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# ANGLO-SAXON CONTRACT LAW: A SOCIAL ANALYSIS

BURTON F. BRODY\*

## INTRODUCTION

HERE IS a great deal of difficulty in attempting to analyze Anglo-Saxon law. While there is sufficient material, especially when coupled with known Germanic custom, the *key* to understanding the material is not available.<sup>1</sup> Therefore, there exist significant differences of opinion among the historians as to its meaning. Sir Frederick Pollock and his colleague Frederic Maitland assert that the Anglo-Saxon contract, if it existed at all, was extremely rudimentary.<sup>2</sup> Their conclusion is based upon the primitive economy of the period and the resultant lack of need for the means of commercial exchange. Professor Holdsworth is equally certain there was no Anglo-Saxon contract law because of the unavailability of enforcement.<sup>3</sup> On the other hand, Professor Harold Hazeltine is quite certain that the pre-Norman English made great use of the contract.<sup>4</sup>

One cause of these conflicting analyses is a disagreement over the validity of known continental practices as evidence of the Anglo-Saxon law.<sup>5</sup> Far more meaningful, however, are the conflicts in fundamental attitudes about contracts and differences in approach to them. Pollock and Maitland maintain the distinction between formal contracts and consensual contracts with far greater purposeful-

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1. 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 29 (2d ed. 1898).

2. 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1898), 1 POLLOCK & MAITLAND, *supra* note 1, at 43-44. That the evaluation is probably the contribution of Sir Frederick, see POLLOCK, CONTRACTS IN EARLY ENGLISH LAW, 6 HARV. L. REV. 389 (1893).

3. 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 82 (3d ed. rewritten 1923).

4. Hazeltine, *The Formal Contract of Early English Law*, 10 COLUM. L. REV. 608 (1910).

5. Compare 1 POLLOCK & MAITLAND, *supra* note 1, at 25-26, 43-44 with Hazeltine's plunge into Teutonic practice in the third sentence of his article, *supra* note 4.

ness than does Hazeltine. Although they discuss formal contracts in their chapter on the subject,<sup>6</sup> it would seem fair to infer that they are not quite satisfied that formal contracts are of the same dignity as consensual contracts. They seem to reflect an earlier view of primitive formal contract: "Not only are the formalities of equal importance with the promise itself, but they are, if anything of greater importance. . . ."<sup>7</sup> However, Hazeltine shares no such misgivings and asserts the very existence of contracts in Anglo-Saxon England.<sup>8</sup>

Another cause of the conflicting opinions appears to be a tendency on the part of those denying the existence of contracts during the period to place the subject within property law<sup>9</sup> or criminal law.<sup>10</sup> But Sir Henry Maine resolves this dispute. He cautions against misunderstanding the primitive mentality. He advises that placing legal concepts in specialized categories is the activity of an intellectually advanced society.<sup>11</sup> He warns that a practice of wide primitive application may be restricted by modern analysis to a narrower range; and further, modern law had its origin in a broader primitive practice which we have retained, but in a severely limited manner. Thus Maine explains the intertwined conceptual relationship of contract and conveyance. Another writer seeking to transcend contemporary rubrics points out that although the Anglo-Saxon requirement of transaction witnesses was primarily designed to protect against theft charges, other purposes could reasonably be served by the same procedure.<sup>12</sup>

Those denying the existence of the early contract can also look to Maine's statement that:

There are few general propositions concerning the age to which we belong which seem at first sight likely to be received with readier concurrence than the assertion that the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract . . . . [W]here old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by convention. . . .<sup>13</sup>

6. 2 POLLOCK & MAITLAND, *supra* note 2, at 185.

7. MAINE, ANCIENT LAW 339 (new ed. with introduction and notes by Sir F. Pollock 1930).

8. Hazeltine, *supra* note 4.

9. 1 POLLOCK & MAITLAND, *supra* note 1, at 57.

10. 2 POLLOCK & MAITLAND, *supra* note 2, at 184.

11. MAINE, ANCIENT LAW 315-322 (10th ed. 1885).

12. Stone, *The Transaction of Sale in Saxon Times*, 29 LAW. Q. REV. 323, 326 (1913).

13. MAINE, *supra* note 11, at 304.

"[T]he movement of progressive societies has hitherto been a movement from Status to Contract,"<sup>14</sup> is another of his succinct analyses. Pollock in his notes on Maine's work limits this to the law of property,<sup>15</sup> *i.e.*, movement from property to contract. Nonetheless, Maine did not seek to deny the existence of enforceable promises in early law. His extensive discussion of the subject prevents such a conclusion. Instead, his words disclose two observations: First, primitives recognized binding agreements, but the scope of their applicability was limited; second, by implication, the Saxons were on the road to modern law because they enforced voluntary undertakings.

The dispute can go on and on, but Maine himself supplies the vehicle for rising above the battle. He provides the means of profiting from the insight of all historians by setting forth a fundamental description of a contract compatible with both Bentham's and Austin's views. Sir Henry says:

"[T]wo main essentials of a contract are these: first a signification by the promising party of his *intention* to do the acts or observe the forebearances which he promises to do or observe. Secondly, a signification by the promisee that he *expects* the promising party will fulfill the proffered promise."<sup>16</sup>

Using these as the criteria for a contract, and keeping in mind Maine's caveats on the study of primitive law, it would appear the Anglo-Saxons enforced voluntary undertakings of a contractual nature.

#### THE SAXON SOCIETY

Because contracts merely reflect the general state of life in a society, any worthwhile investigation of Anglo-Saxon contracts must begin with a brief sketch of the civilization. In the political sphere, there was no central government as we understand the term. Tribes of Angles, Saxons and Jutes asserted sovereign power within given geographic areas.<sup>17</sup> These groups developed collaterally, but not necessarily in unison. Eventually three sovereign states emerged, and by 800 A.D. Wessex reigned supreme. Then Danish invaders were somewhat successful and the land was again divided and subjected to multiple rule. However, by 901, Wessex reasserted its supremacy. It is in this era, the first three-quarters of the tenth century,

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14. MAINE, *supra* note 11, at 170.

15. MAINE, *supra* note 7, at 190.

16. MAINE, *supra* note 7, at 347.

17. 2 HOLDSWORTH, *supra* note 3, at 14-16.

that the first significant steps toward effective central authority were taken. But by 1017 the Danes had fought back to rule all of England, not merely as a conquering invader, but as a politically successful alternative to the turmoil of Ethelred the Unready.<sup>18</sup>

However, these competing forces which fragmented England shared common problems and therefore similar practices. The political unrest, coupled with the harshness of primitive existence, left little time for carrying on the many duties of government. The law of nature was nowhere completely supplanted by the artificial rule of state. Whatever control existed was exercised by local lords and family groups.<sup>19</sup>

When blood was spilled, the law of nature sanctioned vengeance and the Anglo-Saxon law permitted it. The kindred set out to avenge the injury, and if the malefactor's kindred resisted, a private war ensued.<sup>20</sup> Throughout the era, the Church sought to alleviate this problem by granting asylum.<sup>21</sup> The state attempted to provide a superior authority to which all men would answer so that there would be no need to resort to the crude practices of personal justice authorized by nature.<sup>22</sup>

The civil law which appeared sought to restrain the retribution of instinctive justice within limits consistent with domestic tranquility. For example, the laws of King Alfred 42 (871-901) dealing with feuds provided:

We also command: that the man who knows his foe to be home-sitting fight not before he demand justice of him. If he have such power that he can beset his foe, and beseige him within, let him keep him within for VII. days, and attack him not, if he will remain within. And then, after VII. days, if he will surrender, and deliver up his weapons, let him be kept safe for XXX. days, and let notice of him be given to his kinsmen and his friends. If, however, he [the foe] flee to a church, then let it be according to the sanctity of the church; . . . But if he [the party seeking revenge] have not sufficient power to beseige him within, let him ride to the "ealdorman," and beg aid of him. If he [the ealdorman] will not aid him, let him ride to the king before he fights. In like manner also, if a man come upon his foe, and he did not before know him to be home-staying; if he

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18. 2 HOLDSWORTH, *supra* note 3, at 16.

