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AN EXERCISE IN SOCIOLOGICAL JURISPRUDENCE: HEREIN THE SIGNAL THEORY

BURTON F. BRODY*

INTRODUCTION

THE fourth sentence of Oliver Wendell Holmes' monumental study of the common law states the fundamental tenet of the sociological school of jurisprudence. There the young Holmes said:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.¹

Sixteen years later in 1897, Holmes then a Justice of the Supreme Court of Massachusetts, persisted in his beliefs about the study of law. He stated:

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for the rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it laid down have vanished long since, and the rule simply persists from blind imitation of the past.²

It has been observed that Holmes' beliefs about the analysis of the law are equally applicable to other social activities.³ His pejorative assessment of the value of logic was merely an expression of his beliefs that the rigid syllogistic forms of Aristotelian logic were inadequate tools of social analysis. And as such, his work was the

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1. HOLMES, *THE COMMON LAW*, (Howe ed. 1963).
2. HOLMES, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
3. WHITE, *SOCIAL THOUGHTS IN AMERICA* (Beacon ed. 1957).

first in a series of innovative analyses of other social phenomena such as history, politics, philosophy and economics.⁴

Later, Dean Roscoe Pound gave formal structure to Holmes' germinal beliefs, setting forth the boundaries of the sociological school of jurisprudence.⁵ He stated that one of the activities of this school of jurisprudence is to ascertain the social, economic, moral, political and psychological conditions out of which law evolves. The wisdom and efficacy of such analysis has not been, nor can it be, denied. However, the very readiness of its acceptance has militated against its widespread application to fundamental concepts of our laws.

It is the purpose of this paper to demonstrate the validity of the sociological analysis by applying it to the "doctrine of consideration" in contract law. However, one is constrained to admit, that another proof of the truths of sociological jurisprudence is insufficient reason to engage in this effort. A more profitable objective is to use the teachings of sociological jurisprudence to articulate a doctrine of consideration that can have meaning to students of the law. There are two reasons that the doctrine of consideration is a particularly appropriate subject of sociological analysis. First, because it is a basic concept whose beginning marks the beginning of a new era of Anglo-American law. And second, because in its present state it is a product of the kind of logical analysis that sociological jurisprudence finds totally inadequate. Therefore, the potential of understanding promised by a sociological analysis of consideration justifies the effort.

THE PRESENT DOCTRINE

Section Two of *The Restatement of Contracts* defines a promise as "[A]n undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future."⁶ However, the *Restatement* first states that a contract is, "A promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty."⁷ The concept

4. *Id.* at 15.

5. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912).

6. RESTATEMENT OF CONTRACTS § 2 (1933).

7. *Id.* at § 1.

which converts promises into contracts is, of course, consideration, and as such is the *sine qua non* of contract doctrine. It, therefore, has momentous effect.

The clauses, "the law gives a remedy," and "the law in some way recognizes as a duty," are innocent enough to modern minds, especially minds devoted to legal study, but when viewed in their historical context they are pregnant statements. It is far too easy for contemporary scholarship to overlook the painstaking development of legal remedies. Ignoring, for the moment, the social changes which have been wrought and focusing only on the evolution of legal doctrine, one must still concede that the present sophisticated set of legal remedies results from an enduring effort to overcome primitive anarchy and medieval narrow-mindedness. Respect for this struggle should by itself militate against taking too lightly the clause, "the law gives a remedy."

More significantly, because the struggle to create effective means of righting wrongs is for the most part in the past, there is a tendency to overlook what is today merely implicit, but was in earlier times most explicit, when legal doctrine dictates a remedy. "The law gives a remedy," carries with it, in theory at least, the very real possibility that the executive branch of government, in fulfilling its obligation to enforce judicial decisions, will use physical force.⁸ This use of force in a civilization which has so fervently sought to rise above the directness of instinctive justice is a step not readily authorized; even though that step is in the overwhelming majority of instances merely a theoretical one.

The plea remains timely because there are promises which seemingly conform to accepted definitions, but are not contracts.⁹ And on the other hand, there are promises for which exceptions to accepted doctrine have been forged so that they may be enforced.¹⁰

8. *Supra* note 2.

9. *See, e.g.*, fungible goods cases: *Standard Bank of Canada v. Lowman*, 1 F.2d 935, 940 (W.D. Wash. 1924); *Edwards v. Cleveland Mill and Power Co.*, 193 N.C. 780, 138 S.E. 131, 134 (1927); *see also*, accord and satisfaction cases: *Rogers v. Spokane*, 9 Wash. 168, 37 P. 300 (1894); *Continental Nat'l Bank v. McGeoch*, 92 Wis. 286, 66 N.W. 606 (1896).

10. *Supra* note 6, at § 86: *Byerly v. Duke Power Co.*, 217 F.2d 803, 806 (4th Cir. 1954); *Levin v. Diamond State Poultry Co.*, 175 F. Supp. 851, 854 (D. Del. 1959); *supra* note 6, at § 87: *Howard v. Zilch*, 346 Mass. 33, 190 N.E.2d 77, 78

What is worse is that in neither class of cases are the results ones which conflict with a reasonable sense of justice; the sharpest criticism that can be made is that the decisions contradict accepted theory. Therefore, it would seem the difficulty is not one of understanding but rather articulation. Professor Llewellyn pinpointed the problem in evaluating a symposium on the doctrine:

As we have seen, 'Consideration' is a vast, sprawling field, with part of its roots hopelessly intertwined with other roots from other phases of our law, in ways which show clearly enough in work and result, but which do not show clearly in most discussion.¹¹

THE SHORTCOMINGS OF PRESENT DEFINITIONS

Current statements of the doctrine of consideration merely describe each phenomenon that has ever constituted consideration. However, such definitions provide insufficient guidance for predicting future developments and decisions because they fail to reveal *why* each such phenomenon has been deemed adequate consideration. Therefore, even though everyone is totally aware of what consideration *does* and knows each component *constituting* consideration, no one is quite sure what consideration *is*.

The Causes

The causes for the inadequate explanation of the doctrine are subtle, distinct and yet intertwined. The major reason has been that the efforts to distill a doctrine have, for the most part, been expended in a vacuum.¹² The documentation of authority has been monumental and the analysis of legal theory has been no less than brilliant. However, there has been little attempt to relate legal reasoning to the civilization which gave rise to it. In other words, the impact of sociological jurisprudence has been slight. The examination of social forces has not generally been deemed within the scope of contract scholarship. Therefore, because law is only a part—al-

(1963); *Travelers Indemnity Co. v. Szymanski*, 207 Misc. 130 (1954); *supra* note 6, at § 89; *Byerly v. Duke Power Co.*, *id.* at 806; *supra* note 6, at § 90; *Stevens v. G.L. Rugo and Sons Inc.*, 209 F.2d 135, 143 (1st Cir. 1954).

11. Llewellyn, *Common Law Reform of Consideration: Are there Measures?* 41 COLUM. L. REV. 863 (1941).

12. Shatwell, *The Doctrine of Consideration in the Modern Law*, 1 SYDNEY L. REV. 289 (1954).

beit a significant part—of a culture, the contract scholarship which ignored the other facets of the culture must perforce fall short of total understanding. As a result of the disinclination to place developing doctrine in the various social and economic environs through which it has passed, the analysis of consideration has not penetrated to the essence of the doctrine.

Human Nature

Another cause of the failure to definitively articulate a fully satisfying consideration doctrine flows from the nature of man. Legal scholars, as a result of the very human need to feel that man has somehow improved the world he inhabits, underestimated earlier contract systems. Sir Henry Maine, a preminent legal historian commits this subtle sin when he describes the operation of an ancient body of contract doctrine:

That which the law arms with its sanctions is not a promise, but a promise accompanied with a solemn ceremonial. Not only are the formalities of equal importance with the promise itself, but they are, if anything, of greater importance; for that delicate analysis which *mature jurisprudence* applies to the conditions of mind under which a particular verbal assent is given appears, in ancient law, to be transferred to the words and gestures of the accompanying performance.¹³

Another equally eminent scholar exhibits the same hindsighted smugness about the development of contract theory when he states:

English law started from a groundwork of archaic Germanic ideas not unlike those of early Roman law, and quite unrelated to the common sense of a modern man of business. Form and ceremony were everything, substance and intention were nothing or almost nothing. Only those transactions were recognized as having legal efficacy which fulfilled certain conditions of form, and could be established by one or the other of certain rigidly defined modes of proof. The proof itself was formal and, when once duly made, conclusive. *The history of this branch of our law, through the Middle Ages and even later, consists of the transition from the ancient to the modern way of thinking.*¹⁴

So motivated, scholars seeking to set forth a doctrine of consideration did not see the true relationship between primitive and contemporary legal systems. Further their very human need to find qualitative, substantive improvement through the ages not only led them to misinterpret primitive contracts, but more significantly did

13. MAINE, ANCIENT LAW 303 (4th Amer. ed. from 10th London ed. 1906) (Emphasis added).

14. POLLOCK, PRINCIPLES OF CONTRACT 135 (7th ed. 1902) (Emphasis added).

not permit them to see contemporary theory in true perspective. Thus, once again, it is not surprising that to this point no totally satisfactory statement of the doctrine of consideration has been made.

Resulting Cause

Still another cause of the imperfect recitals of a consideration doctrine flows from a combination of the prior two causes. Dean Shatwell succinctly describes the results of the delicate combination of ignoring societal influences on the law with underestimating the sophistication of earlier contract theory. He says:

Firstly, although the doctrine of consideration was accepted as authoritatively imposed upon the English Courts, there was as there still is, a tendency to regard it as a legacy from the past, to accept it as a burden imposed irretrievably by past authority rooted in the procedural structure of the common law and thus to lose sight of its substantive purpose of bringing together under a single test of validity a wide range of economic dealings which possessed only the common element of bargain. With this fatalistic acceptance of consideration went also a tendency to push analysis of the doctrine itself to a level of abstraction, to make sort of analysis *in vacuo* which substituted logical deduction from definition in place of induction from the whole context of the doctrine on bargain.¹⁵

In this manner, the attempt to recite a doctrine of consideration became the pursuit of an intellectually symmetrical doctrine, regardless of whether that symmetry existed in the enterprises of man. Thought was dictated by the desire to define, and therefore a definition came into existence without regard for its utility. The inadequacy of deductive reasoning as the exclusive means of social analysis has already been discussed. Suffice it to say that the keystone research on consideration was unaffected by the revolt against Aristotelian logic.

THE RESULT

The consequence of these causes and others has been that the present statements of the doctrine of consideration constitute a paradigm rather than a definition that promotes understanding and facilitates prediction. The effect of giving the highest priority to achieving logical harmony has been the obfuscation of the true goals sought by civilization through its system of contracts. That this results from the pursuit of logical symmetry has been definitively dem-

15. *Supra* note 12, at 313.

onstrated by Professor Fuller in *The Reliance Interest In Contract Damages*.¹⁶ That article points out that although standard contract theory espouses only the protection of the "expectancy interest," Anglo-American courts have long guarded the "restitution" and "reliance" interests as well. It shows how either the concept of "expectancy" has been restructured to accommodate "reliance," or what is worse, how a miscarriage of justice occurred because a court was unwilling or unable to see "reliance and restitution" as within the minor premise of the contracts syllogism which limited itself exclusively to "expectancy". Chapter four of the *Tentative Draft of The Restatement of Contracts, Second* is an attempt to postulate a consideration doctrine that will accurately reflect court action.¹⁷ The goal of this paper is to articulate *why* courts have acted as they have. And from that understanding, postulate a consideration doctrine which will facilitate accurate deductive application.

REMEDYING THE INADEQUACIES

To begin the task of perfecting a truly useful definition of consideration several altered approaches are required. First, in order to take fullest advantage of the view afforded by the times, contracts, and therefore consideration, must not be limited to the somewhat narrow theoretical rubric assigned it by traditional legal scholarship. Rather, contract must be scrutinized in its more basic function as the institutional enforcement of voluntarily assumed obligations.¹⁸ From this perspective it is possible to see the philosophical teachings of contract theory permeating other areas of law traditionally deemed distinct. And thus, a fuller appreciation of contract will be fostered.

Further, a complete understanding of consideration can only come if contract is viewed as a social activity rather than as a mere

16. Fuller & Perdue, 46 YALE L.J. 52, 373 (1936-37).

17. There is no doubt that Chapter Four achieves its goal. In thirty-nine sessions with comments covering two hundred fifty pages. The tentative draft most accurately analyzes decisions and legislation. However, the draft fails to articulate the principle which cuts across all this institutional activity; therefore while it is an improvement over earlier statements of a doctrine it too fails to fully satiate the quest for understanding.

18. *Contra*, FRIEDMAN, CONTRACT LAW IN AMERICA 17 (1965), where contract is limited to those agreements not subject "to special legal treatment . . . of special statute or legal rule . . ." The results of this somewhat narrowed view are pointed out in Childres, Book Review, 18 J. LEGAL ED. 478 (1966).

legal device. By viewing a contract as it serves society, its true significance can be seen. By placing, in a general way, each phase of the evolving doctrine in its proper social and economic setting, a better understanding of consideration can be had.

In addition to the two general changes in approach suggested, a very specific, somewhat drastic modification of thinking is required. The distinction between *formal* and *informal* contracts must be forgotten, and attention directed to the concept of promissory obligation that these categories were created to serve.¹⁹

The distinction between formal and informal contracts is a particularly inhibiting result of the need to find progress. Ritualism was and is associated with primitive societies. Scholars tend to equate the meager technology of a primitive society with a lack of sophistication in human affairs. As a result, legal scholars, surrounded by highly developed technology, studying ancient contracts, had no difficulty dismissing such systems as quaint and finding contemporary systems infinitely intellectually superior. Scholars found a difference in kind when all that probably had taken place was a change in degree.

Formal contracts were dismissed as somewhat mystically validated by anachronistic ritual totally incapable of rational comprehension. Researchers concluded that the modern era had reached a higher plateau of theory because the means of binding a promise had become less ritualistic. Their certainty about the advance of civilization did not permit them to see that instead of the elimination of ritual, what in fact had happened was the substitution of a contemporary rite for an ancient one. A ritual relevant to a modern society had replaced a ceremony whose significance had been lost in antiquity. The change in ceremony was regarded as the eradication of ritual. Thus, they found their own times had developed contract theory to the point where "substance" substituted for "form."²⁰

The distinction resulting from the pejorative assessment of ancient systems has hindered the understanding of consideration because it

19. HOLDSWORTH, *THE MODERN HISTORY OF THE DOCTRINE OF CONSIDERATION, SELECTED READINGS ON THE LAW OF CONTRACT* 61, 100 (1932). See also 2 *BOSTON U. L. REV.* 87, 174 (1922).

20. *Supra* notes 13 and 14.

has prevented students of the subject from seeing the doctrine in full light. Formal contracts have been treated as substantively distinct from informal ones, and as such almost totally ignored. The effort to enunciate a doctrine of consideration has limited its search to informal contracts because formal contracts and the doctrine of consideration were thought to be contradictory concepts. Therefore, attempts to recite a doctrine of consideration have been restricted to only a part of the subject. It is no wonder that such a limited perspective has yielded less than satisfactory results. Forgetting the specious distinction between informal and formal contracts causes the contemporary theorist to surrender a small portion of self-esteem, but in so doing he gains the portals of understanding.

As a result of ending the distinction between formal and informal contracts and further expanding the view of contract to include most voluntarily assumed obligation, the full impact of contract as a body of societal problem-solving experience begins to emerge. Then by seeing the effect social evolution had on the doctrine of consideration, a basic understanding of the doctrine becomes possible. When consideration is viewed in its socially relevant role a definition, basic enough to include cases that traditional doctrine has heretofore handled by way of exception, can be wrought. Only by seeing the entire doctrine of consideration in its complete social setting, coupled with an understanding of contract as a social phenomenon, can a definition of consideration that will facilitate future decision be articulated.

