp 242-3. Also, Jenks, n 91, pp 187-8. For a prior '*marry my daughter case*' see *Anon* (1458) 37 Hen VI pl 18 fo 8. See also Baker & Milsom, n 118, pp 236-9 and *Stoljar Contract*, n 101, p 12. Cf. *Anon* (1428) 7 Hen VI pl 3 fo 1.

⁷³⁸ Baker & Milsom, n 118, p 242 'Townshend. It seems to me no action [lies] in our law, because it is only a bare promise, and *ex nudo pacto non oritur actio*; as if I promise you £20 to rebuild your hall, here no action lies because there is *no quid pro quo*; and it is not the same as where I promise you six shillings a week to have such a one at board, because then there is *quid pro quo*, and the law takes it that he is someone by whose service I gain advantage. Moreover in the case at bar the thing that is [undertaken] to be done is spiritual, which can not be sold nor can the party be compelled to do it; and so it is not right that the other should be charged.'

promise a schoolmaster so much money to teach my son, *which he does*, he will have an action of debt; and so it is where I promise a physician or surgeon a certain sum to cure a certain poor man; or if I promise a labourer so much money to repair a certain road which is the highway, good action lies on this; and so here.⁷³⁹ (*italics supplied*)

Here, there was *consensus* - a certain sum (a fixed sum) agreed to be paid by a man in return for another marrying his daughter. Thus, it was analogous to the payment of money for the performance of a service (marrying her) with the motive/purpose being irrelevant (and St German not thinking there was any public policy issue involved).⁷⁴⁰ St German also noted that this agreement was not affected by any private reservation of one of the contracting parties - such as not actually paying up in accordance with his promise (*'though he [the father] thought not to be bound thereby'*). Finally, these instances were examples of a contract subject to a condition (*'If you teach my son, cure another, repair a road, marry my daughter'*). Thus, if the condition was satisfied, the contract was complete.

In conclusion, St German indicated that the validity of a contract was not affected by a motive or a private reservation. Further, he treated paying a person to marry (or to fast for him) as no different to any other service contract.

(e) Promise at Common Law - To Make a Gift

Unlike the canon law position, St German thought that - when a person promised to make a charitable donation (a gift) to a university *etc* (i.e. no '*worldly profit*' was involved) - a party was not bound at common law. That is, that a person was not bound by a gratuitous promise. St German stated:

in those promises made to a university or such other [i.e. charitable promises], that is to say, to the honour of God, or to the increase of learning, or such other like, where the party to whom the promise is made is bound to no new charge by reason of the promise made to him but as he was bound before, there they think that no action lieth against him though he perform not his promise; for it is no contract...⁷⁴¹

Here - although the promisor intended to be bound - his intention was to make a gift (*'honour of God...increase of learning'*) not a contract. As a gift, at common law, the promisor would have been bound if the promise had been contained in a deed. Or, if - although not in a deed - there had been delivery of the subject matter to the promisee (say, a personal chattel or money or livery of seisin of land). However, while the promisor would have, otherwise, committed a sin at canon law, he was not bound at common law by a unilateral gratuitous promise.

In conclusion, St German indicated that the validity of a contract was not affected by a motive or a private reservation. Also, a promise to make a gift was not enforceable as a contract.

(f) Promise in the Past

As Bracton pointed out - for a contract - there had to be *consensus*. That is, the wills of the parties had to meet. This had, *per force*, to be a *present* intention. The intention of a party in the past was not the same as his intention in the present. This was confirmed by St German in examples he gave. For example, a house is built and - after this - the homeowner promised to pay the builder £40. There was no *consensus*.⁷⁴² So too, payment for a past trespass. St German stated the reason:

the cause [reason] is, for that such promises be no [not] perfect contracts. For a contract is properly where a man for his shall have by assent [agreement] of the other party certain goods or some profit *at the time of the contract* or after. But if the thing be promised for a cause that is past, by way of recompense, then it is rather an accord than

⁷³⁹ Ibid, p 243. Some of these examples were taken up by St German, see text to n 734. See also *Anon* (1458) 37 Hen VI pl 18 fo 8, *per* Moyle J 'if I say to a surgeon that I will give him 100s if he will go to one J., who is sick, and give him medicines and cure him, and the said surgeon gives the said J medicines and cures him, he shall have a good action of debt against me for the [100]s....Likewise here, when he promised to give him 100 marks to marry his daughter, which he has done, it seems the action is maintainable. See also Baker & Milsom, n 118, pp 239 and Ames Lectures, n 90, p 93.