19. 1 PALGRAVE, HISTORY OF THE ENGLISH COMMONWEALTH DURING THE ANGLO-SAXON PERIOD 180-185 (1832); 1 POLLOCK & MAITLAND, *supra* note 1, at 29.

20. 1 PALGRAVE, *supra* note 19, at 182; LAUGHLIN, *The Anglo-Saxon Procedure*, in *ESSAYS IN ANGLO-SAXON LAW* 183, 266 (1876).

21. LAUGHLIN, *supra* note 20, at 270.

22. 1 PALGRAVE, *supra* note 19, at 182. The author draws an analogy between this process and International law as propounded by Grotius.

[foe] be willing to deliver up his weapons, let him be kept for XXX. days, and let notice of him be given to his friends; if he will not deliver up his weapons, then he may attack him. If he [foe] be willing to surrender, and to deliver up his weapons, and any one after that attack him, let him [attacker] pay as well "wer" as wound, as he may do, and "wite," and let him have forfeited his "maeg"-ship. We also declare, that with his lord a man may fight "orwige," [without committing war] if any one attack the lord: thus may the lord fight for his man. After the same wise, a man may fight with his born kinsman, if a man attack him wrongfully, except against his lord; that we do not allow. And a man may fight "orwige," if he find another with his lawful wife, within closed doors, or under one covering, or with his lawfully-born daughter, or with his lawfully-born sister, or with his mother, who was given to his father as his lawful wife.<sup>23</sup>

Notice how this statute created conditions which had to be fulfilled before revenge could be lawfully taken. And notice further that a penalty was provided for failure to comply with the statute.

Of passing interest is the non-applicability of the statute to situations which contemporary lawyers would recognize as calling for a manslaughter conviction rather than one for murder. This exception is the first demonstration that although these ancient peoples achieved scant technological development, they were wise in the ways of man.

Other than attempting to control private warfare, the other major challenge to Anglo-Saxon civil authority was theft—especially cattle theft.<sup>24</sup> Elaborate provisions concerning the pursuit, apprehension, conviction and punishment of thieves were prevalent in the laws of the Anglo-Saxon kings throughout the era.<sup>25</sup>

The first step in limiting self-determined vengeance to tolerable levels was to provide substitute remedies and a system for enforcing them. The Anglo-Saxons had a system of *wergelds*, a set amount of compensation that had to be paid to the relatives of a slain person by the slayer.<sup>26</sup> This attempted adjudication suffered from the inability

23. All of the laws of the Anglo-Saxon kings may be found in THORPE, *ANCIENT LAWS AND INSTITUTES OF ENGLAND* (1840), a translation printed by command of King William IV. The page number of the modern English translation in Thorpe's book shall hereinafter be placed in parentheses following the law cited. Thus, law number 42 of King Alfred quoted above would appear: Alfred 42 (THORPE 91).

24. 2 POLLOCK & MAITLAND, *supra* note 2, at 149-153 & 156-165.

25. See, e.g., Aethelbirth 4, 9 (THORPE 5, 7); Hlothar & Eadric 7, 16 (THORPE 31, 35); Wihtraed 25, 26, 27, 28 (THORPE 43); Alfred 24, 25 (THORPE 51); Ine 7, 12, 17, 18, 35, 36, 37, 46, 47, 75 (THORPE 107, 111, 115, 125, 131, 151); Edward The Elder 1 (THORPE 159); Aethelstan I, 1, 9, IV 2, 3, 4 (THORPE 199, 205, 223-225); Edmund 5 (THORPE 251); Edgar 6-11 (THORPE 275-277); Ethelred 3 (THORPE 283); Cnut 21, 23, 24, 25 (THORPE 390-393).

26. Wer-gilds (THORPE 187-191); 2 HOLDSWORTH 43-46; KEETON, *THE NORMAN*

of the central government to enforce its will, however, and the success of the substituted remedies depended on channelling the self-help features of primitive practices into the judicial system. This necessity gave rise to what is referred to by some experts as the procedural contract.<sup>27</sup> This procedural contract and the system of sureties it created was the theoretical basis of all Anglo-Saxon contracts.

#### THE PROCEDURAL CONTRACT

The Germanic ancestors of the Anglo-Saxons employed a formal contract as a basic part of their legal process.<sup>28</sup> This custom carried into England and required that defendants, upon accusation, provide sureties for their appearance in and compliance with the court.<sup>29</sup> The laws of Hlothar and Eadric provided:

If one man make plaint against another in a suit, and he cite the man to a "methel" [court] or to a "thing," [a different court] let the man always give "borh" [surety] to the other, and do him such right as the Kentish judges prescribe to them.<sup>30</sup>

If one man make plaint against another; after he has given him "borh," and then after three days let them seek for themselves an arbitrator, unless a longer period be desired by him who carries on the suit: after the suit is settled, let the man do justice to the other within seven days; let him satisfy him either in money or with an oath, whichever be desired by him; but if he will not do this. then let him pay c. without an oath: within one day after, let them settle.<sup>31</sup>

The defendant's appearance was guaranteed by placing him in the custody of his sureties.<sup>32</sup> In this respect the procedural contract is the forerunner of bail bond systems.<sup>33</sup> Although the typical procedural contract guaranteed both appearance and compliance, there were provisions for separate guarantees. The laws of King Edgar required every accused to have a surety to guarantee justice, and if the accused fled, the surety had to answer.<sup>34</sup> A special provision applying to thieves is particularly akin to bail in that the surety was allowed twelve months to pursue the thief and recapture him.<sup>35</sup>

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CONQUEST AND THE COMMON LAW 16 (1966); 1 POLLOCK & MAITLAND 48.

27. Hazeltine, *supra* note 4; Henry, *Forms Of Anglo-Saxon Contracts And Their Sanctions*, 15 MICH. L. REV. 552, 554 (1916-17).

28. LAUGHLIN, *supra* note 20, at 189.

29. Henry, *supra* note 27, at 556.

30. Hlothar & Eadric 8 (THORPE 31).

31. Hlothar & Eadric 10 (THORPE 31, 33).

32. Henry, *Consideration In Contracts 601 A.D. To 1520 A.D.*, 26 YALE L.J. 664, 667 (1916-17).

33. *Id.*

34. Edgar II 6 (THORPE 269).

35. Edgar II 6 (THORPE 269).

The second part of the procedural contract, compliance with the judgment, has a slight similarity to the contemporary practice of requiring appeal bonds.<sup>36</sup> Aethelstan's laws allowed a convicted thief to be released to his kindred if they guaranteed payment of the penalties assessed and assured his future good behavior.<sup>37</sup>

More comparable with contemporary practices is the provision of Aethelstan V, *Twelfth*<sup>38</sup> which allowed thieves under fifteen years of age to be released to their families upon guarantee of future good behavior. Contemporary juvenile courts can grant periodic continuances to an accused minor, allowing him to remain at home with his family while fulfilling behavioral mandates determined by the court.<sup>39</sup> Today the parents may not be subject to the severe sanctions imposed on Saxon sureties, basically payment of the penalties. However, the granting of special consideration to youthful offenders by releasing them to their families on continued good behavior is a similarity which still exists.