It seems proper to note at this point that there is no attempt to slide by or gloss over a questionable point in requesting the banishment of the distinction between formal and informal contracts. Quite the contrary is probably true; driving that distinction from current contract theory may be all this paper accomplishes. The establishment of the SIGNAL THEORY of necessity requires demonstrating that the so-called modern doctrines of consideration, *i.e.*, the bargained-for and detriment/benefits theories, are merely modern counterparts of the Germanic *wed* and *borh*. Much is asked of the reader, but nothing equal in difficulty to thinking of himself as not a great deal more astute than peoples our civilization long has regarded as primitive and uncultured.

SOCIAL UTILITY OF THE DOCTRINE

Investigating the contributions of the doctrine of consideration to the social order of the common law countries reveals a great deal about the doctrine. Knowledge of the social functions of consideration discloses the components of the doctrine. More importantly, awareness of the services rendered by the doctrine in the past indicates what our society will expect of it in the future. And, recognition of what has been, is and will be demanded of it gives great insight to what it is and what it can and must become.

ECONOMIC CONTROL

In a society committed to free enterprise, the doctrine of consideration provided civil authority with one means of controlling economic activity.²¹ The government through its judicial branch, by establishing a doctrine that made possible the enforcement of only some promises, subtly acquired control of entrepreneurial activity. Using consideration to mark off the limits of acceptable economic activity, the law encouraged economic acts within the bounds of the doctrine and discouraged acts outside the pale of it.

As an example of this function of consideration, ponder the relatively disreputable status of gifts in Anglo-American law and mores.²² Has the doctrine of consideration so encouraged transactions in which there is an exchange, that popular suspicion surrounds transactions without exchange? One is at least constrained to admit that in an adversary proceeding, a promisee where consideration exists has an easier burden than a donee. To further explore this function of consideration one might simply ponder the negative implications and connotations of the word "gratuitous" which in its positive sense flows from among the highest motivations known to western culture.

This control function of the doctrine went unnoticed because at first the courts were in all likelihood unaware of the economic consequences of their decisions. On the other hand, even if they had realized their ability to influence economic activity, prudence would

21. KESSLER and SHARP, *CONTRACTS CASES AND MATERIALS*, 1-9 (1953).

22. It is admitted that this example smacks of "which came first, the chicken or the egg?" but it may serve to quickly clarify the point.

have silenced any judicial affirmations of such power. The emerging law of contracts was closely related to a firm belief in the wisdom of private control of enterprise. Therefore, discretion being a better part of valor, the courts would have been wise not to flaunt their power over economic activity.

ONLY SOME PROMISES

The proposition that it would be unwise for a society to enforce each and every promise has been thoroughly examined.²³ Among other problems, a society that attempted total enforcement of each promise made would have no time for anything else. Therefore, each society must decide what kinds of promises shall become the concern of civil authority and which types shall remain a matter solely for private concern. The doctrine of consideration, unique to Anglo-American law, has served as the means of establishing this initial dichotomy.

The common law traditions of individual liberties dictated—whether knowingly or unknowingly—that the law would let the people decide exactly which classes of promises ought to be enforced.²⁴ Civil authority determined the significance of the promise by observing whether or not the parties most intimately concerned with that promise deemed it important enough to demand and give something in exchange for it. Thus, consideration became a criterion for separating those types of promises with which society should concern itself, from those promises which for any number of reasons it might be wisest that society ignore.

BINDING PROMISES

The third social function of consideration is the one upon which the study of contract law has traditionally concentrated. That function is that of determining in particular cases whether or not a promise

23. Willis, *Rationale of the Law of Contracts*, 11 IND. L.J. 227 (1935), Cohen, *The Basis of Contract*, 46 HARV. L. REV. 572-74 (1933).

24. Davis, *Letting Affected Parties Communicate Standards—Exempt Property*, 53 IOWA L. REV. 366 (1967); Davis, *Effect of Employer Approval on Workmens Compensation Decisions—Letting Affected Parties Communicate Standards*, 54 CORNELL L. REV. 97 (1968); Davis, *Letting the Conduct of Affected Parties Play a Meaningful Role in Resolving Disputes Between Adjoining and Concurrent Owners of Real Property*, 22 ARK. L. REV. 1 (1968).

shall be binding. Here again, it is understandable that a legal system of a society devoted to the principle of individual freedom would look to the promisor himself to make this decision. In such an individualistic society, the question whether to enforce a particular promise was quite naturally answered, "Only if the promisor wants it enforced." By inspecting the facts and finding what came to be called consideration, the courts could be satisfied that the promisor desired his promise enforced.

The reason the doctrine of consideration has such great social utility, and although difficult to master, it remains readily accepted, is because at all times the doctrine coincided with the then current values. The very flexibility that makes the doctrine difficult is exactly what makes it valuable. It is only by following the sometimes winding path of the development of the doctrine that a firm, consistent, almost constant first principle of consideration can be found.

AN HISTORICAL PERSPECTIVE

The relationship of modern contracts to ancient systems has long been recognized. In the pursuit of knowledge of modern contracts, the intricacies of ancient systems have been laid bare. However, as meticulous as these historical studies have been, none of the studies have emphasized the problems which the particular civilization was confronting as it created its system of enforceable voluntary obligations. The historical sketch set forth here is not meant to be exhaustive, but introductory. Greatest insight can be achieved by pondering modern practices as one browses ancient ones. One may then see the similarity of problems confronting ancient and contemporary civilizations. Thus, one comes to realize that the changes which have taken place flow not from changing theory, but rather from changes in the techniques of communication, recordation, transportation and most of all, commerce.

Candor demands the recognition that while there is no attempt to mislead, there is a very real tendency to give prominence to those points at which the similarity is most patent. This tendency flows not from a desire to deceive, but rather from the desire to communicate those factors which have contributed to the particular view of consideration herein set forth.

ANGLO-SAXON CONTRACTS

There can be little doubt that the Anglo-Saxon tradition did in fact have considerable influence on the common law. To believe otherwise is to ignore five centuries of Saxon rule and limit the legal history of England as starting from an invasion by a Frenchman. While such a limitation has been thought convenient, some doubt must be expressed as to its validity. For even if a conqueror as esteemed as William could change the legal system overnight, there remains the matter of eliminating rather widely held folk habits of half a millennium's duration. To think that every trace of the Anglo-Saxon commercial system could be ended with such finality, is to credit William with greater efficiency than modern dictators, using vast communications networks, have been able to achieve. Saxon law has influenced the evolution of the common law at least to the extent that it created traditional forms of social conduct upon which our system expands.

The Efficacy of Saxon Obligations

The enforceability of Saxon contracts was based on a system of sureties that had come into being as part of the attempt by civil authorities to replace the physical revenge of instinctive justice with a procedure more in keeping with the demands of an organized society.²⁵ To limit privately determined and privately executed vengeance to tolerable levels, Saxon government provided substitute remedies and a system for enforcing them. They implemented *wergelds*; a set figure to be paid to the kin of the deceased by the slayer.²⁶ To guarantee appearance in and compliance with the court, and thus placate the bloodlust of the injured family, the accused was required to give *borh* (sureties).²⁷

The unique nature of Saxon suretyship, the primary liability of the surety, guaranteed justice would be done.²⁸ The primary liability

25. Laughlin, *The Anglo-Saxon Procedure*, in *ESSAYS IN ANGLO-SAXON LAW* 183 (1876). For an in-depth analysis of Anglo-Saxon contract law see Brody, *Anglo-Saxon Contract Law: A Social Analysis*, 19 *DEPAUL LAW REVIEW* 270 (1969).

26. THORPE, *ANCIENT LAWS AND INSTITUTES OF ENGLAND*, 31-33 (1840).

27. The Laws of Heathar and Eadric §§ 8, 10 in THORPE, *id.*, at 31-33.

28. 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 187 (2d ed. 1898);

of the surety flowed from the fact that the first guarantees, especially in private peace treaties, were no doubt hostages or the delivery of goods to the full amount of the *wergeld*.²⁹ In fact, for a short period during the development, the surety was considered to be a hostage at large obligated to surrender on demand.³⁰ Thus, the primary liability of the surety derived from the knowledge that as a hostage, the surety preferred paying the defaulted amount to suffering the vengeance of the creditor. So effective was this system of sureties to enforce every sort of law, that in due time each man was required to have sureties.³¹

Thus the attempt to overcome the rigors of instinctive justice made use of the very physical violence it sought to end. By inserting a loved one as a buffer between the offended and the offender, the performance of the obligor was assured because the buffer would himself perform rather than suffer the consequences of nonpayment. This tradition of the surety's primary liability, which had its start as the best guarantee in private peace treaties, proved so effective it was assimilated into other commercial undertakings.

Means Of Concluding Agreements

Since the enforceability of voluntary undertakings was literally guaranteed, the primary means of concluding such assumptions of liability shared the common characteristic of reliability.

Sale Before Witnesses

Cattle stealing was a social problem as perplexing as private warfare to the Saxon governments. The laws as early as 688 A.D. provided harsh treatment for thieves.³² However, severe punishment was only one means of offsetting the problem. The other was requiring witnesses to all sales of cattle, so that the purchaser, if accused

LAUGHLIN, *supra* note 25, at 183, 191; Hazeltine, *The Formal Contract of Early English Law*, 10 COLUM. L. REV. 608, 611 (1910).

29. POLLOCK & MAITLAND, *supra* note 28, at 187.

30. POLLOCK & MAITLAND, *supra* note 28, at 187.

31. The Supplements to Edgan's Laws 3 and Echebed's 1, in THORPE *supra* note 26, at 275.

32. Ine 7, 12, 18, 37 and Wihtraed 26, in THORPE, *supra* note 26, at 107, 111, 115, 125 and 43.

of theft, could establish his right.³³ Because it began as a defense to theft, sale before witness has been denied the dignity of contract by at least one expert.³⁴ However, such sales became more than a defense to theft when sureties were also required for efficacy. Ethelred I, 3 orders:

In Case Any One Traffic Without Witness

3. And let no man either buy or exchange unless he have "borh" (surety) and witness: but if anyone so do, let the land-lord take possession of, and hold the property, till that it be known who rightfully owns it.³⁵

Thus, the transacting of business in public was a long-standing, commonplace and rather efficient means of commerce for the Saxons.

The wed Ceremony

The *wed* was a stick. By passing it to the promisee, in full view of the required transaction witnesses, the promisor bound himself to the undertaking.

There are two possible explanations of the *wed* ceremony's significance. In private peace treaties it could easily have been the slayer's spear.³⁶ As such, its delivery uniquely demonstrated the slayer's desire for peace and his full intention to pay the *wergeld*. The other explanation of the ceremony's ability to make a lasting impression, is that it was a carryover from the Continental *festuca*.³⁷ The *festuca* began as the delivery of a special stick having religious significance.

Ergo, either as a symbolic surrender or a resort to the spirits, the delivery of the *wed* was a grave matter, not easily forgotten. The overwhelming import of the *wed* to the Saxon mentality is best evidenced by King Alfred's Laws (871-901) where he relates that he has compiled the laws of his forefathers and states: "At the *first* we

33. The supplements to Hlothar and Eadric 16, in THORPE, *supra* note 26, at 35; Edward the Elder, in THORPE, *supra* note 26, at 159; Aethelstan I 10, 12, in THORPE, *supra* note 26, at 205, 207; Edgan, in THORPE, *supra* note 26, at 275-77; Ethelred I 3, in THORPE, *supra* note 26, at 283; Cnut 23, 24, in THORPE, *supra* note 26, at 389, 391.

34. *Supra* note 14.

35. *Supra* note 26, at 283.

36. Henry, *Forms of Anglo-Saxon Contracts and Their Sanctions*, 21 MICH. L. REV. 79 (1922-23).

37. POLLOCK & MAITLAND, *supra* note 28, at 187; Hazeltine, *The Formal Contract of Early English Law*, 10 COLUM. L. REV. 608, 611 (1910).

teach, that it is most needful that every man warily keep his oath and his 'wed'. . . ."³⁸

Pledges of Salvation

The very real importance to Saxons of the possibility of salvation provided a basis for two more ceremonially concluded contracts. The promisor could literally hand his faith to the promisee as security for the performance in a ceremony not unlike a contemporary handshake.³⁹ The required transaction witnesses could view this ominous pledge, and a subsequent failure to fulfill it would doom the promisor to eternal torment and temporal damnation.

More effectively, the promisor could deposit his chance at salvation with a third party who would be in a position to coerce the promisor's redemption of his faith.⁴⁰ In this form the promisor made his promise and then pledged his faith to a *fideiussor* as security for performance. The *fideiussor* was generally a local bishop or sheriff, who by his temporal authority could coerce performance.

Writing

The early Saxon will was an oral transfer of property concluded before witnesses. When the Church became involved as a major beneficiary it naturally followed that the uniquely priestly skill, writing, was employed to memorialize the contractual exchanges.⁴¹ That the Saxon will was merely a record of a public, oral transfer may best be seen from some documents themselves.⁴²

The adaptation of the clerically initiated practice of writing, to the needs of all members of the land-owning class, soon followed. Documents were far superior to witnesses in land transactions. A transaction witness was sufficient in a cattle sale because the likelihood of all the witnesses perishing before the cattle was slim.

38. *Supra* note 26, at 61.

39. POLLOCK & MAITLAND, *supra* note 28, at 191-92.

40. POLLOCK & MAITLAND, *supra* note 28, at 191-92.

41. HAZELTINE, *Comments on the Writings Known as Anglo-Saxon Wills*, forward to WHITELOCK, *ANGLO-SAXON WILLS* (1930).

42. *See, e.g.*, the wills of Abba and Leof Aethelwold, in THORPE, *DIPLOMATARIUM ANGLIUM AEVI SAXON* 469, 500 (1865); the will of Ordnoth, in WHITELOCK, *ANGLO-SAXON WILLS* 19 (1930).

However, when transferring an eternal asset, land, some more permanent form of proof was required. Similar to the Anglo-Saxon wills, land charters record an oral transfer carried out in public.⁴³

The public *wed* ceremony was the keystone of Anglo-Saxon Contracts. By recording in writing the happening of that event, two additional formal contracts became possible in two situations uniquely susceptible to such recording.

Court Record Contracts

The religious ardor of this ancient culture, the custom of doing business in public and the use of writing by clerics merged to create another ceremony effective to bind a promisor. The bishop was active in the civil judicial system because there was no distinction between ecclesiastical and civil courts; and because he was specially trained in a legal system.⁴⁴ The *fideiussor*, or *wed* ceremonies conducted in open court with the bishop as a witness was an effective means of concluding a contract. The appeal of transacting business, with one witness the party who may eventually have been called on to enforce it, is obvious. No doubt because of its unique enforceability, this became a popular mode of doing business. Bishops, thus burdened with numerous such ceremonies, used their writing skill to create a record protecting themselves from doing injustice because of faulty memory. The making of the court record, in these instances, became the act creating the enforceable promise.

This brief sketch of the Anglo-Saxon law reveals that their practices responded to social problems and at the same time made use of every advanced technique offered by their progress. It is interesting to note the employment by civil authority of the deeply held religious beliefs of the people to foster the enforceability of promises. The civil authorities were probably not grasping at straws by depending on this abiding faith because individuals similarly invoked the hereafter to enforce their personal wishes. One will makes clear the reality of spiritual punishment to the Anglo-Saxons by providing:

[H]e who shall detract from my will which I have now declared in the witness of God, may he be deprived of Joy on this earth, and may the Almighty Lord who

43. ROBERTSON, *ANGLO-SAXON CHARTERS* 45, 59 (1956).

44. POLLOCK & MAITLAND, *supra* note 28, at 40.

created and made all such creatures exclude him from the fellowship of Allsaints on the Day of Judgment, and may he be delivered into the Abyss of hell to Satan the Devil and all his accursed companions and there with God's adversaries, without end and never trouble my heirs.⁴⁵

Of more enduring interest is the observation that each and every means of concluding contracts used by the Anglo-Saxon had singular significance to their society. The public *wed* ceremony, the public sale, pledges of faith, written instruments and court records may seem rather unsophisticated to modern viewers, but to the Saxon culture they were events of ineffable meaning. These ceremonies served to tell Saxons which promises had social importance, which promises ought to be enforced and the requirement of the ceremony gave government a degree of control over private enterprise.