⁷⁴⁰ A similar thinking was reflected by Danvers J in *Anon* (1458) 37 Hen VI pl 18 fo 8.

⁷⁴¹ SS, vol 91, p 231.

⁷⁴² Ibid. Doctor. But what hold they if the promise be made for a thing past? As, if I promise thee £40 for that thou hast builded me a house: lieth an action there? Student. They suppose nay [not]. There was no *consensus* since there had been no agreement on the price between the parties.'

a contract. But then the law is that upon such accord the thing is promised in recompense must be paid or delivered in hand, for upon an accord there lieth no action.⁷⁴³ (*italics supplied*)

(g) St German - Conclusion

One of the issues that can be overlooked with St German is that he was comparing canon law and the common law and they were not the same. Further, his language can be opaque. However, what seems (abundantly) clear is that he was not stating any doctrine of consideration since he would (surely) have referred to it, as a separate pre-requisite for a contract. Further, what he says does not conflict with Bracton. Thus, he stated:

- **Sale - No Price Agreed.** A sale without a fixed price being agreed was unenforceable at common and canon law (if I say... "*I sell thee all my land (or all my goods), and nothing is assigned that the other shall give or pay for it, that is a nude contract and (as I take it) it is void in the law and conscience.*"). The lack of agreement on price (which Bracton said was a pre-requisite) showed that the parties had not made up their minds. They had not reached a *consensus*. They were still in the negotiation stage;
- **Service Agreement - No Price Agreed.** A nude promise was when a person promised to build a house (or perform a service) since no payment was agreed (*'a nude or naked promise is where a man promiseth to another to give him certain money such a day or to build him a house, or to do him such certain service, and nothing is assigned [agreed] for the money, for the building, nor for the service. These be called naked promises, because there is nothing assigned.'*). Thus, a service agreement was no different to a sale agreement. The lack of agreement on price/payment evidenced that the parties had not made up their mind. They had not reached a final intention;
- **Delivery - Quid Pro Quo ('This for That').** Even if there was *consensus*, delivery was a pre-requisite. However, if you delivered '*this*' (i.e. you paid or you delivered the service on your part), the court would ensure you got '*that*'. But you had to deliver (cf. if in a deed). Thus, if you asked a surgeon to treat you (or another) or a carpenter to build you a house or a suitor to marry your daughter, and he did, you had to pay up (assuming a price/payment was agreed). If neither delivered, they could not secure redress against the other;
- **Motive/Private Reservation.** If payment was agreed - the motive (whether charitable or not) or a private reservation - did not affect the agreement (the same position prevails today). Thus, if A paid B to heal C for a charitable reason and B did so, A was bound. So too, if A paid B to fast - or to marry his daughter - for £20 and B did so. There was *consensus*, including a price agreed, as well as delivery. Further, this was a business arrangement not a spiritual act. Nor a gift, since it was not unilateral (not arising from pure liberality);
- **Gift.** If A promised to give money to a charity, '*it is no contract*'. It was, also, not a gift (since there had been no delivery). It was simply a gratuitous promise;
- **Past Intention.** A past intention was not a present one and *consensus* required the final, present, intentions by both parties for there to be a union of minds.

In all this, St German closely followed precedent and was not saying anything new - nothing different from the pre-requisites of Bracton in respect of *consensus* and delivery. In conclusion, there is no evidence of St German enunciating a doctrine of consideration, nor following one previously established.⁷⁴⁴ However, by *ex post facto* rationalisation (and relying on his statements on canon law), it is possible to read too much into what St German wrote and posit the origins of such a doctrine. Simpson stated:

Once the idea was accepted that only those promises should be actionable which had been motivated by a legally *sufficient reason* or consideration, the rule that payment of money or some other recompense was a ground for *assumpsit* could readily be fitted into this analysis. Payment now comes to be relevant because it *motivated* the promise; thus what happens is that payment is looked at in a new and more sophisticated way. This change is only a change in the theory of the matter; the substance remains as before. This development may have been encouraged by *Doctor and Student*....⁷⁴⁵