#### THE PRIVATE PEACE TREATY

The procedural contract was used most often in the settlement of private wars of vengeance. So frequent was its use for this purpose that one writer treats the procedural contract and the peace treaty as one.<sup>40</sup> However, it has been shown that the procedural contract was also available in theft cases.<sup>41</sup> The private peace treaty is sufficiently significant in the development of central government and in understanding ancient enforceable promises to merit detailed discussion.

The basis of the private peace treaty was the *wergeld*, which was an amount of money paid to the deceased's family for the renunciation of their traditional right to avenge the slaying.<sup>42</sup> The provisions of Alfred 42 show this, as does Ine 9: "If any one take revenge *before* he demand justice; let him give up what he has taken to him-

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36. *E.g.*, ILL. REV. STAT. ch. 3, 234 (1967); ILL. REV. STAT. ch. 110A, § 305 (d) (1967); ILL. REV. STAT. ch. 34, § 605 (1967); ILL. REV. STAT. ch. 47, § 13 (1967); ILL. REV. STAT. ch. 57, § 19-20 (1967).

37. Aethelstan, *Judicia Civitatis Lundoniae*, *First* 4 (THORPE 229, 231).

38. Aethelstan, *Judicia Civitatis Lundoniae*, *Twelfth* 1, 2, & 3 (THORPE 241, 243).

39. ILL. REV. STAT. ch. 37, §§ 704-7 (1967).

40. Henry, *supra* note 27, at 554.

41. *Supra* notes 34, 37, 38.

42. LAUGHLIN, *supra* note 20, at 266-268.



self, and pay (the damage done) and make 'bōt' with XXX. shillings."<sup>43</sup>

The events leading to a typical private peace treaty were: The slayer fled to the sanctuary of his own kindred; soon thereafter, either as a result of immediate pursuit or some sort of investigation, the relatives of the slain party appeared—no doubt armed to the teeth, their lust for blood second only to their greed; then negotiations began. The negotiations are described in the laws of King Edmund:

The authorities must put a stop to vendettas. First, according to the public law, the slayer shall give security to his advocate, and the advocate to the kinsman [of the deceased], that he [the slayer] will make reparation to the kindred.

§1. After that it is incumbent upon the kin of the slain man to give security to the slayer's advocate, that he [the slayer] may approach under safe conduct and pledge himself to pay the wergeld.

§2. When he has pledged himself to this, he shall find a surety for the payment of the wergeld. . . .<sup>44</sup>

An earlier translation of the same law sets forth substantially the same transaction but adds insight to the formal nature of Anglo-Saxon contracts:

Then after that it is requisite, that the security be given to the slayer's "fores peca," that the slayer may, in peace, near, and himself give "wed" for the "wer." When he has given "wed" for this, then let him find thereto a "werborh". . . .<sup>45</sup>

It is interesting to note that the peace treaty between Alfred and Guthrum in 885<sup>46</sup> dividing England between them followed this traditional ceremonial passing of a *wed*.<sup>47</sup>

### *The Wed Ceremony*

Anglo-Saxon law was dependent on formality and ceremony to impress events upon the minds of potential witnesses.<sup>48</sup> One must keep in mind that writing was not well known among primitives and therefore human witnesses were essential. The *wed* ceremony was meaningful enough to be remembered by those who viewed it.

43. Ine 9 (THORPE 109) (emphasis added).

44. ROBERTSON, *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I*, 11 (1925).

45. Edmund 7 (THORPE 251) (emphasis added).

46. 2 HOLDSWORTH, *supra* note 3, at 15.

47. Alfred 1-5 (THORPE 153-157); also note that the monarchs provided sureties in the customary form—hostages. Hazeltine, *supra* note 4, at 613.

48. Comment, *Archaic Methods Of Validating A Contract—The "Blow" And The "Libation"*, 21 MICH. L. REV. 79 (1922-23).

The *wed* was a stick; in the case of a private treaty it could easily have been the slayer's spear.<sup>49</sup> Its delivery uniquely symbolized the slayer's assent to fulfill his obligation to pay the *wergeld*, and, therefore, the aggrieved relatives could forego their revenge with confidence. Another explanation of the *wed* ceremony's ability to make a lasting impression is that it was a carryover from the continental *festuca*.<sup>50</sup> The *festuca* had its beginning with the delivery of a stick having special religious significance. Through symbolic surrender or resort to the spirits, the delivery of a *wed* was a grave matter not easily forgotten. The significance of the *wed* to the primitive mentality is best demonstrated by the laws of King Alfred wherein he relates that he has compiled the laws of his forefathers<sup>51</sup> and then says:

At the first we teach, that it is most needful that every man warily keep his oath and his "wed" . . . . But if he pledge himself to that which it is lawful to fulfil, and in that belie himself, let him submissively deliver up his weapon and his goods to the keeping of his friends, and be in prison forty days in a king's "tun:" let him there suffer whatever the bishop may prescribe to him; . . .<sup>52</sup>

### *Saxon Suretyship*

The *borh* referred to in Edmund 7 was the surety, typically more than one and, though not mandatory, generally the relatives of the slayer.<sup>53</sup> The interesting facet of Saxon suretyship was the primary liability of the surety.<sup>54</sup> The first guarantees in private peace treaties were probably hostages<sup>55</sup> or the delivery of goods in the full amount of the *wergeld*.<sup>56</sup> Thus, the primary liability of the Saxon surety descended from the certainty that, as a hostage, the surety preferred paying the defaulted debt to suffering the wrath of the creditor. And note that upon default of the *wergeld* the state no longer prohibited physical vengeance. In fact, for a short period during the development of Anglo-Saxon law, the surety was considered to be

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49. Henry, *supra* note 27, at 555.

50. 2 POLLOCK & MAITLAND, *supra* note 2, at 187-188.

51. Alfred, DOOMS (THORPE 59).

52. Alfred 1 (THORPE 61).

53. LAUGHLIN, *supra* note 20, at 290.

54. 2 POLLOCK & MAITLAND, *supra* note 2, at 187; LAUGHLIN, *supra* note 20, at 191; Hazeltine, *supra* note 4, at 611.

55. Note that even at the relatively late date of 885 Alfred and Guthrum gave sureties in the form of hostages.

56. 2 POLLOCK & MAITLAND, *supra* note 2, at 187.

a hostage-at-large with a duty to surrender on demand.<sup>57</sup> As the system matured, one would not expect the simple certainty of the surety's primary liability to disappear.

Ceremonially, the surety's primary liability was established by the creditor handing the *wed* received from the slayer to the slayer's surety.<sup>58</sup> It is further theorized that by possession of the *wed* the surety, if forced to pay, was able to proceed against the true debtor.<sup>59</sup>

The last part of the statute describing a private peace treaty raises another interesting point. The law concludes:

When that [*wed* and *borh*] is done, the king's "mund" shall be established. In twenty-one days from that time *healsfang* shall be paid; in twenty-one days after that "manbot", and twenty-one days after that the first instalment of the *wergeld*.<sup>60</sup> Thus, at a time in history when money was in rather short supply, the slayer was required to make three substantial payments within two months, and in all likelihood, it was impossible for him to make a lump sum payment of the *wergeld*.<sup>61</sup> Therefore, the ceremonial *wed* and *borh*, which in effect extended credit to the slayer, was the beginning of commercial credit.