THE DEVELOPMENT OF CONSIDERATION

The classic analyses of the development of the doctrine of consideration trace with masterful precision its growth as the articulation of the requirements for success in the various writs of *assumpsit*.⁴⁶ These studies further indicate that the writs developed in response to expanding demands upon the courts for justice in commercial matters. However, none of these studies reveal, except in the most general way, the causes of the more challenging demands which caused the courts in turn to alter their own requirements for success within their chambers. Rather than repeat the work already accomplished, this paper shall rely on it for the accuracy of the chronology; and attempt to relate that chronology to the evolving English economy and culture. It has been said:

The English law of contract is a body of principle which, with a little free adoption in its formative stages from Roman theory and perhaps Canonist theory, has risen directly out of the social and economic relations it regulates and is certainly none the weaker thereby.⁴⁷

The soundness of this observation will be demonstrated herein.

45. WHITELOCK, *supra* note 42, at 87 (1930); see also *id.* at, 5, 9, 17, 29, 35, 51, 55, 65, 69, 71, 75, 79, and 83.

46. Ames, *Parol Contracts Prior to Assumpsit*, 8 HARV. L. REV. 252 (1894); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 53 (1888); Holdsworth, *The Modern History of the Doctrine of Consideration*, 2 BOST. U.L. REV. 87, 174 (1922).

47. Shatwell, *The Doctrine of Consideration in the Modern Law*, 1 SYDNEY L. REV. 289, 320 (1954).

PROCEDURAL OVERVIEW

Before Assumpsit

In the earliest years of the Thirteenth century,⁴⁸ before the emergence of the writ of assumpsit, the only contract remedies available to English litigants were detinue, covenant, account, and debt.⁴⁹

Debt

Debt had its origin in detinue, the writ used to enforce possessory rights in personal property.⁵⁰ However, the writ soon became distinct from detinue.⁵¹ The initial use of the writ was to enforce the obligation to pay a sum certain as stated in a sealed instrument.⁵² It quickly became the means of enforcing judgments, obligations of record and statutory obligations.⁵³ It was a common practice of lenders in the Thirteenth Century to require from the borrower a recognition of the debt and a judgment for it, even before any money was actually transferred.⁵⁴ This practice enabled execution immediately upon default and thus was a favored security device. It was most useful to professional moneylenders and accounts for a large percentage of the writs filed during the period.⁵⁵

Thus at its inception, successful actions of debt depended on some written instrument or record. However, in 1338 the writ was extended to debts on a contract without a specialty.⁵⁶ This extension meant that one who obtained goods or services and promised to pay a sum certain in return could be sued even if his promise was not in a sealed instrument.⁵⁷ Thus arose the classic *quid pro quo*.

48. CHESHIRE & FIFOOT, *THE LAW OF CONTRACTS*, 4-6 (6th ed. 1945).

49. Ames, *Parol Contracts Prior to Assumpsit*, *supra* note 46.

50. *Id.* at 4; FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 217 (1964); *cf.*, SHIPMAN, *COMMON LAW PLEADING* 114 (3rd ed. H. Ballantine 1923).

51. CHESHIRE & FIFOOT, *supra* note 49, at 4; FIFOOT, *MISTORY AND SOURCES OF THE COMMON LAW* 217 (1964).

52. CHESHIRE & FIFOOT, *supra* note 49, at 4; PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW*, 633-35 (5th ed. 1956).

53. SHIPMAN, *supra* note 50, at 132-38.

54. POLLACK & MAITLAND, *supra* note 28, at 203-04.

55. FIFOOT, *supra* note 50, at 217-21.

56. CHESHIRE & FIFOOT, *supra* note 49, at 4, citing: Anon (1338).

57. Y.B. 12 Edw. 3, T. term (debt.) *But see*: Barton, *The Early History of Consideration* 85 L.Q. REV. 372 (1969) for a date 120 years later. *But see*,

The writ of debt, by the middle of the Fourteenth Century, could be used to enforce sealed or recorded promises of sums certain and similar oral promises where the defaulting promisor had actually received goods or services in connection with his promise.

Covenant

Covenant became a popular form of action by the end of the reign of Henry III (1272). It applied, for the most part, to cases involving land transactions.⁵⁸ However, the most stringent requirement was that there be a sealed instrument for an uncertain amount,⁵⁹ because if a sum certain was stated the proper writ was debt.⁶⁰

Account

Although account is generally discussed as a contract writ, it probably was not.⁶¹ It was brought against guardians of minors, bailiffs (manor managers) and agents to account for money due another.⁶² The duty to account could not be voluntarily assumed, but rather it was imposed by law upon those serving in positions of trust.⁶³ In fact, the successful plaintiff in account obtained only an order requiring an audit. If the auditor found a sum to be due and the defendant still refused to pay, the plaintiff was then required to institute an action in debt to enforce payment of the sum certain as computed by the auditor.⁶⁴

Detinue

As stated earlier detinue was the writ used to assert possessory

McGovern, *Contract in Medieval England: The Necessity for Quid pro Quo and a Sum Certain*, 42 *TEMPLE L.Q.* 173 (1969). Professor McGovern quite ably argues that debt was more contractual in nature than generally thought and, therefore, the 1338 date is misleading.

58. CHESHIRE & FIFOOT, *supra* note 49, at S; POLLACK & MAITLAND, *supra* note 28, at 217-19; Fifoot, 257.

59. FIFOOT, *supra* 50, at 258; CHESHIRE & FIFOOT, *supra* note 49, at S; SHIPMAN, *supra* note 50, at 141-43; POLLOCK & MAITLAND, *supra* note 28, at 216-20.

60. *Id.*

61. CHESHIRE & FIFOOT, *supra* note 49, at 6; FIFOOT, *supra* note 50, at 273; SHIPMAN, *supra* note 50, at 144-47.

62. *Id.*; POLLOCK & MAITLAND, *supra* note 28, at 221-22.

63. CHESHIRE & FIFOOT, *supra* note 49, at 6; FIFOOT, *supra* note 50, at 273; Ames, *Parol Contracts Prior to Assumpsit*, *supra* note 46, at 257.

64. CHESHIRE & FIFOOT, *supra* note 49, at 6.

rights to chattels.⁶⁵ As the conceptual forerunner to debt, detinue had a great influence on the development of contract. The ability of detinue to recover only specific goods evolved, quite naturally, into debt's limitation to recovery of sums certain. However great its influence might have been in this respect, detinue in its own name, made a significant contribution to the development of modern contracts.

In the Fifteenth Century a buyer of goods, who had promised in writing to pay, could sue in detinue to obtain the goods.⁶⁶ One must note that the significance of this is that it constitutes an exception to the requirement of a *quid pro quo*. The justification for this exception was that because the buyer had promised to pay in a sealed instrument, he became at once subject to a suit in either debt or covenant (depending on the certainty of the amount) by the seller, with out regard for the fact of delivery. If the buyer was to be vulnerable to immediate enforcement, fairness dictated that the seller be similarly susceptible. Therefore, the buyer was permitted to assert his right to possess the goods by means of an action in detinue.

However, it must be recalled that the right to bring detinue was restricted to one thought to have property in the goods.⁶⁷ Thus, the rationale became that property in the goods had passed at the moment the bargain was made.⁶⁸ The medieval lawyers viewed this exception to the *quid pro quo* requirement not as the enforcement of mutual promises, but rather as the enforcement of exchanged grants of proprietary rights.⁶⁹

An Observation.

Earlier, reference was made to the tendency of modern theorists to take a rather disparaging view of early contracts. Most modern

65. *Supra* note 50.

66. CHESHIRE & FIFOOT, *supra* note 49, at 4; FIFOOT, *supra* note 50, at 228-29; AMES, *Parol Contracts Prior to Assumpsit*, *supra* note 46, at 257. *Accord*, GLANVILLE, A TREATISE ON THE LAW AND CUSTOMS OF THE KINGDOM OF ENGLAND chapter XIV (Beale Trans 1900) wherein it is noted that in Glanville's time debt was available in sales situations only if there was delivery, part payment or earnest.

67. SHIPMAN, *supra* note 50, at 114-18; POLLACK & MAITLAND, *supra* note 28, at 174-83.

68. CHESHIRE & FIFOOT, *supra* note 49, at 5; FIFOOT, *supra* note 50, at 228-29; AMES, *Parol Contracts Prior to Assumpsit*, *supra* note 46, at 258.

69. *Id.*

analysis concentrates on contract theory after the development of *assumpsit*. At the very least there has been the continued devotion to the distinction between formal and informal contracts. It was earlier contended that a true understanding of consideration (and thereby contract) can only come from eliminating that distinction. There is here no intent to recant that earlier contention; but objectivity demands recognition that there is ample justification for the distinction. However, conceding that the distinction is one possible interpretation of events, is far from agreeing that it is the correct interpretation. In fact, my earlier contention is reinforced by observing the oversights in interpreting those events.

Even the most dubious critic must admit that covenant clearly required a sealed instrument. Further, account rectified not broken promises, but broken trusts. Debt itself grew out of *detinue*, a property writ. And debt depended entirely on some writing or other formality. It is therefore understandable that an analyst might well doubt the contract thrust of these writs.

However, the greatest justification for a pejorative evaluation of pre-*assumpsit* contract theory is the view of the medieval theorists themselves. They did not view what they did as the enforcement of promises, but as the exercise of property rights. The medieval lawyers did not see the enforcement of voluntary assumptions of duty. On the contrary, they saw only the fulfillment of ownership prerogatives. Fortesque said: "If I buy a horse of you the property is straightaway in me, and for this you shall have a writ of debt for the money, and I shall have *detinue* for horse on this bargain."⁷⁰

To whatever extent the low evaluations of early practice may in this manner be justified, the advantage of hindsight must not be lost to the insecurity of those who extended the frontiers of justice. The medieval practitioners spoke in terms of property because that was the familiar and the certain. As all men, they sought to step into the unknown from the very firm threshold of the known. The words they spoke as they ventured forth should not prevent analysts from measuring the meaning of what they did. They enforced voluntarily assumed obligations that had not been before enforced. The words they chose to express in familiar terms what they had done and thus

70. Y.B. 20 Hen. 6, f.35, pl. 4 (1442).

made it acceptable, should not now be used to cloud the significance of their achievement.⁷¹ To do so would not only be unfair, but as stated earlier prevents true understanding.

Assumpsit.

It has been said that the creation of the writ of assumpsit was the start of a modern system of contract.⁷² The full import of this observation emerges when it is coupled with Maine's belief that the movement of all societies is from status to contract.⁷³ The availability of assumpsit as a contract remedy becomes then, from Maine's viewpoint, more than a refinement of contract theory; it is a significant development in Western Civilization.

Assumpsit arose as an extension of trespass on the case, a tort action.⁷⁴ In the form in which it first appeared, assumpsit is difficult to characterize as a contract action.⁷⁵ At first, the writ enabled recovery for misfeasance by one who had undertaken a duty. The classic example of this is the oft discussed *Humber Ferryman's Case* in 1348.⁷⁶ The plaintiff sued the Ferryman who had undertaken to transport a mare owned by the plaintiff across the Humber. The defendant overloaded his boat and thus caused the death of the horse. The defendant contended that a writ in covenant or trespass would lie, but not assumpsit. The court found the writ proper and instructed the defendant to plead.

It is clear that the *Humber Ferryman's Case* (and thus incipient assumpsit) was not so much a case of a broken promise to transport the mare, as it was a case of negligently destroying the mare during transport. A leading expert asserts that the primary purpose of early assumpsit was to overcome the maxim "*Volenti non fit injuria*" (He

71. Professor Plucknett discusses the same sort of verbal conveyance as regards the creation of assumpsit; he makes the added point that the theorists knew exactly what they were doing and purposely chose the familiar words. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 638 (15th ed. 1956).

72. FIFOOT, *supra* note 50, at 338.

73. MAINE, *ANCIENT LAW* 304 (10th ed.).

74. SHIPMAN, *supra* note 50, at 149; PLUCKNETT, *supra* note 71, at 637; Ames, *The History of Assumpsit*, *supra* note 46.

75. PLUCKNETT, *supra* note 71, at 637; FIFOOT, *supra* note 50, at 332-33; CHESHIRE & FIFOOT, *supra* note 49, at 8.

76. 22 Ass. 94 pl. 41 (1348).

who consents cannot receive an injury).⁷⁷ In its earliest applications, *assumpsit* served to overcome the primitive notion that liability for trespass could only result from an unauthorized contact.

A number of attempts were made in the Fifteenth Century to extend *assumpsit* to remedy nonfeasance.⁷⁸ However, this extension to remedy the failure to perform, as well as performing badly, did not occur until the early years of the Sixteenth Century. When this step finally came, it came with suddenness. In 1503 some judges still applied *assumpsit* only to misfeasance.⁷⁹ This reluctance to extend the scope of *assumpsit* resulted from two causes. First, judges recognized the tortious heritage and nature of the writ and were hesitant to hold that nonperformance of a contract constituted a tort. Secondly, to reward such nonfeasance would be to give a remedy for an informal agreement contrary to the policy of covenant.⁸⁰

But suddenly in 1504, *assumpsit* was extended to remedy the failure to perform the promise, as well as performing it in less than a satisfactory manner.⁸¹ And within a year this extension was accepted with little or no dispute.⁸² The rationale for this extension of *assumpsit* to nonperformance was the deceit implicit in promising and failing to fulfill that promise.⁸³ As a result of shifting the emphasis to the deceit, the trespass origins of *assumpsit* faded.⁸⁴ The more subtle deceit rationale, while still tortious in nature, was a much better bridge to a modern contract theory than was the blatantly tortious trespass. By the middle of the century *assumpsit* was fully established as the means for the enforcement of informal, executory promises, and the road to modern contract lay open.

Extensions Of Assumpsit.

At approximately the same time as *assumpsit* achieved total ac-

77. Ames, *The History of Assumpsit*, *supra* note 46.

78. *E.g.*, Y.B. 2 Henry 4, Michs. No. 19 (1400); Y.B. 14 Henry 4, f.18, pl. 58 (1436).

79. FIFOOT, *supra* note 50, at 334-37; CHESHIRE & FIFOOT, *supra* note 49, at 9.

80. CHESHIRE & FIFOOT, *supra* note 49, at 9.

81. Anon. Y.B. Michs, 20 Henry VII, f.8, pl. 8 (1504). *But see*: Baron, *The Early History of Consideration*, 85 L.Q. REV. 372 (1969).

82. Nora, Y.B. Michs. 21 Henry 7, f.41, pl. 66 (1505).

83. PLUCKNETT, *supra* note 71, at 640-43; Ames, *The History of Assumpsit*, *supra* note 46.

84. CHESHIRE & FIFOOT, *supra* note 49, at 9-11.

ceptance, the mid-Sixteenth Century, the King's Bench created *indebitatus assumpsit*.⁸⁵ The King's Bench fostered this form of *assumpsit* because it enabled the court to hear cases that theretofore had been within the exclusive jurisdiction of Common Pleas.⁸⁶ To accomplish this, King's Bench offered a new analysis that enabled recovery under *assumpsit* for wrongs theretofore actionable only by debt. The new theory was that where a debt existed, the law (King's Bench only) would presume a subsequent *assumpsit* (promise) to pay the debt. Once available, the less rigorous practice rules under *assumpsit* brought a considerable amount of business to King's Bench from Common Pleas. However, Common Pleas did not sit idly by and watch potential litigants take their business to King's Bench. The two branches warred; King's Bench seeking to increase its activity by encouraging *assumpsit* as an alternative to debt, and Common Pleas seeking to maintain its monopoly over debt by confining *assumpsit* to its earlier bounds.