⁷⁴³ Ibid, pp 231-2. Cf. Jenks, n 91, p 136 who noted that the point on past consideration made by St German was reflected in subsequent cases. Jenks cited *Hunt v Bate* (1559) Dyer 272a (73 ER 605)(see 21); *Jeremy v Goochman* (1595) Cro Eliz 442 (78 ER 683); *Barker v Halifax* (1600) Cro Eliz 741 (78 ER 974) and *Docket v Vowel* (1602) Cro Eliz 885 (78 ER 1110). See also Ibid, pp 133, 141.

⁷⁴⁴ The only wording that might hint of it was his statement: 'if he to whom the promise is made shall have a charge [financial loss] by reason of the promise, which he hath also performed, then in that case he shall have an action for the thing that was promised, though he that made the promise have no worldly profit by it.' However, this was in the context of an example of A paying B to heal C. If B had healed C at no cost, he would have incurred no damages. Thus (as today), he would have had no loss to sue for.

⁷⁴⁵ Simpson, n 4, p 415.

However, St German did not treat payment as motivating a promise. Indeed, he expressly asserted that motive in a contract was irrelevant (although a charitable intention might reflect a gift as opposed to a contract). St German also stated (like Bracton) that a valid sale required a fixed price. Thus, payment was a legal pre-requisite - not a '*legally sufficient reason*' ('*or consideration*'). So too, delivery. That is, payment of the full price (or payment of part or delivery of an earnest) or - on the other side - delivery of the goods or service *etc.* When St German referred in his examples to a lack of agreement on the price or the payment sum, it seems clear that he viewed the lack of it as evidence the parties had not made up their minds. Thus, there was no *consensus*. Finally, although St German did not refer to an *arra*, it is asserted that - if an *arra* (earnest) had been given in the cases he cited, he would have accepted that the contract was binding. The fact that an *arra* was involved or an exchange (*quid pro quo*) would make it clear - as clear as glass - that the transaction was a business one and not a gift - since a gift never involved either.

(h) Rastell (1525)

Another text of this time, a law dictionary by Rastell - *Exposiciones Terminorum* (c. 1525) - stated in its definition of contract:

Contract is a bargain or covenant between two parties, where one thing is given for another, which is called *quid pro quo*; as if I sell my horse for money, or if I covenant to make you a lease of my manor of Dale in consideration of twenty pound that you shall give me, these are good contracts, because there is one thing for another. But if a man make a promise to me, that I shall have 20 shillings and that he will be debtor to me thereof, and I ask the 20 shillings and he will not deliver it; yet I shall never have any action to recover this 20 shillings because this promise was no contract, but a bare promise, and *ex nudo pacto non oritur actio* but if any thing were given for the 20 shillings though it were not *but to the value of a penny, then it was a good contract.*⁷⁴⁶ (*italics supplied*)

The reference of '*one thing given to another*' (that is, an exchange or reciprocity) derived from contracts in early times being barter (goods for goods) or sale (goods for money) - the need for delivery of *seisin* being a pre-requisite. Further, one suspects that the expression '*quid pro quo*' was just pleading slang in the king's court -⁷⁴⁷ meaning that a person could not obtain redress if he had not delivered on his part (the money or the goods). As to the latter example - as with St German - a *promise* to loan money was not the same as an agreement to loan - lacking Bracton's pre-requisites of *consensus* and - even if the beneficiary of the 20 shillings accepted the offer - *delivery*. However, a person was bound if an *arra* was given in return - and an *arra* could be a God's Penny or even less. *Why was the person bound?* The *arra* was a token (evidence) that a man intended to be bound; and delivery of the *arra* comprised delivery of the underlying subject matter (i.e. the obligation to pay back the money comprising the debt, with the *arra* representing that value).⁷⁴⁸ In his examples (likely) Rastell had in mind the recent case of *Southwall v Huddleston & Reynolds* (1522) in which the judges had distinguished between a contract (which was legally binding) and a mere '*communication*' (negotiation) between the parties, which was not. Brudenell CJ distinguished the two in words that would not be out of place today. He stated:

sir, bargains and sales are [understood] in the way it has been concluded and agreed between the parties, as far as their intentions can be understood. For if I sell you my horse for £10, and we are both agreed, and you accept a penny as earnest, this is a perfect contract and you shall have the horse and I shall have an action for the money. But if I want to sell my horse to you for £10, and you say you will give £9 for him, and I say I am content, nevertheless if you do not pay the money at once but go away, it is not a bargain; for I was not content that you should have my horse except for £9, and even though you say you are content this is still not perfect because you have not paid the money and so you have not performed the agreement...⁷⁴⁹ (*underlining supplied*)