This ceremony of *wed* and *borh* lent itself to every type of undertaking and, as modified and refined, became the form for every kind of transaction.<sup>62</sup> One refinement of the *wed* ceremony enabled a man to become surety for himself.<sup>63</sup> All that was required was the passing of the *wed* from one hand to the other. The *wed* ceremony, by supplying sureties, guaranteed performance; but the ceremony as originally conceived took place at the time of "buying off" the feud. However, by going through the ceremony and supplying sureties at the time of the undertaking rather than after default, the promisor could make his present promise enforceable at a later date.<sup>64</sup>

#### SALE BEFORE WITNESSES

The attempt by the civil authorities to overcome the other major

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57. 2 POLLOCK & MAITLAND, *supra* note 2, at 187.

58. 2 POLLOCK & MAITLAND, *supra* note 2, at 187; Hazeltine, *supra* note 4, at 611.

59. Hazeltine, *supra* note 4, at 611; Henry, *supra* note 32, at 679.

60. Edmund II 7; ROBERTSON, *supra* note 44.

61. 2 POLLOCK & MAITLAND, *supra* note 2, at 187.

62. 2 POLLOCK & MAITLAND, *supra* note 2, at 187; LAUGHLIN, *supra* note 20, at 190; Henry, *supra* note 32; Hazeltine, *supra* note 4.

63. 2 POLLOCK & MAITLAND, *supra* note 2, at 186.

64. Henry, *supra* note 32, at 677.

threat to Saxon stability, cattle stealing, created another means of entering into enforceable undertakings. The laws as early as Wihtraed (690-725) and Ine (688-725) provided harsh punishment for thieves: death,<sup>65</sup> slavery<sup>66</sup> or dismemberment.<sup>67</sup> The prosecution for theft was literally that—pursuit.<sup>68</sup> If the thief was caught in the act, he could be summarily executed; if he was discovered later, but with the cattle in his possession, the procedural contract was adopted to the situation.<sup>69</sup> The owner grabbed one ear of the animal and the possessor the other, and each claimed ownership.<sup>70</sup> The possessor provided sureties and the matter would go to court.

The most common defense to the theft charge was honest purchase.<sup>71</sup> The defendant could call his seller to vouch the title or,<sup>72</sup> if the seller was unavailable because he chose not to implicate himself, the defendant called the mandatory transaction witnesses. It was for this very reason, defending against theft charges, that the laws of Saxon England contained numerous demands that witnesses be present at sales.<sup>73</sup>

One writer has described a typical Saxon sale.<sup>74</sup> The parties and the witnesses assembled in the market place or public square. The goods, generally horses or cattle, were inspected by the witnesses for brands or earmarks<sup>75</sup> establishing the seller's ownership. Then the witnesses listened closely to what the parties said, so if needed, they could later be called upon to swear as to the representations made by each party.<sup>76</sup> Notice that the description places the sale in a public place as well as in the presence of witnesses. Some of the same laws requiring witnesses also required public sales.<sup>77</sup> The

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65. Ine 12 (THORPE 111); Wihtraed 26 (THORPE 43).

66. Ine 7 (THORPE 107); Wihtraed 26 (THORPE 43).

67. Ine 18, 37 (THORPE 115, 125).

68. 2 POLLOCK & MAITLAND, *supra* note 2, at 157.

69. Henry, *supra* note 27, at 64.

70. 2 POLLOCK & MAITLAND, *supra* note 2, at 158.

71. 2 POLLOCK & MAITLAND, *supra* note 2, at 158.

72. Hlothar and Eadric 7, 16 (THORPE 31, 35).

73. Hlothar and Eadric 16 (THORPE 35); Edward the Elder 1 (THORPE 159); Aethelstan I 10, 12 (THORPE 205, 207); Edgar 6-10 (THORPE 275-277); Ethelred I 3 (THORPE 283); Cnut 23, 24 (THORPE 389, 391).

74. Stone, *The Transaction Of Sale In Saxon Times*, 29 L. Q. REV. 323, 333 (1913).

75. 2 POLLOCK & MAITLAND, *supra* note 2, at 158.

76. Stone, *supra* note 74. Compare this compulsory listening to the formal stipulation of Roman law.

77. Hlothar & Eadric 16 (THORPE 35); Edward I (THORPE 159); Aethelstan I 12

reasons for this were to have safety in troubled times and to make the goods less valuable to a thief by limiting his ability to sell them.<sup>78</sup> “[A] thief not know where he shall deposit his theft.”<sup>79</sup>

Such witnessed sales were obviously imperative for prudent, law-abiding Saxons. Witnessed sales eventually became more than a defense to theft upon the requirement of sureties for enforcement. Ethelred I, 3 commands:

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 any one so do, let the land-lord take possession of, and hold the property, till that it be known who rightfully owns it.<sup>80</sup>

The surety’s involvement elevates this transaction to a contract; it is no longer merely a sale having legal effect as a defense to theft.

Observing the refinements of the ceremonial creations of enforceability, and viewing the particular voluntary undertakings so made enforceable by the Anglo-Saxons, gives a unique insight into their civilization. The promises a society enforces, tells much about it.

#### SAXON PROPERTY PRINCIPLES

Another phenomenon common to all Anglo-Saxon contracts should be noted before studying particular contracts. Primitive contracts were real in the sense that title passed immediately, either upon the completion of the deal with the formalities or upon payment.<sup>81</sup> The subsequent delivery by the seller merely gave the buyer possession and enjoyment; it had no legal effect. Honoring Maine’s observation that it is only a sophisticated legal system which distinguishes transfer of title from contracts requires a brief pause to investigate the interplay of the real nature of Anglo-Saxon contracts and their rules of property law.

Even though a purchaser was able to successfully defend himself from punishment for theft by the voucher of warranty or the witnessed sale, he was not entitled to retain the goods.<sup>82</sup> Regard-

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(THORPE 207); Edgar 6-10 (THORPE 275-277).

78. Stone, *supra* note 74, at 326.

79. Edgar 2 (THORPE 275).

80. Ethelred 3 (THORPE 283).

81. YOUNG, *The Anglo-Saxon Family Law*, in *ESSAYS IN ANGLO-SAXON LAW* 121, 167; LAUGHLIN, *supra* note 20, at 189, 228.

82. 2 POLLOCK & MAITLAND, *supra* note 2, at 158.

less of the purchaser's innocence, he could establish no property in the stolen goods. This indicates the Saxon economic system was, for a time, rather rudimentary, because the protection of innocent purchasers is done to encourage free exchange in more sophisticated economies.

Although the innocent purchaser lost his cattle, he was not without some recourse. Under the laws of Hlothar and Eadric (673-686) a special rule applied to purchases made in London:

If any Kentish-man buy a chattel in "Luden-wic," let him then have two or three true men to witness, or the king's "wic"-reeve . . . . [If he cannot do that [vouch a warrantor], let him prove at the altar, with one of his witnesses or with the king's "wic"-reeve, that he bought the chattel openly in the "wic," with his own property, and then let him be paid its worth . . . .]<sup>83</sup>

The same rule was extended to all sales by the time of Aethelstan (924-940).<sup>84</sup> This partial protection of innocent purchasers shows the Saxon economy was making significant progress from its primitive start.