Indebitatus assumpsit completed its entry into the common law in 1602. The Exchequer Chamber of all the judges of England, at the prompting of the King's Bench justices, decided once and for all, that *indebitatus assumpsit* was an alternative remedy for the traditional writ of debt.⁸⁷ The plaintiff was given the choice of writs because:

Every contract executory imports in itself an *assumpsit*, for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it; and therefore when one sells any goods to another and agrees to deliver them at a day to come, and the other in consideration thereof agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, both parties may have an action of debt or an action of the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself actions upon the case (*assumpsit*) as well as actions of debt.⁸⁸

The effect of this decision was more than a mere broadening of *assumpsit*. It marked the beginning of the end for actions in debt. Suit in debt was costly; procedurally, debt was more demanding upon plaintiffs and was subject to wager of law, a practice perforce losing favor with plaintiffs.⁸⁹ Therefore, given a choice, plaintiffs

85. PLUCKNETT, *supra* note 71, at 644-45.

86. CHESHIRE & FIFOOT, *supra* note 49, at 11.

87. Slades Case, 2 Co. Rep. 501 (1602).

88. *Id.* at 509.

89. PLUCKNETT, *supra* note 71, at 644-48; Ames, *The History of Assumpsit*, *supra* note 46, at 53.

would prosecute their claims in assumpsit to obtain a more just resolution (trial by jury rather than wager of law) at a lower cost.

However, the widespread acceptance of indebitatus assumpsit had even more far reaching effect than discussed heretofore. The acceptability of the technique of implying promises as a means of attaining social justice which was accomplished through *Slade's Case*, demonstrates that nothing is quite so powerful as an idea.⁹⁰ Once accustomed to the concept of implied promises, the law had no difficulty in allowing other such "promises" to be found and enforced under indebitatus assumpsit. Thus, soon after *Slades Case*, *quantum meruit* and *quasi-contract* emerged.⁹¹

The implied promise of indebitatus assumpsit became the promise implied in fact of *quantum meruit*. Where one provided goods or services for another but no price was set, the courts, accustomed to the rationale of *Slade's Case*, had no difficulty finding an implied promise to pay a reasonable amount.⁹² The first instance of this was in 1609.⁹³ This application of implied promise began where the plaintiff was obligated by law to provide the service. The innkeeper's duty to accept the guest was matched with the implied promise to pay.

Extending the rationale of implied promise to a situation where no promise could be found, took a little longer. *Quasi-contract*, a remedy as if there were a contract, did not appear until later in the Seventeenth Century. It was brought to enforce judgments and statutory duties, or to avoid the unjust enrichment of one party at the expense of another.⁹⁴ It allowed assumpsit to be brought where no promise had been made, and further, where there were no acts by the defendant from which the courts could reasonably infer a promise. The extension of assumpsit to this limit has been recognized as part of the struggle to avoid the expenses, the unjust and dilatory procedure and other difficulties required to successfully prosecute a writ of debt.⁹⁵

90. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 477-78 (1897).

91. Ames, *The History of Assumpsit*, *supra* note 46, at 153; PLUCKNETT, *supra* note 71, at 648.

92. CHESHIRE & FIFOOT, *supra* note 49, at 13; FIFOOT, *supra* note 50, at 561; Ames, *The History of Assumpsit* *supra* note 46, at 53.

93. *Warbrook v. Griffin*, 2 Browne 254 (1609).

94. FIFOOT, *supra* note 50, at 360; Ames, *The History of Assumpsit*, *supra* note 46, at 53.

95. CHESHIRE & FIFOOT, *supra* note 49, at 14.

It was as a substitute for account that assumpsit was first employed in quasi-contract.⁹⁶ Thus, instead of suing for an accounting by one who had received another's money as a fiduciary or by mistake, the plaintiff could sue in assumpsit to enforce a promise that in fact had never been made.

A statutory or customary duty is about as far as one can get from a promise. Yet there was little hesitation in extending indebitatus assumpsit to such duties. This occurred by 1679.⁹⁷ And at the start of the next century, within one-hundred years of *Slade's Case*, promises implied by law through quasi-contract were fully accepted into the Common Law and became the means to enforce foreign judgments.⁹⁸

Summation

The procedural means for the enforcement of contracts evolved over five or six centuries. The process began with the writ of debt, whereby promises were enforceable by either some formality or a fictitious passing of property. The process ended with the application of assumpsit to situations where no promise was ever made. The evolution thus runs the full gamut from enforcing promises by disregarding them, to enforcing duties (where no promise can possibly be found) by means of an assumed promise. The cause for such drastic changes in approach, was the equally drastic change in the economic and social life of England as that nation moved from agrarian feudalism to investment capitalism.

After the appropriate form of action for the enforcement of promises, assumpsit, was created, a new arena for the accommodation of societal change arose. What came to be called "consideration" became the theoretical rubric within which changed social values could be reflected. In the next section the evolution of the writs will be retraced from the point of view of showing how the development of each writ reflects underlying social change. Then the evolution of what is called the doctrine of consideration will be examined to see

96. Ames, *The History of Assumpsit*, *supra* note 46, at 53.

97. *Id.*

98. *Id.*

that still further social growth dictated changes in that doctrine, exactly as earlier progress had forced the new writs.

SOCIOLOGICAL ANALYSIS

Up to the mid-Fourteenth Century the writs to enforce promises were account, covenant, detinue and debt. The significant point is that until that time those writs provided adequate commercial justice for most people, when one considers the economic activity of the era.

The Life in Early Norman England

All through this earliest period of contract law, the economy of England, although indicating some exceptions which were the forerunners of change, can be best described as agrarian.⁹⁹ The primary unit of social and economic life was the manor. Each manor was, to a large extent, a self-sustaining economic unit. It produced almost everything it needed, and most of the commerce within it was accomplished by barter. The use of coined money began on the smaller estates in Twelfth Century with the commutation of feudal services and spread to the larger estates in the next century.¹⁰⁰ The introduction of a convenient medium of exchange fostered a marked degree of change in economic practice. Commerce, as we think of it, grew.¹⁰¹

However at this stage, the great feudal estate and its emphasis on heraldic status, dominated English life. Commercial transfers, as a part of the entire economy, can be for the most part, divided into two categories. First, transfers among the lower classes of vital goods and services (the upper classes received these necessities by way of feudal dues). And the second category, transactions pertaining to vast feudal manors among members of the upper classes. The writs of covenant, account, debt and detinue were sufficient to fill the needs of this era.

99. LIPSON, AN INTRODUCTION TO THE ECONOMIC HISTORY OF ENGLAND—THE MIDDLE AGES 1-1602 (4th ed. 1926); GIBBONS, INDUSTRY IN ENGLAND 65-148 (11th ed. 1925); DIETZ, AN ECONOMIC HISTORY OF ENGLAND 31-56 (1942).

100. DIETZ, *supra* note 99, at 52; LIPSON, *supra* note 99, at 77-89.

101. DIETZ, *supra* note 99, at 81.

*The Relationship of the Writs to the Life***Covenant**

Covenant, the suit on a sealed instrument pertaining to land, was uniquely feudalistic. Those men wealthy enough to deal in real estate also had the social status of participating in the heraldic hierarchy. Their social order was geared to royal pomp and prerogative. The people were in empathy with the ceremonial facets of feudalism and understood them. Therefore, to the feudal Gestalt, the affixing of a seal was a natural, rational and most meaningful ceremony. To those participants, it is quite likely that affixing the seal was more than mere symbolism; it was the essence of act.

It is also worthy of note to observe that in addition to being most meaningful, the sealing ceremony had great social utility. The greater number of the landed gentry were probably illiterate, so transfer by signature was beyond the possible. However, the heraldic order gave each person a distinct coat of arms. A signet ring was highly portable and candle wax everywhere at hand. A man with widespread holdings could readily deal in that land, despite his illiteracy, because his seal demonstrated his assent. Thus the sealing ceremony was a convenient means of transfer, as well as a meaningful one, and thereby promoted the all-important distribution of wealth.

Account

Account similarly reflected the social customs and economic practices of early feudalism. William the Conqueror divided England among his most able and trusted followers. However, for obvious reasons, he did not give these men one huge tract. Rather, the shrewd monarch gave them each a number of large estates in different parts of the island.¹⁰² This absentee ownership required the delegation of supervision to estate managers. Further, the short life span in these rigorous times often resulted in the heirship of minors. No doubt guardians were required to protect the interest of the wealthy orphans.

The writ of account protected the interests of those persons re-

102. GIBBONS, *supra* note 99, at 70-71; DIETZ, *supra* note 99, at 34-35.

quired by the realities of medieval life to entrust their fortunes to another. In this respect, account filled a definite need of the feudal economy. The need to place wealth in the hands of others was common. Further, it was a practice that was readily subject to abuse. Some means of protection was demanded of the courts if the economy was to be maintained. Account was the remedy that filled this need.

Debt

Holmes divided the writ of debt into at least two eras.¹⁰³ There was the formal period of the writ. At this point, the major concern of the law was the proof of the existence of the debt. Therefore, any satisfactory proof of the debt by the plaintiff (a record, a specialty, etc.) led to victory. The reasons for success on a specialty or a record are much the same as was discussed in relation to covenant. All that seems necessary to add is that these formal uses of debt also filled the economic needs of the era. The professional financiers of the era used debt on a record as a security device. The availability of such effective security no doubt encouraged moneylending and in that manner contributed to economic progress. The writ of debt was thus a means by which the government protected individuals engaged in the essential economic function of providing investment capital (even on the limited basis a feudalistic economy had need for capital).

The second stage of the writ of debt was the *quid pro quo* development after 1338.¹⁰⁴ The satisfactory proof of the debt was extended to include a benefit bestowed upon the promisor. It is illuminating to observe the timing of this extension of debt. The use of money grew rapidly in the Twelfth and Thirteenth Centuries.¹⁰⁵ Among the reasons for this marked increase were the silver brought from the east by the Crusaders and the mining of silver in Europe. The conversion of feudal services to money payment placed significant amounts of coin in the hands of the wealthy. At the same time, it left these people without many services necessary to their continued well-being. The answer was quite naturally, to purchase the required services.

103. HOLMES, *THE COMMON LAW*, 213 (Howe ed. 1963).

104. *Id.*, *supra* note 56.

105. DIETZ, *supra* note 99, at 52-55.

In a relatively short period cash was spread throughout all levels of the society. Money transactions replaced barter transactions with increasing frequency. So that by the Fourteenth Century promises to pay money for goods were common; and the need for legal means of enforcing them, overwhelming. This *quid pro quo* rationale is a prime example of legal theory's relationship to economic change.

As earlier noted, this application of debt was supported by a property rationale. The concepts of property and possession were familiar and well understood. The *quid pro quo*, with its fictional property rationale, can now be seen as the convenient bridge in the transition from property to contract. Further, the *quid pro quo* had added import to a culture emerging from a barter economy. Possession of the article for which payment was sought had almost ineffable significance to those so accustomed to barter.

Detinue

The role of detinue as the counterpart of debt has been discussed. However, this writ itself met economic needs of the earliest era. It was used to enforce the return of personal property by bailees.¹⁰⁶ Thus, it protected the interests of persons who found it necessary to place personal property in the possession of others. No doubt such transactions were not then as frequent as they are now. However, it is difficult to envisage any economy, no matter how simple, that does not require some bailment.

From a sociological point of view, the common law, from its very inception, provided remedies to meet the economic needs of the society. The most frequent and essential economic activity was protected. And further, the remedies which were available were acceptable because they fit within the pattern of experiences and actions of the society.

Economic Activity Not Covered by the Writs

Accuracy demands the recognition of economic activity beyond the simple agrarian practices heretofore discussed. There can be no doubt, and it should be kept uppermost in mind, that the agricultural activity of the manor was predominant. The production and distri-

106. SHIPMAN, *supra* note 50, at 114.

bution of food was the overwhelming economic concern of the era. Further, because the social system was also so closely geared to the land, there was little social status attached to non-agrarian activity. The lack of overpowering economic urgency and the lower social standing of non-landed activity, combined to keep such activity from the forefront of English justice. There was trade, flourishing trade, but it was of secondary economic and social significance. Therefore, governmental adjudications of disputes arising from such secondary activity was outside the mainstream of the common law.

From the very start of the era, the woolen trade was important to the English.¹⁰⁷ This trade waned and then flourished.¹⁰⁸ During the reign of Edward III wool fully established itself as a factor in the economy. When Parliament assembled, the judges were seated on woolsacks to remind them of wool's importance to the realm.¹⁰⁹

Wool was England's chief export commodity.¹¹⁰ Raw and processed wool were the cornerstones of trade with the continent that brought iron, timber, furs, wine and beer, hemp, fish and other products to England.¹¹¹ The international aspects of the trade and the exigencies of doing business over great distances created problems beyond the capacity of the law courts.

Domestic trade was carried on in the towns through the craft guilds and in the other areas at markets and fairs.¹¹² A market served local needs, selling produce and the goods necessary to normal life.¹¹³ Fairs on the other hand, served larger geographic areas and were the means of distributing the imported foreign goods.¹¹⁴ Neither fairs nor markets were permanent, ongoing enterprises. Rather, they were held on a periodic basis in different locations. A fair or market might continue for a day or as long as a week and then end, not to reopen for months or a year. The contract remedies of

107. LIPSON, *supra* note 99, at 391.

108. LIPSON, *supra* note 99, at 391-94.

109. DURANT, *THE REFORMATION* 27 (1957).

110. LIPSON, *supra* note 99, at 391-402; GIBBONS, *supra* note 99, at 120.

111. FIFOOT, *supra* note 50, at 290; DIETZ, *supra* note 99, at 85-86.

112. LIPSON, *supra* note 99, at 196-390; GIBBONS, *supra* note 99, at 134-48; DIETZ, *supra* note 99, at 57-79.

113. LIPSON, *supra* note 99, at 220-21.

114. *Id.*

the common law were totally inadequate for this faster-paced, sporadic commercial activity.

However, instead of expanding or extending the remedies available in the courts of general jurisdiction, the medieval English had special courts to adjudicate these unique disputes. Such special jurisdictions follow from feudalism's propensity to analyze all social problems from the viewpoint of status or estate.¹¹⁵

Towns were served by the borough courts, local courts dating back to the Saxon era, concerned primarily with local matters.¹¹⁶ The concern of the borough courts was slightly different than the concern of the manorial court. Each court characteristically concerned itself almost exclusively with matters related to its special interest.¹¹⁷ Therefore, although there might have been a geographic overlap, there was not much dispute between them. The manorial court concentrated on disputes regarding the feudal relationships of the manor; whereas the borough courts devoted themselves to the somewhat different problems of village or town life.

The dispute that did exist was over the place of the borough within the feudal structure. This dispute was eventually resolved in favor of the towns by the ever-rising economic power of the towns; and thus the boroughs, in reality, bought their way out of the feudal pyramid.¹¹⁸ The borough's ascendancy as a social and economic force in medieval England made the borough courts a significant factor and a matter of Royal grant.¹¹⁹ The development that eventually ended their prominence was the demand for centralized government.¹²⁰

A greater number of the commercial disputes were resolved by the fair or, as they were known, piepowder courts. This name is popularly thought to be derived from the dusty feet of the itinerant merchants who availed themselves of its offices.¹²¹ The jurisdiction of the fair

115. DIETZ, *supra* note 99, at 72. One is driven to observe that it may have been feudal Britain that gave rise to the apothegm, "Different strokes for different folks."

116. PLUCKNETT, *supra* note 71, at 83-94.

117. *Compare*, PLUCKNETT, at 83-94 with PLUCKNETT, at 95-100, *supra* note 71.

118. LIPSON, *supra* note 99, at 191-92.

119. LIPSON, *supra* note 99, at 193.

120. PLUCKNETT, *supra* note 71, at 93, 169.

121. LIPSON, *supra* note 99, at 223; BLACK'S LAW DICTIONARY 466 (3rd ed. 1933); PLUCKNETT, *supra* note 71, at 660.

court was granted by the royal charter authorizing the fair.¹²² These courts decided disputes arising out of the conduct of the fair. The non-feudalistic, itinerant nature of medieval commerce, created a need for mobile, quick and responsive justice that was both beneath the feudal dignity of the common law and beyond its capacity. Speed and mobility were achieved by creating a court at the site of the likely dispute. Responsiveness was achieved because the court was composed of men involved with the operation of the fair and therefore totally familiar with the needs of the litigants and with commercial custom.¹²³ It is not surprising then that these courts, both borough and fair, met the demands of the merchants by doing what the common law courts would not and could not do. Fair courts and borough courts enforced informal (unsealed) parol contracts without a *quid pro quo*.¹²⁴

In the tradition of continental practice, the English Law Merchant and Admiralty courts were at first local.¹²⁵ Each town or port involved in the foreign trade had a special court to adjudicate disputes arising from this activity. These courts would hear all such matters, and it is therefore difficult to distinguish the commercial from the maritime questions. Later in the era as the interests of the central authority in commerce and international relations were recognized, the Crown began opening its own courts of this kind.