This is no different to Bracton. In a sale, there must be immediate payment, part payment or an *arra*, for it to be valid (actionable), see 12. Pollard J said much the same:

It seems that the evidence is good. Speaking of bargains and sales, sir, these all depend on the communication and words between the parties. For some bargains may take effect at once, and some upon something to be done later.

⁷⁴⁶ J Rastell, *Exposiciones Terminorum* (1525)(*contract*) cited by Baker & Milsom, n 118, p 483. See also Jenks, n 91, p 135.

⁷⁴⁷ It does not appear to have been used in Continental civilian literature. See also Pollock, Pt 2, n 404, p 416 '*Quid pro quo*, a peculiarly English term.'

⁷⁴⁸ Baker Doctrine, n 2, p 1183 'The courts do not seem ever to have been troubled about economic disparity between consideration and promise; it was a common maxim that for a penny consideration a man could bind himself for £100.' Also, Baker Oxford, n 118, pp 865-8.

⁷⁴⁹ *Southwall v Huddleston* (1522), see SS, vol 119, p 160. See also Broke J at p 158 'It is not like the case where I bargain and sell my horse to you for £20, in which case if you do not pay at once it is ineffective and merely a communication; there he was to have one thing in return for another, which is only like a contract, and that is not perfect without immediate *quid pro quo*.'

They may be upon condition, and they may also be perfect even if there is no *quid pro quo* [exchange] at once. It all depends on the communication between the parties. For instance, if there is a communication between you and me that I should have £20 for my horse, and I agree, if you do not pay the money at once this is no bargain, for my agreement is in return for the £20 and if you do not pay at once you are not acting in accordance with my agreement...If, however, I sell you my horse for as much as John at Style shall say, this is good if John at Style states the amount, but if he does not it is void. So a contract may be good or void depending on something yet to come. Moreover, if I sell my horse for £10 to be paid at a certain day, this is good even though there is no *quid pro quo* at once.⁷⁵⁰ (*underlining supplied*)

This is also no different to Bracton - the condition was immediate payment. In the case of the latter example, the horse was delivered subject to JS determining the price. When he did, the condition was fulfilled. Similar statements distinguishing between a contract and a mere '*communication*' (that is mere negotiation, discourse, conversation) may be found in the arguments of the king's solicitor (Griffith),⁷⁵¹ the king's attorney (Bradshaw),⁷⁵² the Recorder of London (Brook)⁷⁵³ and Sgt Pollard⁷⁵⁴ in the later case of *Renniger v Fogossa* (1551). The key thing (like today) was whether the basic terms had been agreed (i.e. there was *consensus*).⁷⁵⁵ Further, the principles employed by the king's court to determine whether *consensus* had been reached in respect of a sale seem fairly clear, viz.

- **Sale - Price.** A sale required a fixed price. If the price was not agreed on - or if it was not ascertainable (such as being fixed by a third party, John Style) - this evidenced that the parties had not reached *consensus*. They were still in a negotiation stage;
- **Sale- Payment.** The court regarded it as implicit in business transactions that payment was to be effected immediately - unless agreed otherwise, such as the parties selecting a future day for payment. The court did this by implying a '*condition*' (as Fitzherbert J indicated in the case above '*If I grant [sell] my horse to you for £20...it is a condition ...it be paid at once.*') Agreement on delayed payment of the price could be evidenced by: (i) part payment; or (ii) payment of an earnest. Their absence was evidence that *consensus* had not been reached. So too, if a day appointed for payment had not been agreed on;
- **Sale - Delivery.** There also had to be delivery - a pre-requisite for a contract laid down by Bracton (see 12). There was delivery if the price was paid (or part paid or an *arra* given) or the article sold was delivered. As Pollard J put it, 'if I sell my horse for £10 to be paid at a certain day, this is good even though there is no *quid pro quo* at once.' This was fine, because there did not have to be immediate delivery by both parties at once. Delayed payment by one party (or delayed delivery by another) was fine (providing the price was agreed or ascertainable). Delivery was also good evidence of *consensus* since a person would hardly hand over his property if he had not thought that a sale had been agreed.