Secondly, even though the purchaser of personal property had title at the moment the contract was formed, he was not allowed to recover the goods from subsequent purchasers if he had allowed the seller to retain possession.<sup>85</sup> This is the reverse of the problem in modern conditional sales contracts. Instead of a contemporary untitled *purchaser*-possessor, the Saxons were plagued by the untitled *seller*-possessor. The contemporary problem was finally resolved by the introduction of recording.<sup>86</sup> The Saxons, with no means of giving public notice, solved their problem by allowing the seller to make valid subsequent sales. And it would seem that on similar facts the same result would be reached by a contemporary court.<sup>87</sup>

On the other hand, the purchaser of real estate who postponed taking possession was protected by the Saxons in spite of the fact that they did not have a recording system.<sup>88</sup> At first, land was the subject of community ownership. Private rights in land did not

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83. Hlothar & Eadric 16 (THORPE 35) (emphasis added).

84. Aethelstan I 24 (THORPE 213).

85. LAUGHLIN, *supra* note 20, at 228.

86. *Sherer-Gillett Co. v. Long*, 318 Ill. 432, 149 N.E. 225 (1925). *See, e.g.*, ILL. REV. STAT. ch. 26, § 9-401 *et seq.* (1967).

87. *Huschle v. Morris*, 131 Ill. 587, 23 N.E. 643 (1890); *Gradle v. Kern*, 109 Ill. 557 (1884).

88. LAUGHLIN, *supra* note 20, at 228; YOUNG, *supra* note 81, at 168.

develop until later, and by that time writing provided a new method of substantiation. Thereafter, Saxons felt safe in allowing the first purchaser to assert his claim on the basis of his written proof.

There does not seem to be any indication that the Saxons were plagued by multiple transfers of land by document. Here again, contemporary law solves the problem with recording acts.<sup>89</sup> This lack of multiple transfers can indicate a number of things—honesty, no appreciation of the possibilities, or a relatively short existence for the system. Also plausible is the theory that because writing was a skill possessed by so few persons in any given area, the local scribes served as sort of a living registry of deeds.

In an investigation of the development of contracts, the different property rules for land and chattels must be kept in mind. These differing rules were the result of, and the cause of, significant developments in the law of enforceable voluntary undertakings. Attention will now be focused on the various undertakings to which the formal contract, as modified and refined, were applied.

## FORMAL CONTRACTS

### BETROTHAL CONTRACTS

The Anglo-Saxons considered betrothal a real contract of sale.<sup>90</sup> As a contract of sale, it was concluded before witnesses. As a real contract, it established the groom's rights to his woman at the moment he paid the price. This is demonstrated in Aethelbirht's Laws which state that one who carries off a maiden must pay her owner,<sup>91</sup> but if she is betrothed then he must compensate the groom.<sup>92</sup>

Soon the formal *wed* ceremony developed and sureties were exchanged to conclude the betrothal.<sup>93</sup> Thus one writer concludes that our "wedding" comes from the Anglo-Saxon *wed*.<sup>94</sup> Another asserts it comes from the German *bewedding*.<sup>95</sup> The significant point is that in both interpretations, the term describes the betrothal, not the nuptials. Because of the real nature of the contract,

89. See, e.g., ILL. REV. STAT., ch. 30, §§ 45 *et. seq.*

90. YOUNG, *supra* note 81, at 168.

91. Aethelbirht 82 (THORPE 25).

92. Aethelbirht 83 (THORPE 25).

93. Edmund, Of Betrothing A Woman 1, 5 (THORPE 255).

94. Henry, *supra* note 27, at 645.

95. YOUNG, *supra* note 81, at 168 n.1.

it was betrothal by *wed* and *borh* which had juridical effect. The later marriage added nothing of substantive meaning.

However, in recognition of the special ethical nature of marriage, the groom, except in the very earliest German law, could not compel specific performance.<sup>96</sup> If the guardian refused to deliver the maid, or if she herself refused to be delivered, the disappointed suitor could only recover what he had paid plus one-third. The converse was not true; reluctant grooms lost everything they had paid and could be sued for the purchase price.<sup>97</sup>

#### WARRANTY OF QUALITY

A special statute dealing with betrothals can be a possible indication that the Anglo-Saxons made specific warranties of quality. Aethelbirht 77 provides:

If a man buy a maiden with cattle, let the bargain stand, if it be without guile; but if there be guile, let him bring her home again, and let his property be restored to him.<sup>98</sup>

The possibility becomes distinctly less remote when we read Ine 56: If a man buy any kind of cattle, and he then discover any unsoundness in it within XXX. days; then let him throw the cattle on his [seller's] hands, or let him swear that he knew not of any unsoundness in it when he sold it to him.<sup>99</sup>

The means of proving the exact terms of the bargain and warranty were, of course, the transaction witnesses who were present and ordered by Edgar's Laws to:

[G]ive the oath that he never, neither for money, nor for love, nor for fear, will deny any of those things of which he was witness, nor declare any other thing in witness, save that alone which he saw or heard: . . .<sup>100</sup>

Being that in the earliest recorded law of betrothals there were provisions regarding misrepresentations, and transaction witnesses were required, it is not unlikely that express as well as statutory warranties of quality were made by the Saxons. For what other reason would the witnesses be ordered to listen? The exchange of *weds* between the principals and their respective sureties could be viewed; it required no verbalization. Title passed by the acts and

96. YOUNG, *supra* note 81, at 169.

97. Ine 31 (THORPE 123).

98. Aethelbirht 77 (THORPE 23). Courtesy prevents conjecture as to the possible area and scope of the fraud.

99. Ine 56 (THORPE 139).

100. Edgar 6 (THORPE 275) (emphasis added).



did so immediately. The goods could be inspected in silence. In short, the only reason for the witnesses to listen carefully was to hear what the seller told the buyer. The conversation between the principals could be of import only as regards the nature of the goods. It seems clear these primitive people made warranties of quality.

Thus, the warranties of quality in Aethelbirht 77 and Ine 56 may be compared with contemporary implied warranties in that all are imposed by law. The Saxon warranty of title was imposed by law in that a seller, if called upon, was compelled to stand behind his transaction.<sup>101</sup> This ancient warranty of title, however, was much stricter than current implied warranties. As an integral part of the Saxon substantive criminal law, it could not be waived.

#### WILLS

The chief contribution of Canon law to Anglo-Saxon law is the will.<sup>102</sup> A priest probably wrote out the last wishes of the dying property owner. In fact, Professor Hazeltine asserts that written wills were introduced for the material benefit of the Church<sup>103</sup> and were evidence of contractual obligations.<sup>104</sup> He provides a most elegant statement of the commercial essence of Anglo-Saxon wills:

The Anglo-Saxons think in terms of grantor and grantee; and by grant they mean both conveyance and contract. The king and leading laymen form a large part of the class of grantors; while the ecclesiastics and ecclesiastical institutions are one of the largest, perhaps the largest, class of grantees. These grantors and grantees are traffickers. The subject-matter of their bargaining are not, however, spears or chasubles: these two groups of men are concerned with other things of far greater durability and value. The men of this world want things in the next; while the men of the next world want things in this. By their gifts the lay folk buy things in the spiritual world; and by their counter-gifts and counter performances the clerical buy things in the corporeal world. Rights in terrestrial possessions are exchanged for rights in heavenly mansions; and these rights are exchanged by grants which at the same time are contracts.<sup>105</sup>

At first these transactions were made orally before the required witnesses in the same manner as any other transaction. When the clergy became involved as one of the parties, a better form of memorialization of the rights created was sought. Writing was merely a

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101. Ine 75 (THORPE 151); Edward I 1 (THORPE 159).