The early local law merchant took into account the unique problems of adjudicating the rights of foreigners. In fact, it had no difficulty in treating Englishmen from another locality as it would treat a foreigner.¹²⁶ The development that merits them special recognition, over and above the strictly local commercial courts, was their recognition of bonds and promises to pay. The exigencies of trading over great areas, caused these commercial courts to recognize the efficacy of bonds, promises and eventually bills of exchange as a means of discharging debts.¹²⁷ As to the enforcement of contracts,

122. FIFOOT, *supra* note 50, at 293; LIPSON, *supra* note 99, at 223.

123. LIPSON, *supra* note 99, at 255.

124. AMES, *Parol Contracts Prior to Assumpsit*, *supra* note 46; CHESHIRE & FIFOOT, *supra* note 49, at 7; FIFOOT, *supra* note 50, at 293.

125. PLUCKNETT, *supra* note 71, at 657-61.

126. PLUCKNETT, *supra* note 71, at 664-65.

127. PLUCKNETT, *supra* note 71, at 666-69.

these courts concurred with the borough and fair courts. They enforced parol, unsealed, totally executory contracts.¹²⁸

Summation

The belief that the medieval England did not enforce informal contracts results, in part, from different usages of the phrase, "common law." If "common law" describes the law common to all of England and actively administered in the Crown's interest (*i.e.*, King's Bench, King's Council, Common Pleas, etc.) and excludes appeals to Royal conscience (Equity); then it is accurate to state the common law afforded no means of enforcing oral, executory contracts. Difficulty arises because the phrase, "common law" is not generally used in that restrictive, technical sense.

Quite the contrary is true. Generally, the phrase, "at common law" is used in an historical rather than technical sense and thereby should include all court systems and courts. Expanded in this manner, it has been shown that executory parol contracts were in fact enforceable "at common law".

To enforce such contracts in medieval times however, a litigant had to pursue his claim in a special court, familiar with the special customs of persons who of necessity conducted their affairs by means of such contracts. For our purposes at this point, it is sufficient to note that in these specialized courts different standards for success were demanded of plaintiffs. These different standards were a result of the then unique nature of the transactions in dispute. Oral, informal contracts were enforceable in these courts because these courts understood the portentous nature of parol, executory, unsealed promises to men of commerce. On the other hand, the courts under the more direct influence of the Crown did not enforce executory unsealed promises because in their role as the judicial arm of land based, militaristic feudalism, informal executory promises had no meaning whatsoever to them.

At this point it seems worthwhile to reinforce the earlier observation of the shortcomings of the strictly technical analysis of consideration and contract.

Technical analysis, in addition to ignoring the sociological import

128. PLUCKNETT, *supra* note 71, at 665.

of doctrine, has also generally limited itself to "common law" in the precise restrictive, technical sense. This limited view resulted in the failure to observe informal contracts as a meaningful, albeit secondary, part of even the earliest feudalistic life. From this initial omission has come the lack of insight, earlier decried, into the later developments of the "common law" itself—even within the restricted area to which technical analysis has limited itself. By expanding its area of study to include the other courts, technical analysis would have seen the "common law" (in the broader sense) as responsive to the economic and social drives of the populace. From the awareness of this responsiveness would have come an understanding of seemingly inconsistent doctrinal developments. And it might well be added that observation of this responsive quality of law aids in understanding the very essence of a legal system having individual liberty as its fundamental goal.

The facts are simply that the earliest era of the common law—in the restrictive sense—could, and therefore did, enforce the vast majority of its transactions by way of the writs of account, covenant, debt and detinue. The proof necessary for success in these writs consisted of facts having great meaning to that culture because they went to the essence of either the social or economic system of that era. Concurrent with, but not alternative to these writs, were remedies in less socially or economically important courts. These less prominent courts filled the breach left by the land oriented, feudalistic courts of so-called general jurisdiction. These other lesser courts served special needs with special remedies. It should come as no surprise, then, that as the unique transactions become the ordinary economic activity, the courts of general jurisdiction absorbed the formerly unique practices of the specialized courts.

The point is, that even at the early period of medieval times, there was at least in theory, some means of enforcing every transaction that took place. The only question was in which court any particular transaction could be enforced. One reason modern scholarship has not captured the essence of contract has been the failure to articulate and pursue this point.

The transactions which are today of great social and economic import, were in early times so insignificant as to be beneath the direct involvement of the King's justices. By limiting scholarly scrutiny to

the efforts of only the King's courts, the attempt to explain commercial law has been confined to the thoughts of men who did not deign to deal in goods. Therefore, the strictly technical analysis has literally been an attempt to explain investment capitalism in the language of chivalry. The commercial rules of medieval times which are most informative for the modern era, were ignored because they were not administered by the King's feudalistic courts.

It will be seen that as the economic and social realities drove feudalism from England, the King's courts merely assimilated what had done before by other courts. As transactions theretofore of limited importance, became important enough to the realm to require the King's justice, the King's courts adopted the established, workable solutions. As commercial promises which had earlier had portent only to those outside the mainstream of feudalism (merchants) acquired national import, they demanded the King's protection. There was no change in law, merely forum. And what the King's justices recognized as meaningful to the enforcement of a promise, changed accordingly. It was old wine in rewashed bottles, moved to a new cellar, and guarded by a wary, somewhat reluctant steward.

English Life and the Creation of Assumpsit

It is a great temptation to attribute progress of any sort to a given number of cataclysmic events. However, candor demands the admission that social development is a continuum made up of various factors. As well as events which have for some reason attracted attention, progress is a salmagundi of attitudes, counter-attitudes, emotions, ideas, ambitions, hopes and conquered evils mixed to constantly varying recipes, but all seasoned with what may be called social inertia. Despite the knowledge that to deal solely in events is to merely scratch the surface, one must follow those events because their record is all the remains of the era. However, as the events are enumerated, one should keep in mind that commerce constantly grew throughout the era because of the fact that a better standard of living could be achieved for more people through trade, than could be had by economic isolationism. Then as now, economic intercourse was more efficient than even the most sophisticated self-sufficient unit. At best, the events alluded to give impetus to or provide focus for

what was in all likelihood inevitable. There is no intention to prove a causal connection; the mere coincidence in time is sufficiently illuminating.

The early years of the Fourteenth Century saw England achieve, comparatively speaking, a higher economic plateau.¹²⁹ The towns had grown, industry developed and as earlier noted, the commutation of feudal services was an ever increasing practice that put money into circulation. Of course, all was not perfect, but England had come far in the two centuries-plus since William's victory. The fortunes of the laboring class had risen with the growth of industry and had received added impetus when the famine early in the century resulted in higher wages for the survivors.¹³⁰

The year of 1348, in which the *Humber Ferryman's Case* was decided, seems an unusual one in English history. It is one of those years in which a number of forces seem to come together in a vortex before thrusting off in new directions. A mushrooming economy, domestic political contentment resulting from Edward III's need for money to fight France and victories over the French at Crecy and eventually Calais marked the years immediately preceding 1348. Then in this same year,¹³¹ the Black Plague came to England. The plague overwhelmingly enhanced the value of labor and pushed the economy to further industrialization as the resulting higher wages attracted the survivors. Although they coincide, it seems more than a coincidence that 1348 also saw the start of *assumpsit*, starting the law irretrievably down the road to modern contract.

English Life After Assumpsit

The years following the first attack of the Black Death were followed by unrest and discomfort of all sorts. The Plague itself returned periodically throughout the following century.¹³² The ranks

129. GIBBINS, *supra* note 99, at 149-50; DURANT, *supra* note 109, at 37-39.

130. GIBBINS, *supra* note 99, at 151.

131. There seems to be some disagreement in the counting of the years of Edward III's reign. Different experts have placed both the Humber Ferryman's Case and the Plague in 1349 and others have placed them in 1348. I have chosen 1348 as the year for both, not out of any conviction but rather out of belief that both occurred in the same year and that clarity is aided by arbitrary selecting the earlier year for each.

132. DURANT, *supra* note 109, at 39.

of the English nation were decimated three times over,¹³³ causing every human endeavor from theology to agricultural to pause, if not to disintegrate. The cost of labor zoomed and all other costs spiralled in their turn.¹³⁴ Statutes seeking to re-establish the economic stability of pre-Plague days were enacted. These laws sought to roll-back all costs by returning wages to an acceptable level.¹³⁵ This ordinance was doomed to the same fate as any other act attempting to repeal the law of supply and demand; it was honored most in its breach. Subsequent statutes enacted to reinforce the original attempt to return to economic stability demonstrate that the problem persisted throughout the era.¹³⁶ None of these laws had any effect other than earning the ire of the people. Social conflict between the classes grew with each enactment. Churchill offers as evidence of the social conflict and unrest the fact that in the sixteen years between 1351 and 1377 Common Pleas heard nine-thousand breach of contract cases.¹³⁷ Whether this proves his point is debatable, but it does show a definite trend in the law.

Simultaneous with attempts to rollback wages, the Crown levied taxes seeking to raise funds for further military adventure. Discontent with Church wealth, power, and politics caused further unrest. Dissident prelates spoke out and were heard by a people fearful of the horrible death and resentful of the medieval cost/price squeeze within which they were trapped. The general unrest took direction and culminated in the Peasants' Revolt of 1381.¹³⁸ The revolt was crushed by the brave and treacherous Richard II, who quickly revoked all the concessions previously granted in his suit for peace.¹³⁹ Regardless of the sudden final victory for the Crown, the specter of conflict between the classes loomed large and real for all Englishmen for the next century.

133. DURANT, *supra* note 109, 39; GIBBINS, *supra* note 99, at 152.

134. DURANT, *supra* note 109, at 39; GIBBINS, *supra* note 99, at 151-57.

135. 23 Edw. 3 Stat. 1 (1349).

136. 25 Edw. 3 Stat. 1 (1350), 31 Edw. 3 Stat. 2 (1357), 34 Edw. 3 Stat. 1 66 9-11 (1360). 1 Richard II Stat. 1 66 (1377), 12 Richard II c.c. 3-7 (1388).

137. CHURCHILL, *THE BIRTH OF BRITAIN* 270 (Bantam ed. 1963).

138. *Id.*, at 268-76; DURANT, *supra* note 109, at 37-48 (1957); GIBBINS, *supra* note 99, at 162-70.

139. One expert (GIBBINS, *supra* note 99, at 170-79) asserts that the insurgents emerged victorious despite their rapid retreat. This assertion is based on the relative stability and well being that existed after the Revolt. One is constrained to

The century that followed the Revolt was filled with internal struggle for the Crown of England. It featured the famous Wars of the Roses between the Houses of York and Lancaster and culminated with the establishment of the Tudor Kings in the person of Henry VII.¹⁴⁰ Industry and commerce grew, spurred in part by the comparatively fewer workers needed to raise sheep and make wool than were necessary for crop production.¹⁴¹ The Crown began encouraging industry by taking steps to require the English wool be manufactured into cloth instead of exported for conversion.¹⁴² Ship building, exploration and commerce were similarly promoted.

The one hundred fifty years following the first Plague brought feudalism to its knees. Workers were scarce; they developed wants, and the realities of production and distribution were on their side. Moreover, the nobles although justifiably wary of the common folk, warred among themselves to gain the throne. Their success in butchering each other removed a great obstacle from the path of the rising lower and middle classes.

The economic and social changes following the Peasant Revolt and the countervailing protective wariness are reflected in the unsuccessful attempts, mentioned earlier, during the Fourteenth Century to extend *assumpsit* to nonfeasance cases. The ultimate successful extensions of that writ in the Sixteenth Century mirror in the courts the triumph of mercantilism over feudalism.

The Scene for the Extensions of Assumpsit

The reign of Henry VII (1485-1509) was marked by his concern for commerce.¹⁴³ He granted concessions to merchants; he personally financed their expansion; he promoted their interests by negotiating treaties eliminating tariffs. Industry was throwing off the traces of control by artisan's guilds.¹⁴⁴ The great explorations

observe that tranquility can result equally from either oppression or contentment; and that economic gain flows more often from scarcity of supply than from largesse of the wealthy. Wary, may be the most apt description of the English national mood for over a century following the Revolt.

140. DURANT, *supra* note 109, at 106-09.

141. GIBBINS, *supra* note 99, at 180-86; LIPSON, *supra* note 99, at 115-30.

142. GIBBINS, *supra* note 99, at 192-93.

143. DIETZ, *supra* note 99, at 139.

144. GIBBINS, *supra* note 99, at 196.

were underway and they engendered enterprise. The merchant class moved to the forefront of English society.

It is no wonder then, that by 1504 *assumpsit* was extended to provide a true remedy for breach of contract. At this point, the King's justices could comprehend the injury resulting from the total absence of performance as well as the injury from negligent performance.

In 1504 the feudalistic Gestalt was replaced with a merchant Gestalt. Trade and commerce had replaced the agriculturally oriented manor as the essential element of English economic effort. Henry VII, distrustful of the nobles who survived the bitter struggle that made him King and in all likelihood recognizing the inevitable, bestowed Royal favor upon the merchants. These former stepchildren of the feudal social order gained social acceptance, political power and economic security from the man who stood atop the feudal pyramid. The common law courts in extending *assumpsit* were merely facing up to reality. The informal executory promise of traders had replaced the ceremonious, pompous, dynastic land transfers of feudal nobles, as the basic unit for the transmission of English wealth. The interests of the peddlers had become the interests of the throne, and therefore had to be protected.

Moreover, along with merchant interests, the common law courts adopted merchant values. Informal executory promises had gained the stature and acceptability of the ceremonial livery of seize or equally ponderous seal. The courts now appreciated the portent of merchant promises, so they enforced them. Because they could now fully appreciate such promises, they enforced them exactly as they had formerly enforced the familiar feudal acts of transfer.

As commerce continued its growth, the Crown and the courts continued to expand their understanding of it and its values. Therefore, by mid-century *assumpsit* was fully established and *indebitatus assumpsit* beginning.

In 1558 Elizabeth I ascended to the throne. She recognized the emerging middle class as a source of power and trade vital to her nation. In addition to the stimulus rising prices gave to industrialization, the Queen also spurred economic growth.¹⁴⁵ She reversed the

145. W. & A. DURANT, *THE AGE OF REASON BEGINS* 46-50 (1961).

debasement of currency begun by Henry VIII; she granted monopolies in the production and distribution of many goods. She encouraged new industry and chartered the merchant adventurers. It is no accident that the famous East India Company began during her reign. Ship building reached its zenith and the English Navy and merchant fleet grew. Empire and enterprise became inextricably intertwined leaving feudalism far behind.

The full acceptance of *indebitatus assumpsit* came with *Slade's Case*, near the end of Elizabeth's reign. Seven years later, in 1609, *quantum meruit* was created. Notice that it took one hundred and fifty years (1348-1504) to extend *assumpsit* from a basically tort action to a true contract remedy. Once that was done it did not take quite so long to find additional uses for the writ.

As stated earlier, the common law went from enforcing promises by ignoring them to concentrate on their form, to enforcing promises where none was made and none could even be reasonably presumed. This complete reversal in the law merely reflected an equally drastic shift in English economic and social life. In the next section it will be shown that the further developments in the English economy were reflected by modifications of the doctrine of consideration. The modifications of consideration all took place under the same writ, *assumpsit*, rather than by the creation of new writs or by extensions of existing ones. In other words, the doctrine of consideration replaced the writs as the legal battlefield for the attempts to make the law responsive to the needs of the people.