(i) Yorke (1526-35)

The word '*consideration*' - in the everyday sense of '*reason*'- appeared in a case in 1526/35 in Roger Yorke's Notebook. *Inter alia*, it stated:

⁷⁵⁰ Ibid, p 159. Ibid, *per* Fitzherbert J at p 155 'If I grant my horse to you for £20, you shall not have it unless you pay the money at once, for when I say 'for £20' it is a condition that it be paid at once. So it is [i.e. it is also the same] if I sell my horse for £20; and there is no difference between my granting and selling, so long as it is for a price and so long as it is apparent that I want to sell it. If, however, I appoint a day when the money is to be paid, and you promise and agree to this also, this is a perfect contract and [you] shall have possession at once, and [I] shall have an action at the day....Where no day is appointed, however, nothing is certain.'

⁷⁵¹ *Reniger v Fogossa* (1551) 1 Plow 1 (75 ER 1), p 5 'For every agreement ought to be perfect, full, and compleat; and the evidence here does not prove the agreement [to be such] but rather a communication or conversation, than an agreement: for an agreement concerning personal things is a mutual assent of the parties, and ought to be executed with a recompense, or else ought to be so certain and sufficient, as to give an action or other remedy for a recompense: and if it is not so, then it shall [not] be called an agreement, but rather a nude communication without effect.' The word '*not*' appears to be missing.

⁷⁵² Ibid, p 7, 'For when there is a mutual assent of the parties upon a thing uncertain, this may not be adjudged in law any more than a vain communication and discourse when the thing is not afterwards performed.'

⁷⁵³ Ibid, p 13 'every gift, every grant, every feoffment, and every confirmation is an agreement, for it is the will of the donor that the donee shall have the thing, and the donee is content to take it. And so here is a mutual assent of their minds, which mutual assent of the minds is an agreement, and an agreement is nothing but a mutual assent of the minds touching any thing, for there ought to be something upon which their minds may concur and conclude.'

⁷⁵⁴ Ibid, p 17 'the definition of the word [agreement] it seems to me that *agreementum* is a word compounded of two words, viz. *aggregatio* and *mentium*. So that *agreementum est aggregatio mentium in re aliqua facta vel facienda*. [agreement is a union of minds in any thing done or to be done]. And so by the contraction of the two words, and by the short pronunciation of them they are made one word viz. *agreementum*, which is no more than an union, collection, copulation, and conjunction of two or more minds in any thing done or to be done.' Whether Pollard was etymologically correct is debatable, Lucke, n 236, p 300. See also Swain, n 102, p 181.

⁷⁵⁵ *Southwall v Huddelston* (1522), see SS, vol 119, p 156, *per* Fitzherbert put it, 'If there is a fault in me...for example, if I go away and leave the other uncertain as to his due - this is not a perfect contract, but a communication, and each of the parties is at liberty.'

if I promise you to build you a house by a day, and do not, this is only *nudum pactum* for which you will not have an action on the case; and you have suffered no wrong by this nonfeasance...[contrariwise] if I give certain money to one to make me a house by a day, and he does not make it by the day, there this is a '*consideration*' [reason] why I should have an action on my case for the nonfeasance.⁷⁵⁶ (*underlining supplied*)

That is, the payment of money was the reason why an action on the case was sustainable. It evidenced *consensus* (an agreement to build a house for a fixed sum of money) as well as delivery (of the money) being effected. Thus, the builder was in breach of contract.

In conclusion, it is asserted that all the above is pure Bracton (pre-requisites of consensus and delivery). There is no evidence of a doctrine (pre-requisite) of consideration - or that 'consideration' had a technical legal meaning - in the text Doctor and Student, where it was used in a number of senses This included its being used as a synonym for the words 'price' and 'payment' - this for the purposes of determining whether a price (payment, recompense) had been agreed on. If not, this evidenced that the parties had not yet made up their minds - they were still in the negotiation stage - and, so, there was no consensus.