102. KEETON, *THE NORMAN CONQUEST AND THE COMMON LAW* 17 (1966).

103. Hazeltine, *Comments On The Writings Known As Anglo-Saxon Wills*, *Foreward* to D. WHITELOCK, *ANGLO-SAXON WILLS* (1930).

104. *Id.* at 18.

105. *Id.* at 19-20.

more permanent form of evidence as to the ownership of an eternal asset—land. Therefore, the clergymen used their writing ability to record the transaction. The documents themselves note the presence of witnesses at an oral declaration. For example, the will of Brihtric and Aelfswith begins as follows: "This is the last will of Brihtric and his wife, Aelfswith, which they *declared* at Meopham, in the presence of their relations, namely, Wulfstan Ucca, . . . and Bishop Aelfstan."<sup>106</sup> The basic oral nature of Anglo-Saxon wills is confirmed by other instruments: "I Abba reeve make known and order to be written how my will is. . . ."<sup>107</sup> Still other documents evidence the need for witnesses to the verbal disposition:

It is for that Ordnoth wishes to have the testimony of God and his community at the Old Minister: namely, that he and his wife *announced in their presence* that the part of his possessions which he *stated* was to into his friends . . . .<sup>108</sup>

And finally Leof Aethelwold's will concludes: "Then I will that there be distributed for my soul, *as I have now said to the friends to whom I spoke.*"<sup>109</sup> Some of the wills contain words which clearly apply to contractual transactions. The will of Eadwald Oshering and his wife Cynethryth begins: "This is the agreement . . . concerning the land at Chart, . . ."<sup>110</sup> A phrase in Aethylwyrd's will reads: "[This is] the covenant that Eadric has with the brotherhood at Christchurch."<sup>111</sup>

Professor Hazeltine's description of the theological commercialism evidenced by Anglo-Saxon wills can best be seen by the return performances requested or set forth. The will of King Aethelstan states that he has granted his estates and possessions to the glory of God and for the redemption of his and his father's souls.<sup>112</sup> And Aethflaed left her property "For the praise of God and the need of her soul and her lord's. . . ."<sup>113</sup> One Badanoth left his land to a convent so they would care for the divine reward of his soul.<sup>114</sup> Ceolwin left her land to the convent at Winchester "On the *condition* that they remember the souls of her and Osmond . . . . And the

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106. WHITELOCK, *ANGLO-SAXON WILLS* 27 (1930).

107. THORPE, *DIPLOMATARIUM ANGLIEUM Aevi SAXON* 469 (1965).

108. WHITELOCK, *supra* note 106, at 19.

109. THORPE, *supra* note 107, at 500 (emphasis added).

110. THORPE, *supra* note 107, at 465.

111. THORPE, *supra* note 107, at 510-11.

112. WHITELOCK, *supra* note 106, at 57.

113. WHITELOCK, *supra* note 106, at 67.

114. THORPE, *supra* note 107, at 477.

convent has *promised* her to so settle so that Wulfstan, her brother's son, have a hide of rent-free land as long as he shall live."<sup>115</sup>

The most patent proof of the mercantile exchange of wealth for salvation is the written arrangement between Archbishop Wulfred, Osulf Aldorman and Osulf's wife:<sup>116</sup>

I Osulf, by the grace of God aldorman, and Beornthryth my consort, give to Christ's church at Canterbury the land at Stanstead, XX sulugs, to God Almighty and to the holy convent in the hope, and for the reward of the eternal and future life; and for the health of the souls of both of us, and our children. And with great humility we pray that we may be in community of those who are servants there of God, and the men who there have been lords, and of the men who have given their lands to the Church. And that a twelvemonth after our time, there be given in divine goods and also in alms, as is done from their own.<sup>117</sup>

I now Wulfred, by the grace of God archbishop, fulfil these aforesaid words, and ordain that a twelvemonth after the time of them both, it may thus be, on one day, at Osulf's anniversary, both with divine goods and with alms, and also with reflection to the convent. Now I ordain that these things be given a twelvemonth after from the Liminges [a list including breads, cattle, poultry, cheese, wines and ale] . . . . Also I pray the community that they perform these divine goods at that time, for their souls: that every masspriest sing for Osulf's soul two masses, two for Beornthryth's soul; and every deacon read two Passions for his soul, two for hers; and every servant of God sing two fifties for his soul, two for hers, that ye before the world may be blessed with worldly goods, and their souls with divine goods. Also I pray the community that ye remember me at that time with such divine good as may to you seem fitting; I who have settled this settlement, both for love of the convent and of the souls of those whose names are here before written. Valete in Domino.<sup>118</sup>

Osulf left land to the convent in return for its prayers and the giving of alms on his behalf. The archbishop agreed to the bargain, bound his successors in interest, and then issued specific instructions as to the manner of performance. In one document, the land is transferred, the return promise given and detailed instructions as to its fulfillment set forth. May it be assumed that the archbishop in providing a place for himself in the generosity of alms distribution and the grace of the prayers was merely setting his sales commission?

Anglo-Saxon wills had a completely different legal effect than do contemporary testamentary dispositions. Modern wills are the dispositive act of the testator, whereas ancient wills merely recorded a prior disposition of the property in a legally enforceable exchange.

115. THORPE, *supra* note 107, at 493 (emphasis added).

116. THORPE, *supra* note 107, at 459.

117. THORPE, *supra* note 107, at 459.

118. THORPE, *supra* note 107, at 46-63.

Therefore, while the typical modern will is in the present tense,<sup>119</sup> ancient wills are worded in the past, such as: "[H]ave disposed;"<sup>120</sup> "It was bequeathed . . . ;"<sup>121</sup> "In this manner appointed . . . ;"<sup>122</sup> and "Has given this deed. . . ."<sup>123</sup>

The difference in legal effect goes to the real nature of Anglo-Saxon contracts. Modern wills are revocable,<sup>124</sup> but Anglo-Saxon wills, as contracts concluded by *wed* and *borh*, passed title at the moment made and were, therefore, irrevocable. Once the contract was formalized, title passed to the beneficiary. It has been observed that title to land evidenced by a document could be asserted against subsequent purchasers. Once the agreement was concluded, the witnesses and, more reliably, the document, would prove the beneficiary's title in the event the testator had had a change of heart and attempted to or did convey to some third person.

Before leaving the Anglo-Saxon probate practice, albeit a contractual one, note should be taken of a practice which still exists today—requiring the guardian of the property of a minor to post bond.<sup>125</sup> The laws of Hlothar and Eadric provide:

If a husband die, wife and child yet living, it is right that the child follow the mother; and let there be sufficient "borh" given to him from among his paternal kinsmen, to keep his property till he be X. years of age.<sup>126</sup>

#### WRITTEN CONTRACTS

Documents were preferred over human witnesses as proof of land transfers. The human witness was acceptable in a sale of cattle because chances were the witnesses would survive the cattle and thereby be available in the event any dispute as to title to the goods arose.<sup>127</sup> This was not possible in land contracts, however. Thus, the lay population, after observing the benefits achieved by the clergy in

119. See, e.g., 3 RABKIN & JOHNSON, CURRENT LEGAL FORMS 701-705 A. at 48-61 f (1968).

120. THORPE, *supra* note 107, at 462.

121. THORPE, *supra* note 107, at 465.

122. THORPE, *supra* note 107, at 473.

123. THORPE, *supra* note 107, at 479. See also: "has settled" at 479; "I have committed . . ." at 555; "has ordered . . ." at 547; "how I have given . . ." at 557; "has bequeathed . . ." at 586; "have given . . ." at 588; "has disposed of . . ." at 596; "I have given . . ." at 599.