THE EVOLUTION OF CONSIDERATION

As soon as the common law began to enforce informal, executory promises, the question became which of such promises to enforce. It was as obvious then as it is today, that not all promises could or should be enforced. The doctrine of consideration became the means of separating the commercial wheat from the non-commercial chaff. The actual molding of the doctrine,¹⁴⁶ as well as the choice of the term *consideration*,¹⁴⁷ is the result of an amalgam of influences. Roman

146. Ames, *The History of Assumpsit*, *supra* note 46; Holdsworth, *Modern History of the Doctrine of Consideration*, 2 BOSTON UNIV. L. REV. 87, 174 (1922).

147. Holdsworth, *supra* note 146, 174.

theory, Continental practice, Equity's practice and the past practices of the Law itself, all entered into the formation and articulation of the doctrine. The best description of the doctrine is that it is a statement of the requirements for success in *assumpsit* and the extensions of that writ. And it is this very description of the doctrine which also best describes its major shortcoming, as mentioned earlier. As a statement of the procedural requirements for success in *assumpsit*, the doctrine—as presently articulated—is a paradigm rather than a definition. In its present form, the doctrine merely describes everything that has ever led to success in *assumpsit*; it does not give any indication *why* any particular set of circumstances were or were not successful. To determine why particular concepts appear on the list of successes in *assumpsit*, the social and economic climate of the Empire must be understood.

Entreprenurial England

It would be easiest to describe the economic development of this era as merely a continuation of the transition from feudalism already discussed. However, the continuing commercial achievements in this era that the feudal Gestalt finally and fully gave way to a new set of experience and values—an *entreprenurial* one.¹⁴⁸ Some of the more illuminating commercial developments will be set forth to show the full extent of the shift in the English national attitude.

Foreign trade expanded in both the East and West.¹⁴⁹ England traded with the Spanish and English Colonies in the New World. Simultaneously, trade with India, Arabia and Africa flourished. During the reign of James I (1603-1625) foreign commerce totalled approximately £ 2,000,000.¹⁵⁰ It tripled in the next century; and by 1760 had more than doubled again to £ 14,500,000.¹⁵¹ Fishing, shipbuilding, coal mining, iron production, and other industrial activity increased dramatically.

However the relationship of foreign trade and industrialization was an ever accelerating spiral. The colonies demanded goods, causing

148. In 1660 practically all tenures were converted to common socage, thereby ending the incidents of tenure. 12 Cav. 2 c.24.

149. GIBBINS, *supra* note 99, at 297-304.

150. GIBBINS, *supra* note 99, at 298.

151. GIBBINS, *supra* note 99, at 298.

the merchants to demand them from manufacturers. The producers in turn, demanded and received better machinery. Increased production efficiency created the need and desire for new and expanded markets. This need for expansion became a major influence in the politics of the Empire. Wars were fought to gain access to or monopolies in certain trading areas.¹⁵² Trade and industry permeated the national and international thinking of the government; and commercial advantage as a means of national expansion found its way into the English tradition.¹⁵³

Other facts point to the expanding entrepreneurial Gestalt throughout this era. Commercial banking became established during the Seventeenth Century.¹⁵⁴ All sorts of venture Capital promotions appeared; the wild schemes trading on the successes of the worthwhile. And numerous books dealing with commercial topics were published. The totality of the conversion from feudal goals to commercial ones is best depicted by the almost speculative dealings in land.

The Crown was forced to sell off much of its land, especially after 1605.¹⁵⁵ Most illuminating is that this crown land was sold to London financiers, who subsequently subdivided it and resold. Land speculation existed on all levels of the feudal pyramid, and the social exclusivity of land ownership was all but destroyed. Sir Edward Coke, for example, at his death in 1634 owned ninety-nine manors; but these constituted only an inventory on hand at the end of his career.¹⁵⁶ At least the same number had been bought and sold by him during his lifetime. Equally demonstrative of the emerging entrepreneurial attitude is that between 1601 and 1640, forty percent (240) of the six hundred manors in two counties were sold.¹⁵⁷ Further, of the persons owning land in another county in the year 1620, two-thirds had liquidated their holdings by 1668. This speculative approach was a far cry from the static, dynastic relationship with land that had been fundamental to feudalism.

152. GIBBINS, *supra* note 99, at 284-304.

153. GIBBINS, *supra* note 99, at 359-80.

154. GIBBINS, *supra* note 99, at 299.

155. Thorne, *Tudor Social Transformation and Legal Change*, 26 N.Y.U. L. REV. 10, 14 (1951).

156. *Id.* at 13.

157. *Id.* at 14.

Feudalism had intertwined political power, social prestige and land ownership. Therefore, the drastic changes in land ownership which took place are indicative of equally meaningful social and political changes. By 1640 the House of Lords consisted of a nobility, most of whom had received their titles since the turn of the Century.¹⁵⁸ Furthermore, the members of Commons were wealthier than their counterparts in Lords.¹⁵⁹ This greater economic power quite naturally evolved into political domination.

In this era, the same factors which had earlier forced the common law courts to reconize parol executory contracts, shaped the emerging doctrine of consideration. In other words, it will be seen that the evolution of the doctrine of consideration merely reflects the changing social and economic conditions and attitudes of the times, exactly as the same factors had earlier created the doctrine. The social, political and economic forces at play in Seventeenth Century England made it inevitable that the doctrine of consideration would become exactly what it did. This is not to imply that the doctrine is incorrect, unwise or unworkable. Rather the intent is to demonstrate that the doctrine, as the creature of economic, social and political change, contains within itself the means to accommodate such change.

The Basic Elements

The basic criteria for sufficient consideration (promise or act, bargained for and given in exchange for the promise, and constituting either a benefit to one or a detriment to the other) were all hammered out within a short time after the common law began enforcing parol executory contracts. The chronology offered here is intended for convenience rather than accuracy. Furthermore, because these elements all were evolved almost simultaneously, a chronology is relatively unimportant. And at least in the world of books, if not the real world, these elements did come forth together.¹⁶⁰

Bargained-for Test

From the point of view of legal theory, the bargained-for test of

158. *Id.* at 14-15.

159. *Id.*

160. 2 ST. GERMAIN, *DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT OF THE COMMON LAW*, ch. 24 (1532).

consideration was created to distinguish between executed consideration, which was effective to bind a promise and a past consideration, which was not.¹⁶¹

When the common law had allowed debt on a *quid pro quo* (1338) and again when it permitted a prior debt to support a promise to pay that debt (special assumpsit, 1542) it solved one kind of problem, but, in so doing, laid the groundwork of another. In the interim (1504) it had extended assumpsit to enforce promises where the promisee had incurred a detriment. Thus in one line of cases, the problem became deciding whether a particular promise was the traditional debt on a *quid pro quo* or a valid special assumpsit to pay an existing debt. Or, on the other hand, was this promise merely seeking support from some prior act done by the promisee for which he had been compensated or for which he had never expected a compensation. It was necessary to determine which because if the promise was either a debt on a *quid pro quo* or a special assumpsit, the law would enforce it. If however the promisee was seeking to enforce the promise on the basis of some gratuitous or already compensated former deed, the common law certainly had no tradition of enforcing such and did not care to do so. The means of distinguishing between those differing kinds of bygone acts was the bargained-for test. If the bygone act had been given at the request of the present promisee it was likely to be the *quid pro quo* or special assumpsit situation as opposed to merely a former act of goodwill.¹⁶²

From an historical point of view, the bargained-for test first was pondered in the famous *Doctor and Student*.¹⁶³ It obtained official sanction in *Andrew v. Boughey* in 1553,¹⁶⁴ and was spelled out in no uncertain terms in 1568:

By the opinion of the Court it (the action) does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of the servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. But in another like action on the case brought upon a promise of twenty pounds made to the plaintiff by the defendant in consideration that the plaintiff *at the*

161. *Supra* note 146, at 174.

162. *Supra* note 146, at 174.

163. *Supra* note 160.

164. (1553) Dyer f. 76a.

*special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued [at] the request of the defendant.*¹⁶⁵

From the sociological analysis point of view it is readily observed that the bargained-for test mirrored the same emerging entrepreneurial attitudes which had forced the acceptance of *assumpsit*. The bargained-for test had appeal as a decision making device because it had a viable relation to the world in which the courts found themselves. It was, as it is *au courant* to say, relevant. Earlier, it was pointed out that the legislative branch of English government had, in this era, begun to take on a middle class or merchant class appearance. It does not seem beyond the realm of the possible that the judicial branch of government went through the same metamorphosis. The bargained-for test of consideration came into existence because it gave judicial sanction to the very essence of commerce—the exchange—in a society committed, consciously or unconsciously, to becoming a commercial society.

Promises

Promises as consideration were recognized so quickly as to have almost no history.¹⁶⁶ A promise, as the very essence of the writ of *assumpsit*, could not be denied effect in that writ. Thus mutual promises, conforming to the bargained-for test, were from the start consideration for each other.¹⁶⁷

From a sociological point of view, another appeal of a promise to the entrepreneurial Gestalt emerges. The merchant mentality is extremely sensitive to what the future may bring—a serious miscalculation could bring financial disaster. When one committed himself to act in a certain way at some future time, he also committed himself to some definite assessment of the future. Therefore, a promise made in the economic realm, subjected to the vagaries of the future, some degree of wealth. The vulnerability of wealth had ineffable meaning to the Sixteenth Century merchants.

165. *Hunt v. Bate* (1568) *Dyer* ff. 272a, b. (Emphasis added).

166. Holdsworth, *supra* 146, at 93.

167. 4 *Co. Rep.* 92b (1603).

The Detriment/Benefit Test

This test is the definitive demonstration of the paradigmatic nature of the doctrine of consideration. It is nothing more than an enunciation in convenient form of the *quid pro quo* of the writ of debt, as extended, and the injury so vital to assumpsit, as an outgrowth of case.

After the common law recognized assumpsit and began the search for the elements bringing success in the new writ, the courts had no difficulty in accepting the familiar real contract of debt on a *quid pro quo*.¹⁶⁸ If the possession of goods was so significant to the far less sophisticated economy of the Fourteenth Century, it is patent that it would be of even greater meaning in the economic atmosphere of the Sixteenth.

Detriment to the promisee is the very essence of consideration.¹⁶⁹ This detriment test merely reiterates in contract doctrine, the tortious injury upon which the original assumpsit writs were based. Without such a detriment, success in assumpsit was and is impossible because without such an injury there would never have been such a writ.

As were the other elements of consideration, the detriment test was recognized in the *Doctor and Student*.¹⁷⁰ The efficacy of detriment as consideration received wide judicial acceptance in the late Sixteenth and early Seventeenth Centuries.¹⁷¹

It is most enlightening to note that the first articulation of the benefit/detriment test is attributed to Lord Coke. Earlier it was pointed out that Coke was truly a man of his time; he was equally adept in commerce and law. In articulating the detriment/benefit test, he blended the law with economic truth. When he said, "[E]very consideration that doth charge the defendant in an assumpsit must be to the benefit of the defendant or charge of the plaintiff;"¹⁷² he was injecting his understanding of the world—his values as an entrepreneur—into the arena of legal theory. The benefit/

168. CHESHIRE & FIFOOT, *supra* note 49, at 11; FIFOOT, *supra* note 50, at 400.

169. AMES, *The History of Assumpsit*, *supra* note 46; *supra* note 146, at 174.

170. *Supra* note 61.

171. *Supra* note 146, at 174.

172. *Stone v. Wythipol* Cro. Eliz. 126 (1588).

detriment test seems to reflect the attitudes of men of commerce and investment. The detriment test voices the quintessence of commerce—invest (incur a short term detriment by parting with wealth) in anticipation of gain.

A Tangential Doctrine

The development of the law's refusal to evaluate the adequacy of consideration, concurrent with the development of the doctrine itself, proves the doctrine's origins in an entrepreneurial Gestalt. The reluctance to evaluate the litigants' bargain emerged along with the other rules, in the second half of the Sixteenth Century.¹⁷³ This respect for the bargain struck by the parties mirrors the typically entrepreneurial demand to be left free to profit by greater wisdom. The last thing a wily Elizabethan businessman wanted was to be denied the fruits of his insight by the intervention of the courts. Social and political power strong enough to have kept the courts from these most tempting evaluations, must have also molded the other facets of the doctrine. Each and every facet of the doctrine of consideration is the unique product of the social, economic and political climates and attitudes of a nation irreversibly committed to commerce.

THE EXCEPTION THAT PROVES THE RULE

The famous rule of *Foakes v. Beer*,¹⁷⁴ where the House of Lords decided that a promise to pay a liquidated judgment debt is not consideration for either the creditor's waiver of interest or a promise not to enforce the judgment, is the best testimony to the validity of a sociological analysis. In that case, the Lords did not respond to the needs of the new economic era, and their own words express their misgivings. They, in ruling as they did, retained a rule the wisdom of which they candidly questioned. However, to fully appreciate the forces pulling at the Lords, one last look at England's economic growth is required.

THE INDUSTRIAL REVOLUTION

The expanding commerce of the preceding two centuries created

173. *Sturlyn v. Albany Cro. Eliz.* (1587).

174. 9 App. Cas. 605 (1884).

new demands and new problems. Industry grew and agriculture became more efficient in response to the emerging realities. England had become so much a commercial country that even her scientists were practical men. To a marked degree, English scientists tended toward research which promised industrial advantage.¹⁷⁵ A series of inventions enabling mass production of cloth was the beginning of the new era in English life.¹⁷⁶ It marked a change of kind rather than degree because entrepreneurial interest and emphasis shifted from trading to manufacture. England changed from a mercantile economy to an industrial one. The Industrial Revolution was the culmination of the economic evolution heretofore discussed. Therefore, the results of this change in English economic life, brought together all the factors which influenced contract doctrine.

The consequences of the Industrial Revolution are still being uncovered. As a result, no litany of changes can hope to be complete. However, the Durants list the major consequences of the Revolution.¹⁷⁷ Highlights from that list are sufficient for our purposes. They believe the Industrial Revolution: (1) proliferated inventions and machines, completely transforming western industry; (2) moved economic power from guild controlled home manufacture to a system of capital investment and free enterprise; (3) industrialized farming and fostered scientific agriculture; (4) promoted scientific research, both basic and applied; (5) gave England control of the seas and of the most profitable colonies. Forced other nations to follow England's lead; (6) changed the English character and culture by increasing the population and industrializing it; shifted the population to the north and west, closer to raw materials, transformed the pastoral countryside into manufacturing enclaves and created the urban slum; (7) depersonalized and made war far more efficient; (8) speeded and improved transportation and communications; and thus made feasible greater industrial units and enabled government of larger areas; (9) generated democracy because the rising entrepreneurial class sought the support of the masses; (10) forced the wider dissemination of education to meet the rising demand for individuals capable of coping with the advanced technology; (11) dis-

175. W. & A. DURANT, *ROUSSEAU AND REVOLUTION* 670-71 (1967).

176. GIBBINS, *supra* note 99, at 343.

177. *Supra* note 175, at 680-82.

tributed goods and services among more people; (12) sharpened the urban mind but dulled the appreciation of beauty; (13) altered the intellectual approach to various problems; economic analysis of human events became common; (14) the scientific approach so necessary to physical sciences was applied to other human endeavors and religious belief waned; (15) the last item on the list is so perceptive an intermingling of industrial and social change that it merits repeating:

The Industrial Revolution transformed morality. It did not change the nature of man, but it gave new powers and opportunities to old instincts primitively useful, socially troublesome. It emphasized the profit motive to a point where it seemed to encourage and intensify the natural selfishness of man. The unsocial instincts had been checked by parental authority, by moral instruction in the schools, and by religious indoctrination. The Industrial Revolution weakened all these checks. In the agricultural regime the family was the unit of economic production as well as of racial continuance and social order; it worked together on the land under the discipline of the parents and seasons; it taught co-operation and molded character. Industrialism made the individual and the company the units of production; the parents and the family lost the economic basis of their authority and moral function. As child labor became unprofitable in the cities, children ceased to be economic assets; birth control spread, most among the more intelligent, least among the less, with unexpected results to ethnic relations and theocratic power. As family limitation, and mechanical devices freed woman from maternal cares and domestic chores, she was drawn into factories and offices; emancipation was industrialization. As the sons took longer to reach economic maturity made premarital continence more difficult, and broke down the moral code that early economic maturity, early marriage, and religious sanctions had made possible on the farm. Industrial societies found themselves drifting in an amoral interregnum between a moral code that was dying and a new one still unformed.¹⁷⁸

Yet the House of Lords, subjected to the combined pressures of all these changes, did not succumb. And in remaining steadfast, they revitalized for the Nineteenth Century and anachronistic, as well as erroneous, doctrine. Their own words best portray the difficulty in withstanding progress.