19. LUCY AND WALWYN (1561) & A MOOT OF 1562

A case in 1561 and an Inner Temple moot in 1562 may be noted.

(a) Lucy v Walwyn (1561)

This case concerned a dispute over a land purchase. P asserted that an undertaking (agreement) was reached with D for P to assist D - in return for 100s (or a gelding) - to persuade one S to lease certain land to D. However, D later bought the land from S himself. Counsel for D (Nicholls) argued that:

in an action on the case there must always be a consideration, in fact or in law....here...there is no consideration in fact or in law, for the party who undertook to obtain the lease was to have nothing before obtaining it, and so there was no *quid pro quo*, but only *nudum pactum*.⁷⁵⁷

The word '*consideration*' was used to refer to exchange⁷⁵⁸ - evidenced by examples given by Nicholls (although he appears to only have given examples of considerations in law).⁷⁵⁹ Thus, even if the parties had agreed (that is, reached a *consensus*), there was no delivery. Contrariwise, if D had paid the 100s (or part of it or an *arra* or delivered the gelding) up front - or if S had leased the land to D as a result of the persuasion of P - there would have been sufficient delivery. However, there was not. For his part, Counsel for P (Onslow) argued that there was *quid pro quo* - the gelding in return for the effort to persuade S to grant D the lease. However, this was insufficient since there was no actual delivery (exchange). In short, agreement (*consensus*) without delivery was no good. It did not make a contract (following Bracton).

(b) Inner Temple Moot of 1562

In the case of a Moot 1562 (see Baker & Milsom, n 118, p 487), the Note stated:

Note that Keilwey said that if I give someone else 20s or a penny, in consideration that he to whom the gift is made shall make me an assurance of the manor of Dale for the sum of £20 to be paid later, and he takes the money but makes no assurance, the other may have an action on the case and recover damages to the value of the land, because it was a contract and there was *quid pro quo* [exchange].

This is in accordance with Bracton. The 20s (which, also, was sufficiently large to comprise part payment) or the 1d both constituted an earnest (*arra*). The *arra* evidenced the agreement on the part of the buyer to pay £20 for the land. And, delivery of the *arra* by the buyer, was as good as his delivery of the £20. It bound him, following Bracton and early law. The Note continued:

⁷⁵⁶ Baker Spelman, n 118, pp 296-7. See also Baker History, n 118, p 1104.

⁷⁵⁷ *Lucy v Walwyn* (1561), see Baker & Milsom, n 118, pp 485-7.

⁷⁵⁸ He cannot have used '*consideration*' in the sense of '*payment*' or '*recompense*' as such, since there was such (100s or a gelding).

⁷⁵⁹ As to a consideration of law, he stated 'if a man menaces my villeins of my manor of Dale, so that they flee from it...it is a wrong and against the law [menacing being a crime].' So too slander, another example he gave. It, also, was a criminal offence. But not of opening a school, mill or fair [it was not a criminal offence, unless it could be shown to be a public nuisance].

Thomas Gawdy said that even if no money was paid, but someone promised another to enfeoff him of his manor of Dale before a certain day, and the other promised to pay him £20 for it, if the feoffer did not make the feoffment the other could have an action on the case even though no money had been paid. But Keilway denied this, and that it is only *nudum pactum*, whereupon *non oritur actio*, without *quid pro quo*.

Keilway also reflected Bracton, viz. in a sale, even if a fixed price was agreed, if there was no *delivery* of the price (or part) or an *arra*, there was no sale. Here, no payment (or part payment or earnest) was delivered. Thus, the buyer had not bound himself. Not having bound himself, he could not bind the other party. He had not delivered something (*quid*, the money or part) for the other delivering something (*quo*, the land); i.e. '*this*' for '*that*'. In short, a matter of '*promises...promises*'.

In conclusion, Lucy v Walwyn (1561) and the Inner Temple moot reflected the fact that a valid contract required delivery. Both reflected Bracton (see 12). Money (or part or an arra) or the subject matter had to be delivered. Such delivery was also good evidence of consensus.

End of Part One of this Article.

Copyright

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).