124. See, e.g., ILL. REV. STAT. ch. 3, § 46 (1967).

125. See, e.g., ILL. REV. STAT. ch. 3, §§ 146-148 (1967).

126. Hlothar & Eadric 6 (THORPE 31).

127. LAUGHLIN, *supra* note 20, at 235.

recording wills, found the same procedure useful for land contracts. In all likelihood there was some carryover effect from the first Roman occupation of England, since the Roman governors used documents for the same purpose.<sup>128</sup>

Within fairly short order the written transfer of land became a ceremony having equal legal stature with the *wed* ceremony. Setting one's hand to the charter became another means of concluding a binding undertaking. The evidentiary efficacy of such documents can be seen in a number of cases from the era. In a suit by the Bishop of Worcester for land taken from his church, the Bishop prevailed because he showed a charter from King Aethelbald. The report, says the Bishop, "confirmed these things with the witness of the charters . . . ."<sup>129</sup> Stronger proof of the evidentiary weight given to charters is shown by the case of Berhtwulf, March 28, 840.<sup>130</sup> Here the King of the Mercians dispossessed Bishop Heaberht from certain land and distributed it among his own men. Heaberht appeared before the king and his nobles and was restored to his land on the strength of his charters. Notice that in the latter case the land was in the hands of third parties, but it could still be reached because of the writing. This reinforces the earlier discussion of Saxon property principles, problems and solutions.

These charters also reflect their close similarity to the Anglo-Saxon will. They further testify that the general method of exchange in the era remained public transfer before witnesses, since they contain the language referring to an oral act, previously accomplished in the presence of witnesses:

Earl Aethelstan *has granted* by charter this estate of Uffington to . . . and this *was done* with the cognisance of Wynsige, Bishop of Berkshire, and Archbishop Wulhelm and Bishop Hrothward and many others, both bishops and abbots and thegns, *who were assembled there, when the manor within the stated boundaries was handed over* to the possession of St. Mary's at Abingdon.<sup>131</sup>

**And:**

This is the agreement which Bishop Brihthelm and Abbot Aethelwold *have made* about their exchange of lands, namely that the bishop should give the hides at Kennington as a perpetual inheritance to the Church at Abingdon, and the abbot should give the seventeen hides at Creedy Bridge to the bishop in perpetuity, [to be held]

128. 2 POLLOCK & MAITLAND, *supra* note 2, at 192-193.

129. ESSAYS IN ANGLO-SAXON LAW, Select Cases 316 (1876).

130. *Id.* at 330.

131. ROBERTSON, ANGLO-SAXON CHARTERS 45 (1956) (emphasis added).

during his life and [disposed of] at his death. And they have likewise *exchanged* everything, both livestock and other things, as they *agreed* between themselves. And this *has been done* with King Edwy's permission, and these are the witnesses: . . . [eleven are listed].<sup>132</sup>

Thus the use of writing to prove sales was first used to serve the unique needs of the Church. The spread of the practice to the dealings of all segments of the community was a natural step.

#### CONTRACTS WITH SALVATION AS SECURITY

The importance of religion in Anglo-Saxon times is shown primarily by the numerous transfers of property to churches and church personnel. However, another indication of the prominence of religion is the reliance placed on promises secured by the promisor's potential salvation. The people and the civil authorities were sufficiently confident in such promises that they were enforced. Alfred 33 sets out the procedure for enforcing such promises:

If any one accuse another on account of a "god-borh," and wish to make plaint that he has not fulfilled any of those ["god-borhs"] which he gave him, let him make his "fore-ath" in four churches; and if the other will prove himself innocent, let him do so in XII. churches.<sup>133</sup>

Thus, if a promisee wanted to allege breach of a promise secured by the promisor's faith, it had to be done by swearing an oath in four churches. The alleged promisor had an absolute defense by a counter-oath sworn in twelve churches. Such a method of enforcement is mute testimony to the faith of the people. The people had confidence in this procedure because a falsehood by either party would constitute multiple perjury—a contempt of Church and the saints.<sup>134</sup> No Anglo-Saxon would risk that.

There were two methods by which a promisor could pledge his faith. He could deliver it directly to the promisee by literally handing it to him, and thus we can observe a similarity to the hand-grasp.<sup>135</sup> More effectively, the promisor's faith could be deposited with some third person who would be in a position to coerce the promisor to redeem his faith (*i.e.*, his salvation) by temporal sanctions.<sup>136</sup> The promisor would make the promise to the promisee and then

132. *Id.* at 59 (emphasis added).

133. Alfred 33 (THORPE 83).

134. 1 POLLOCK & MAITLAND, *supra* note 1, at 58.

135. 2 POLLOCK & MAITLAND, *supra* note 2, at 191-192.

136. 2 POLLOCK & MAITLAND, *supra* note 2, at 191.

pledge his faith to a *fideiūssor* as assurance the promise would be fulfilled. The *fideiūssor* was generally a local bishop or sheriff who, by his authority, could enforce the promise.

While this may be viewed as a natural progression from the surety contracts discussed earlier, there is a significant difference. God, rather than the *fideiūssor*, was surety for the promise, or more precisely, the promisor's salvation was.<sup>137</sup> The *fideiūssor* did not accept any obligation. This distinguishes him from the surety. He merely became a repository of the promisor's faith (his chance of salvation) and held temporal means of enforcement.

The reality of spiritual punishment to the early English, and thereby its effectiveness as a means of enforcement, is best demonstrated by how individuals used it in their own behalf. Wills of the era ended with phrases such as:

And whatsoever man shall alter this bequest, may he be a companion in the torment of hell of Judas, who betrayed Our Lord.<sup>138</sup>

[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 created and made all creatures exclude him from the fellowship of all saints 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 suffer with God's adversaries, without end and never trouble my heirs.<sup>139</sup>

Therefore, it can be observed that obligations secured by the promisor's faith were likely to be kept, and if his faith was placed in the hands of a *fideiūssor*, the promise was enforceable by temporal coercion.

#### CONTRACT OF COURT RECORD

Akin to the procedure of placing one's faith in the hands of a *fideiūssor* was the practice of making contracts in court. In Anglo-Saxon times there was no distinction between ecclesiastical and civil courts.<sup>140</sup> The bishop was active in the government (and the legal system particularly) because he was specially trained in law. It has also been pointed out that the people of that era were accustomed to doing their business before witnesses. The appeal of transacting busi-

137. 2 POLLOCK & MAITLAND, *supra* note 2, at 191.