FOAKES V. BEER

An analysis of this case is a study of the legal craft itself. It proves the profound wisdom of Maitland's observation about the writ system.¹⁸⁰ *Foakes*, an action in modern contract (assumpsit),

178. *Supra* note 175, at 682.

179. *Supra* note 174.

180. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 2 (1909): "The forms of action we have buried, but they still rule us from their graves."

relied on the authority of *Pinnel's Case*,¹⁸¹ decided almost three hundred years earlier under the writ of debt. It may be observed that one reason the buried writs ruled from their tomb was that despite the fact their memory lingered, few understood their full meaning.

Debt, with its origins in *detinue*, was in essence a property writ. It did not enforce a promise; it confirmed existing property rights. The inappropriateness of deciding a contemporary contract question by the application of a property principle is one of the underlying problems of the doctrine of *Foakes v. Beer*.¹⁸²

Another irony in *Foakes* is that the Lord's in fact adopted the *obiter dictum* of *Pinnel*. Careful reading discloses that *Pinnel's Case*¹⁸³ was decided in favor of the creditor because the debtor failed to plead that the payment of the lesser amount was made in satisfaction of the greater amount due. The discussion of the sufficiency of consideration by the court in *Pinnel* was therefore superfluous as well as inappropriate. And when one recalls to mind the competition between Common Pleas and King's Bench, one can only question the generosity with which the gratuitous discussion of consideration was undertaken by the Court.

However, the consummate irony of the doctrine is the reluctance, if not outright regret, with which it was announced. The debtor's counsel pointed out that:

There is no reason in sense or law why the agreement should not be valid, and the creditor prevented from enforcing his judgment if the agreement be performed. It may often be much more advantageous to the creditor to obtain immediate payment of part of his debt than to wait to enforce payment, or perhaps by pressing his debtor to force him into bankruptcy with the result of only a small dividend. Moreover if a composition is accepted friends who would not otherwise do so, may be willing to come forward to assist the debtor. And if the creditor thinks that the acceptance of part is for his benefit who is to say it is not?¹⁸⁴

This articulation of entrepreneurial values was not without appeal to the Lords. Despite their adoption of Coke's report in *Pinnel*, the Lords each seemed to desire a different rule.¹⁸⁵ The Earl of Selborne saw the economic wisdom of permitting such agreements, and

181. S. Co. Rep. 117a (1602).

182. Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1889); Ferson, *The Rule in Foakes v. Beer*, 31 YALE L.J. 15 (1921).

183. *Supra* note 181.

184. *Foakes v. Beer*, 9 App. Cas. 605, 606, 607 (1884).

185. *Id.* at 613-14.

even recognized a benefit to the creditor. However, he refused to release the debtor because he thought the benefit demanded by the law was "independent" of the economic benefit accruing to a realistically forgiving creditor.

Lord Blackburn was most direct in voicing his dismay. He said: What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do everyday recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.¹⁸⁶

However, the error was Blackburn's, not Coke's. As was pointed out earlier, Coke was fully attuned to, if not in the forefront of, the emerging entrepreneurial values of his era. Coke had not erred, nor had he attempted to stand against progress in his report of *Pinnel*. Rather, Coke the consummate lawyer had realized *Pinnel's* debt (property) foundations. As such, the question of consideration was at best secondary. Therefore, Coke reported that the court in *Pinnel* was unanimous in holding payment of a lesser amount could not satisfy a greater debt.¹⁸⁷ Notice that throughout his report of *Pinnel*, Coke speaks not of the sufficiency of consideration, but of the sufficiency of the satisfaction. Nothing can better demonstrate Coke's understanding of the difference between debt (with its property origins) and *assumpsit*.

As confirmation of Coke's complete understanding, is the freedom he gave his empathy with the entrepreneurial Gestalt in an action of *assumpsit*. In *Bagge v. Slade*,¹⁸⁸ an action of *assumpsit*, Coke drew the distinction between debt and *assumpsit* with the sharpest lines. He held that payment of the lesser amount could not be satisfaction of the greater, but could be good consideration. It seems clear that Coke had not been mistaken in *Pinnel*, and Blackburn need not have gone against his better judgment to perpetuate the holding of that case.

The doctrine of *Foakes v. Beer* proves the validity of the sociological analysis because it is the one instance where the evolution of the

186. *Id.* at 622.

187. *Supra* note 181.

188. 3 Bulst. 162 (1614).

English economy was purposely ignored. And in ignoring progress, the House of Lords created a doctrine it did not like. Further, the validity of the approach is reinforced when one comprehends that the unwise rule of *Foakes* could only have come about as it did. To accomplish the anomaly that is the doctrine, the Lords were required to misunderstand the common law writs rely on *dictum*, reject their own understanding of economics, and defer to the superior judgment of a revered master of the common law—who probably would not have agreed with them!

It is no wonder then that the rule of *Foakes v. Beer* has been criticized and limited to the narrowest possible grounds.

THE RESULT

As a consequence of the House of Lords failing to respond to the entrepreneurial Gestalt, *The Doctrine of Foakes v. Beer*, or more accurately *The Rule in Pinnel's Case*, has been honored most in its breach. The rule has been articulated in many cases, but so many exceptions and limitations have been engrafted onto it as to make it meaningless.¹⁸⁹ The rule as it now exists is a hollow tribute to the past.

*Pinnel's Case*¹⁹⁰ itself created three exceptions to the rule it announced. It held that if something other than a lesser sum of money (e.g., a horse, hawk or robe) were delivered, the debt would be discharged. It further held that early payment of a lesser amount or payment at a different place would also serve to satisfy the debt. And *Foakes v. Beer* conceded that if the promise to forego the debt were under seal, there could be no challenge of the consideration.¹⁹¹

Other exceptions demonstrating the readiness of Courts to depart from the rule are: (1) surrender by the creditor of instrument evidencing debt; (2) payment of the interest in addition to part payment of the debt; (3) foregoing the right of declaring bankruptcy; (4) change in the manner or medium of payment; (5) giving or adding to security; and (6) delivery of a negotiable instrument.¹⁹²

189. 12 A.L.R.2d 1123-29.

190. *Supra* note 181.

191. 9 App. Cas. 605, 611 (1884).

192. *Supra* note 189.

This is only a partial list of the lengths to which modern courts have gone to correct the errors of the House of Lords in *Foakes*.¹⁹³

American contract law began long after entrepenurial values ruled western economics. American Courts had weaker ties to the former feudalistic courts and therefore much less reluctance to overturn or at least nullify the anachronistic edict. The American (and modern) attitude toward the rule is best spoken by Chief Justice Woods of the Mississippi Supreme Court only thirteen years after *Foakes*. He marked himself as a man of modern commerce when he said:

The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept and the actual acceptance of a lesser sum in full satisfaction of a larger sum is without any consideration to support it: that is, that the new agreement confers no benefit upon the creditor. However it may have seemed 300 years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day, and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazards of litigation in an effort to collect all, is not often—nay, generally—greatly to the benefit of the creditor. Why shall not money—the thing sought to be secured by new notes of third parties, notes whose payment in money is designed to be secured by mortgage, and even negotiable notes of the debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as beneficial to the creditor, as any mere promises to pay the same amount, by whomsoever made and whomsoever secured? . . . And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assents to it.¹⁹⁴

The treatment of and attitude toward The Doctrine of *Foakes v. Beer* or the Rule in *Pinnel's Case* as typified by Chief Justice Woods proves that the components of consideration merely reflect the values of the society in which gave rise to it. The one rule of consideration that was alien to the era that created it, has been recognized only

193. For an exhaustive study of the exceptions see, Gold, *The Present Status of the Rule in Pinnel's Case*, 30 Ky. L.J. 72, 187 (1941-1942).

194. *Clayton v. Clark*, 74 Miss. 499, 21 So. 565, 569 (1897).

to the extent it could be vilified and specifically ignored. The rules which have avoided such treatment have done so because they have been responsive to the economic, social, political and moral drives of the era that enunciated them.

APPLICATIONS OF DOCTRINE

Certain applications of the rules of consideration give insight to the true meaning of the doctrine. Words alone can be deceptive, but their real meaning can be obtained by viewing them as they are used. The present words of consideration ("promise, act, bargained-for, and detriment-benefit") are best understood through examination of their application to specific situations. The struggle of theorists with the concept of moral consideration can be particularly illuminating.

MORAL CONSIDERATION

The thought that an obligation of conscience was sufficient to bind a promise to fulfill it, has been the subject of discussion almost from the moment it was uttered.¹⁹⁵ It is generally thought today that duties flowing from ethical criteria, moral obligations or dictates of conscience are not, without additional impetus, sufficient consideration for a promise to fulfill that duty.¹⁹⁶ In other words, it is generally said today that there is no such thing as moral consideration; or that moral obligations are insufficient consideration. However, one cannot help but observe *some* relationship between moral considerations and the doctrine of consideration.

Professor Corbin has indicated that although Lord Mansfield's rule has been almost uniformly rejected, it lingers still because it is a means of maintaining flexibility.¹⁹⁷ The moral consideration rule facilitates growth and change in the law and therefore has endured as a useful tool. And then Professor Corbin posits the difficulties with the rule in linguistic terms. He states:

195. *Hawkes v. Saunders*, 1 Cowper 289 (1782) wherein Lord Mansfield said at 290, "[Y]et as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration."

196. 8 A.L.R. 2d 788; 1A CORBIN, *CONTRACTS* §§ 230, 231 (1963); WILLISTON, *CONTRACTS* § 147 (Jaeger ed. 1957).

197. CORBIN, *supra* note 196, at § 230.

Like other stated rules, this rule is composed of words. Like other rules, also, this one makes an appearance of definiteness and exactitude, seeming to permit and to require the decision of cases by a process of deductive logic alone. A moral obligation is a sufficient consideration—as if anyone can and must recognize moral obligation on sight. It is because of this that the broadly stated rule of Lord Mansfield is so generally disapproved, even in courts where it is frequently appealed to. In many cases where moral obligation is asserted, the court feels that the promise ought not to be enforced; instead of going into the perilous and uncertain field of morality and denying the existence of moral obligation, it is easier to deny the rule. But on the other hand, in cases where the promise is one that would have been kept by ordinary citizens, and the court feels that enforcement is just, an appeal to the rule of moral obligation reaches a satisfying result and averts criticism. It is a common assumption that moral obligation is clear and certain; and it is part of our mores that what morality requires must be done. Therefore, in those classes of cases in which community opinion speaks in no uncertain tones, a promise is enforced if the promisor was already under a moral obligation to render the promised performance. In these cases, we can say with the courts that the moral obligation is a sufficient consideration; or we can say with the American Law Institute that no consideration is required. In other cases, where community opinion is divided and speaks doubtfully, the judicial arm of society withholds enforcement; and we can explain the result by saying (1) that there was no consideration for the promise, or (2) that a moral obligation is not sufficient consideration, or (3) that no moral obligation exists. In cases within the very large doubtful zone, the third of these explanations is avoided, because the court knows that it does not know, and because of the controversy that would ensue.¹⁹⁸

This most perceptive analysis shows that the very existence of a rule of moral consideration is often dependent upon the moral convictions of the times. However, there is another linguistic dimension to the problems with the theory of moral consideration.

Analysis of the doctrine of consideration requires a distinction between the rule of "moral consideration" and moral values which actuate the application of the rules of consideration. Granted, purely ethical precepts cannot be sufficient consideration; but it must also be conceded that societal moral values have in fact *influenced* the exercise of existing contract doctrine. In other words, there is no "moral consideration;" but moral considerations have dictated what is consideration.

Deeply held ethical maxims cannot bind a promise; but widespread moral principles help to determine what will serve to bind a promise.

One of the strengths of sociological analysis is that it permits the assessment of the affect of moral precepts on law. One attempt to reconcile the doctrine denying moral consideration and the decisions

198. CORBIN, note 196, at 343-44.

apparently recognizing it has been to hold that a moral duty arising from what was formerly a legal duty, but which has become unenforceable by some rule of positive law, is sufficient consideration to enforce a promise to perform the barred duty.¹⁹⁹ The *Restatement* attempts to reconcile the differences by treating a number of promises as unenforceable without consideration.²⁰⁰ Scrutiny of this technique of resolving the conflict between doctrine and practice by means of exception will also show the close relationship between consideration and society.

Promises to Pay Barred Debts

Both the first and second *Restatement* state that promises to pay debts barred by the operation of either the statute of limitations²⁰¹ or the Bankruptcy Act²⁰² are enforceable without consideration. Numerous rationales have been affixed for the enforceability of these promises to pay barred debts.²⁰³ Among these rationales have been waiver of the benefits given by positive law, revival of the debt, implied promise, rebuttal of any presumption of payment, and that the statute barred the remedy but did not terminate the debt. These theories seemingly justify the determination to enforce the promise without consideration and thus satisfy inquirers. However, enforcing such promises by way of exception merely maintains the intellectual integrity of the doctrine of consideration at the expense of learning exactly what it is that causes the law to enforce the promise. The true reasons these particular promises are enforced is that their enforcement appeals to widely held concepts of fundamental fairness.

More precisely, the primary reason these particular promises are enforced is the very certain knowledge that the obligation *in fact*

199. 8 A.L.R.2d 791.

200. RESTATEMENT (FIRST) OF CONTRACTS, Topic 4. Informal Contracts Without Assent or Consideration (1933); RESTATEMENT (SECOND) OF CONTRACTS, Topic 2. Contracts without Consideration (Tent. Draft No. 2, 1965).

201. RESTATEMENT (FIRST) OF CONTRACTS § 86 (1933); RESTATEMENT (SECOND) OF CONTRACTS § 86 (tent. draft no. 2, 1965) (FIRST) OF CONTRACTS.

202. RESTATEMENT (FIRST) OF CONTRACTS § 87 (1933); RESTATEMENT (SECOND) OF CONTRACTS § 87 (1965).

203. See CORBIN, *supra* note 196, at §§ 214, 222; WILLISTON, *supra* note 196, at §§ 158, 160, 162; RESTATEMENT (SECOND) OF CONTRACTS § 87 Comment (a) and § 88 Comment (a)(d) (1965).

exists. There is never in any instance a question of whether the promisor received something. A very human response to seeing someone (else) get something-for-nothing moved the social order to enforce these promises. The desire to prevent unwarranted profit, caused our judicial system to find, on the most gossamer of intellectual grounds, an obligation to pay for what had been received.

Another very human response can be discerned in the enforcement of these promises. This particular retributive reaction is implicit in the statement that one who has benefited from the operation of a positive rule of law may become bound by moral consideration or without any consideration.²⁰⁴ The debt existed but could not be enforced. Society could see the benefits from relieving the debtor; but it could not help but react strongly to the debtor's flaunting his immunity. It was one thing to relieve an obligor in the belief that business ought to be completed within a reasonable time (the statute of limitations rationale); or to relieve him out of the belief that a fresh financial start would enable him to contribute to the economy and thereby benefit everyone (the bankruptcy rationale). However, it was a completely different matter to allow the part so graced by his peers to increase his personal stature (his self image at least) by engaging in the bravado of making unenforceable promises. Society was willing to forgive the debts, but it was not willing to have its "nose rubbed" in the yield of its own charity.

Promises to Perform Voidable Duties

Section 89 of both *Restatements* provide that promises to perform voidable duties are enforceable without consideration. These sections are intended to bind promisors who could otherwise avoid their obligation by asserting fraud, duress or incapacity.²⁰⁵ Human impulses similar to the ones stated in the last section can be seen at play here. The law in a free economy, granted its favor, but that favor should not be trifled with.

Promise to Perform a Duty in Spite of Non-Performance of a Condition

Section 88 of both *Restatements* provides that promises to perform

204. Cf. WILLISTON, *supra* 196, at § 202.

205. RESTATEMENT (SECOND) OF CONTRACTS § 89, Comment (a) (1965).

a duty in spite of the non-performance of a condition are enforceable without consideration. The motivation for these sections, while similar to, is slightly more sophisticated than in the earlier sections. Here society recognized that these cases also involved the waiver of a defense not addressed to the merits and one which is also subject to abuse.²⁰⁶

Promissory Estoppel

Section 90 of the *Restatements* candidly discloses their dependence on moral precepts and fundamental fairness. Their words articulate with clarity that the criterion of enforcement is justice. The *Restatements* make promises reasonably inducing action or forbearance enforceable without consideration, "[I]f injustice can be avoided only by enforcement of the promise."²⁰⁷

There can be no better proof that the law has been influenced by social values and moral principles in determining what will make a promise enforceable or what will be consideration. Setting the avoidance of injustice as the standard of enforcement is the penultimate recognition of the influence of meta-legal motivations. As asserted earlier, consideration is, and always has been, a reflection of socio-economic realities.²⁰⁸

CHARITABLE SUBSCRIPTIONS

When one harks back to the earliest contract cases and recalls that a major concern of early doctrine was to *not* enforce promises of gifts, one can see the evolution of the law. The doctrine of promissory estoppel has been invoked to enforce promises of gifts to charity.²⁰⁹ However, a significant part of the evolution has taken place within the seemingly strict confines of the doctrine of consideration itself. The first thing that can be garnered is that the very use of the word "subscription" indicates that the element of bargain is not present. The singular devotion of the *Restatements* to the "bargain

206. RESTATEMENT (SECOND) OF CONTRACTS § 88, Comments (a), (d) (1965).

207. RESTATEMENT (FIRST) OF CONTRACTS § 90 (193) RESTATEMENT (SECOND) OF CONTRACTS § 90 (1965).

208. *But cf.* CORBIN, *supra* note 196, at § 140.

209. *See* note 5, *supra*; WILLISTON, *supra* note 196, at § 140.

concept of consideration,²¹⁰ is the reason that they are required to handle so many enforced promises by way of exception.

It has been noted that enforcement of gratuitous promises was out of keeping with the traditions of the common law. However, Professor Corbin lists twenty jurisdictions which have enforced subscriptions on the basis of reliance.²¹¹ Other theories used to enforce promises to make charitable donations have been an implied promise by the charity to use the funds for proper purposes,²¹² a promise by the charity to raise additional funds,²¹³ the subscriptions to other donors are consideration for the promise in question,²¹⁴ irrevocability of the subscription offer once the charity acts on it,²¹⁵ and public policy.²¹⁶ There can be little doubt that regardless of the particular theory used, American courts tend to enforce promises to make charitable donations. The true question is why American courts found it necessary to enforce such gratuitous promises.

The answer is the same as it was when the common law began to enforce informal contracts. In the same manner that merchantile activity became economically too important for the Royal courts to ignore, charitable organizations contribute too much to our economic life to be left without legal protection. Charities are too important to how America distributes its wealth, to be ignored for very long. The hospital supported by donation is the backbone of health care; charity significantly underwrites medical research; supported private education is crucial; and private welfare agencies are the foundation of American social progress. American charity has progressed beyond the personal benefaction of common law England to become a telling factor in the way we do business. As such our courts must be available to it, and the doctrine of consideration has been modified or enlarged to accommodate it. This doctrinal development was inevitable because no society can afford to leave unprotected (nor unprotectable) so essential a part of its economy.

210. RESTATEMENT (SECOND) OF CONTRACTS §§ 19, 75(1) (tent. draft no. 1 1964); RESTATEMENT (FIRST) OF CONTRACTS § 75(1)(d) (193).

211. CORBIN, *supra* note 196, at § 198.

212. CORBIN, *supra* note 196, at § 198. WILLISTON, *supra* note 196, at § 116.

213. CORBIN, *supra* note 196, at § 198.

214. CORBIN, *supra* note 196, at § 198; WILLISTON, *supra* note 196, at § 116.

215. WILLISTON, *supra* note 196, at § 116; CORBIN, *supra* note 196, at § 198.

216. WILLISTON, *supra* note 196, at § 116.

GOOD SAMARITAN CASES

The thinking that a moral consideration based on a previously received benefit is a sufficient consideration to enforce a subsequent promise to pay for that benefit, opened another line of cases. In recognition of these cases, the *Second Restatement* Section 89A offers an additional promise enforceable without consideration. It provides:

1. A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
2. A promise is not binding under Subsection (1)
 - (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
 - (b) to the extent that its value is disproportionate to the benefit.²¹⁷

The drafters state that one purpose of the proposed Section is to provide a remedy for one who supplies emergency services and necessities.²¹⁸ The case that posits this problem is *Webb v. McGowin*.²¹⁹ The plaintiff without request had saved the defendant's testator from death or serious bodily harm, at a sacrifice of his own physical well being. In gratitude, the testator promised to support the plaintiff. The court held the promise enforceable because the plaintiff had conferred a benefit upon the testator and that was sufficient to make the clear moral obligation a legal one. It was the determination that the testator had received a benefit that was crucial. And it was in this evaluation that the court left the Nineteenth Century for the Twentieth. The court observed, "[T]hat appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received."²²⁰

This is the identical shift in the evaluation of what constituted a benefit as took place (but was left unhonored) in *Foakes*. As was noted the Lords in *Foakes*, participants in the entrepreneurial era, saw the benefit of receiving less money than was due; but their allegiance to the doctrine of *stare decisis* caused them to reluctantly and regretfully accept feudal values. However, the court in *Webb* did not fight its values. This court's determination merely reflected our

217. RESTATEMENT (SECOND) OF CONTRACTS § 89A (1965).

218. RESTATEMENT (SECOND) OF CONTRACTS Comment (d) (1965); see also, CORBIN, *supra* note 196, at § 234.

219. 232 Ala. 374, 168 S. 196 (1935).

220. *Id.* at 197.

era's evaluation of life and limb. In earlier, more rugged days, loss of life or limb was a fact of life. But in our century, as living became less primitive, life took on a new significance. That new meaning is directly responsible for the outcome of the case.

The continuation of the process of social values acting as the determinant of consideration is dramatically reinforced by a case refusing to do what the court in *Webb* did. This stark realization comes from the repetition of the same kind of language the Lords used in *Foakes*. In refusing to enforce a promise to pay for injuries incurred in saving the plaintiff from an axe attack, the North Carolina Court said:

The Court is of the opinion that, however much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law.²²¹

Here is another court refusing to bow to changing social values, but expressing a degree of doubt. Judges are constantly required to re-examine traditional doctrine in the light of their own era. Whether the North Carolina decision will meet the same fate as *Foakes* depends on continuation of the respect for life and limb, and to some degree to the acceptance of the *Second Restatement*.

A CONCEPTUAL STATEMENT OF DOCTRINE

There would be little difficulty in concluding this effort at this point. In so doing, the wisdom and insight of sociological jurisprudence would be demonstrated. However, as noted earlier, such a demonstration is probably superfluous. An additional reason justifying the attempt to use the insights gained from our analysis for the purpose of a redefinition of the doctrine of consideration flows from the nature of exercise itself. To my mind, the essence of exercise is achievement. Exercise—be it intellectual or physical—for its own sake leaves one less than totally fulfilled. To be truly rewarding, exercise should result in a mountain climbed, or an opponent vanquished. Therefore, to reap the full benefit of the effort heretofore expended, there must be an attempt to incorporate the insights gained into contract doctrine.

221. *Harrington v. Taylor*, 225 N.C. 690, 36 S.E.2d 227 (1945).

It is not without some degree of trepidation that such an effort is undertaken. As imminent an authority as Professor Corbin has cautioned that consideration may well be an undefinable concept.²²² He has observed:

The fact is that 'consideration' is an undefined and nebulous concept. Our efforts at definition have been inharmonious and unsuccessful for the reason that a great variety of facts must be included. This is an excellent illustration of the general truth that we do not have universal principles or mechanical rules of clean-cut definitions in the beginning. It is evident that we have a strong desire for such universal and mechanical tests so that we can predict societal action with greater certainty. Therefore, we continually construct exact definitions in general rules. Some thus "lay down the law" with dogmatic vigor, even asserting an a priori necessity, logical or divine.

In all contract law our problem is to determine what facts will operate to create legal duties and other legal relations. We find at the outset that their words of promise do not so operate. Our problem then becomes one of determining what facts must accompany promissory words in order to create a legal duty (and other legal relations). We must know what these facts are in order that we can properly predict the enforcement of reparation, either specific or compensatory, in case of non-performance. We are looking for a sufficient cause or reason for the legal enforcement of a promise. This problem was also before the Roman lawyers, and it must exist in all systems of law. With us it is called consideration.²²³

The desired characteristics of redefinitions of consideration were described by Professor Llewellyn when he wrote:

The quest is not for solution, when the lines seem to conflict, and their relative weight becomes the problem for the court. The quest is rather for the verbal machinery to keep *any* of them from ever being *overloaded*, so that the lines of judicial reconciliation . . . may be helped into that working harmony which cuts down both the arbitrariness of pure authority, and the unpredictability of the sudden results dictated by "sense" or "justice".²²⁴

He stated that the goals of a redefinition must be to state:

[M]easures capable of use in case-law courts. That means measures few enough, and simple enough in form, to be used by men who are not peculiar experts in this particular field.²²⁵

In the attempt to employ the insights of sociological analysis, but recognize the dangers noted by Corbin, and yet hopefully meet the criteria stated by Llewellyn, one is led to the SIGNAL THEORY of consideration. It may now be stated that:

222. CORBIN, *Supra* note 196, at § 109.

223. Corbin, *Does a Pre-Existing duty Defeat Consideration?*, 27 YALE L.J. 362, 376 (1918).

224. Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863, 864 (1941).

225. *Id.*

CONSIDERATION IS AN UNEQUIVOCAL SIGNAL TO SOCIETY BY THE PROMISSOR THAT HE DESIRES HIS PROMISE ENFORCED AGAINST HIM. WHAT PARTICULAR ACT OR ACTS SHALL CONSTITUTE AN EFFECTIVE SIGNAL DEPENDS ON (1) THE FACTS OF THE MAKING OF THE PROMISE, AND (2) THE CIRCUMSTANCES SURROUNDING THE MAKING OF THE PROMISE, INCLUDING BUT NOT LIMITED TO: THE ECONOMIC, SOCIAL, POLITICAL, MORAL AND PSYCHOLOGICAL VALUES OF THE COMMUNITY AND THE ERA IN WHICH THE PROMISE IS MADE.

OTHER OBSERVERS

The SIGNAL THEORY of consideration has been hinted at, if not articulated, by a number of authors. The first was Lord Mansfield. In *Pillans v. Van Mierop*,²²⁶ he discussed the circumstances surrounding the promise, including the commercial realities. And he discussed two instances where the technical rules of consideration had been relaxed—both past consideration cases.²²⁷ He also discussed the social functions of consideration and established the relationship of the doctrine to the earlier formal contracts. All these factors caused him to conclude:

I take it, that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds . . . there was no objection to the want of consideration.²²⁸

Pillans was reversed by the House of Lords in *Rann v. Hughes*.²²⁹ The Lords failed to see the relationship between oral contracts and formal one and thus did not understand what Mansfield meant when he used the word "evidence". He used it in the SIGNAL THEORY sense—an indication to the social order; not in the narrower sense normally meant by lawyers. The difficulty encountered by Mansfield's theory dictated the use of the word "signal" instead of "evidence" in this effort.²³⁰

Sir William Markby, whose analysis was approved by Holdsworth said:

[T]he form of a bargain, or the giving a *quid pro quo*, is not conclusive, but it is, certainly, useful as an indication that the parties contemplated a legal relation.²³¹

226. 3 Burr. 1663 (1765).

227. *Id.* at 1672.

228. *Id.* at 1669.

229. 101 E.R. 1014 H.L. (1764).

230. Holdsworth, *The Modern History of the Doctrine of Consideration*, 2 BOST. U.L. REV. 87, 174 (1922).

231. MARKBY, *ELEMENTS OF LAW*, 309 (6th ed. 1905).

Sir William then proceeded to the essence of the difficulties with the extant doctrine of consideration. He observed:

[T]hat which is a mere matter of form has been used for a wrong purpose; that which is only one out of several possible indications has been used as if it were the sole test.²³²

Holmes saw the same difficulties:

In one sense, everything is form which the law requires in order to make a promise binding over and above the mere expression of the promisor's will. Consideration is a form as much as a seal. The only difference is, that one form is of modern introduction, and has a foundation in good sense, or at least falls in with our common habits of thought, so that we do not notice it, whereas the other is a survival from an older condition of the law, and is less manifestly sensible, or less familiar.²³³

A modern application of a SIGNAL THEORY analysis appears in *De Cicco v. Schwiezer*.²³⁴ Justice Cardozo, in finding that there was consideration for a promise of support to a couple already engaged to marry, said:

The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.²³⁵

In introducing his analysis of "informal contracts without mutual assent or consideration," Professor Corbin recognized that factors causally unrelated to "consideration per se" have been found sufficient to make promises enforceable against their makers.²³⁶ He adhered with some reluctance to the *Restatement* technique of dividing enforceable promises into two categories: Contracts (consideration) and everything else (the exceptions) because of the wide acceptance of the *Restatement*.²³⁷ Corbin worked within the bounds of the definition only because he accepted the reality of its appeal, not because he felt it thoroughly defined its subject.

Thus it can be seen that the societal signal aspect of consideration has been heretofore recognized. The fact that it has not achieved the widespread acceptance sociological analysis discloses it deserves, demonstrates Man's—even intellectual Man's—overwhelming de-

232. *Id.* at 310.

233. HOLMES, *THE COMMON LAW* 215 (Howe ed. 1963).

234. *DiCicco v. Schwiezer*, 221 N.Y. 431, 432, 117 N.E. 807, 808 (1917).

235. *Id.* at 438.

236. CORBIN, *supra* note 196, at § 193 (1960).

237. *Supra* note 196, at 189: "The American Law Institute . . . has constructed a definition. These are stated as if they are now definite and certain and generally prevailing, whether they were in earlier times or not."

sire for a definite rule. Legal literature has opted for the certainty of present doctrine rather than the understanding to be derived from an accurately flexible statement.

CONCLUSION

The sociological analysis has demonstrated that each and every stage in the development, promises were made binding because of the facts of their making and the realities of life in the society in which they were made. In each era, a promisor who engaged in conduct which was particularly meaningful to his contemporaries found himself bound to perform. The bargain had great meaning to entrepreneurial England, but its meaning has diminished in more recent times and other factors have joined and surpassed it on the list of contemporary values.

If the law is truly a continuum, traditional Aristotelian analysis has given us only a still photograph of the doctrine of consideration. This SIGNAL THEORY is an attempt at the motion picture that is necessary. The restriction of consideration to the "bargain concept", has confined us to the economic and social values of a world that no longer exists. The patent absurdity of such limited thought is proved by the fact that the exceptions to that limited view are of as great, if not greater, concern than the rule itself. And this without mentioning whether contemporary concepts of justice are best met under the rule or its exceptions. Exactly as it is less than helpful to restrict "contracts" to an area untouched by contemporary regulation,²³⁸ it is equally unrewarding to limit them to bargains. No doubt, from such constricted scrutiny a symmetrical doctrine emerges. However, the price of doctrinal regularity has been understanding and in some instances justice. This is too high a price.

The proposed revision of the *Restatement of Contracts* is an improvement in that it adds to the doctrine of consideration some of the current factors. However, in the fact that it accepts and strengthens the basic structure of the original *Restatement*—consideration limited to bargain and everything else by way of exception—it perpetuates the mistakes of the past. The time is right to restructure and redefine the law of contracts in the light of its service to our civiliza-

238. *Supra* note 18.

tion and with the knowledge of our attitudes toward it. By doing so, an understanding of what has taken place will be achieved; and hopefully the basis for enlightened future action provided.