138. WHITELOCK, *supra* note 106, at 67.

139. WHITELOCK, *supra* note 106, at 87. See also at 5, 9, 17, 29, 35, 51, 55, 65, 69, 71, 75, 79 and 83.

140. 1 POLLOCK & MAITLAND, *supra* note 1, at 40.

ness before an individual who might eventually be asked to enforce the transaction is obvious. To that end Ine 13 provides: "If any one before a bishop belie his testimony and his 'wed,' let him make 'bōt' with CXX. shillings."<sup>141</sup> This gave the bishop a role in civil government by allowing him to punish perjury and breach of contract. Therefore, if a *wed* was passed in the presence of the court, a special sanction attached to the failure to perform the formalized contract. This was still another means by which the Anglo-Saxons could assume an obligation and have it enforced by the civil authorities.

The special recognition accorded contractual ceremonies in the presence of bishops may be viewed as the forerunner of the recognition of debt authorized soon after the close of the Saxon era. The Statute of Merchant and Staples<sup>142</sup> created special machinery for the recording of debts on court rolls. No doubt the judicial formation of a contract was a popular mode of transacting business because of its unique enforceability. Bishops, burdened with numerous contract ceremonies, wanted some record to protect themselves from the civil penalties for doing injustice.<sup>143</sup> Thus the Statute of Merchant in 1285 which provided for a judicially formalized contract was within the tradition of the people.

#### THE EARNEST CONTRACT

It has already been pointed out that in the earliest contracts the real nature of the transaction required payment in full at the moment the contract was formed. In the case of private peace treaties, the cash required of the slayer was prohibitive. In a sale where the seller was to retain possession, the risk of payment in full was obvious. Where a warranty of quality was given and there was some doubt that the goods conformed, the buyer might want to withhold payment to protect himself. So, to relieve the promisee of the risk of making full payment and yet preserve the legal viability of the contract, the Germans introduced, and the Anglo-Saxons maintained, the *handgeld*, or earnest payment.<sup>144</sup>

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141. Ine 13 (THORPE 111).

142. 13 Edward I, STAT. 3 (1285).

143. Cnut 15 (THORPE 385).

144. LAUGHLIN, *supra* note 20, at 189; YOUNG, *supra* note 81, at 170.



The *handgeld* was of slight intrinsic value. It did not constitute part payment, but rather was a ceremonial means of judicially binding the agreement. It preserved the appearance of a real contract without complete performance by one side.<sup>145</sup> In some respects *handgeld* was similar to the *wed* ceremony. Both were formal acts geared at obtaining enforcement of the contract. They probably differ only in that the *wed* was a worthless stick, while the *handgeld* did have some value.

The *handgeld* may be compared to two similar practices in contemporary business. The first is the option or paid-for offer of the *Restatement of Contracts*.<sup>146</sup> More meaningful is the comparison to our custom of paying earnest money. While *handgeld* was in no way part payment,<sup>147</sup> it was of juridical effect. Can this primitive formality be the reason that many modern contracts specify that in the event the contract is completed, any earnest money will be applied to the purchase price?<sup>148</sup> If the answer is affirmative, another ancient doctrine persists to this day.

#### THE DELIVERY-PROMISE

Another development in the law provided the Anglo-Saxons with a modified formal contract of sale. The supplements to Edgar's Laws 3. state: "This then is what I will: that every man be under 'borh' both within the 'burhs,' and without the 'burhs.'"<sup>149</sup> And the first law of Edgar's son, Ethelred, was: "That is, that every freeman have a true 'borh,' that the 'borh' may present him to every justice, if he should be accused."<sup>150</sup>

By imposing the procedural contract on every freeman as a matter of law rather than as a matter of choice, Edgar and Ethelred made possible simplified formal sales.<sup>151</sup> Because every freeman had sureties by law, it was no longer necessary that they be specially furnished at the time of contract. The mere exchange of *weds* in the presence of witnesses created the contract. The sureties created by statute

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145. YOUNG, *supra* note 81, at 170.

146. 1 RESTATEMENT OF CONTRACTS §§ 46 & 47.

147. YOUNG, *supra* note 81.

148. 8 RABKIN & JOHNSON, CURRENT LEGAL FORMS, FORMS 21.09-21.11 pp. 576-587 (1968).

149. Edgar 3 (THORPE 275).

150. Ethelred I 1 (Thorpe 281).

151. Henry, *supra* note 27, at 652.

would serve to guarantee the undertaken performance or the appearance in court. Such sureties fulfilled their age-old duty in the traditional ways. They either brought the promisor to court to answer for his default or they themselves answered for it.

#### THE SAXON SOCIAL CONTRACT

However, to view the statutory sureties imposed on every citizen by Edgar and Ethelred as merely a means of speeding commercial activity would be to overlook their true significance. The real nature of these sections can be seen by looking at the laws of the two kings who ruled a reunified England at the start of the tenth century.

Edward the Elder, who governed from 901-924,<sup>152</sup> made the first meaningful steps toward establishing central government by commanding:

If anyone disregard this, and break his oath and his "*wed*," which all the nation has given, let him make "bot" as the doom-book may teach: but if he will not, let him forfeit the friendship of us all, and all that he has.<sup>153</sup>

In this statute Edward recognized that a relationship existed among all the people. Also note that this relationship was concluded in the traditional formal manner—exchange of *weds*. The contractual nature of the relationship is demonstrated by the command that if one broke the universal promise, he was to be denied the friendship of all. This first articulation of the Saxon social contract is similar to at least one part of the social contract modern political philosophers discuss. The purpose of the statutory surety was clearly set forth by Aethelstan, Edward's successor, who ordained:

Seventhly, every man shall stand surety for his own men against every [charge of] crime.

§1. If, however, there is anyone who has so many men, that he is not able to control them, he shall place each estate in charge of a reeve, whom he can trust, and who will trust the men.

§2. And if there is any of those men whom the reeve dare not trust, he shall find twelve supporters from among his kindred, who will stand as security for him.<sup>154</sup>

The imposition of permanent statutory sureties was an attempt to establish and maintain order and domestic tranquility. The laws of Edgar and Ethelred later in the century reinforce this principle. In

152. THORPE, *supra* note 23, at 158 n. a.

153. Edward 8 (THORPE 165) (emphasis added).

154. Aethelstan III 7. ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* 145 (1922).

this manner the Saxons established a social contract in that each individual obtained the protection of the law in return for accepting responsibility for the acts of others. With every free man watching others for whom he was responsible, and being watched in turn by those responsible for his conduct, the ancient English at least had the framework for a highly ordered society. In fact, the contemporary viewer may reject this form of social contract as too inhibiting. However, one is only denying the terms of the contract, not its existence. Other civilizations, past and present, have used this social contract with great effect.

Pollock and Maitland recognize an earlier Anglo-Saxon formal social contract—the vassalic contract.<sup>155</sup> The placing of one's folded hands within the hands of another was a token of subjection. By means of this ceremony, one man became the vassal of another. This was a more primitive social contract, but it persisted for many years.

#### CONCLUSION

The major observation that can be offered is that Anglo-Saxon contract law was molded to the particular needs of the society in which it existed. It was a creature of the distinct need to temper private vendettas and discourage cattle stealing. The witnessed sale was combined with the personal, primary liability of the surety created by the *wed* ceremony. This combination created an acceptable foundation upon which to build a law of contract.

The transactions to which this theory and its refinements were applied was limited in number: sales of real estate, cattle and other personal property, testamentary dispositions and betrothals. It is this limited number of transactions which leads observers to dismiss the Anglo-Saxons as primitive and to ignore their contributions (albeit merely only the preservation of some Roman and Germanic practices) to modern law. However, it does not seem profitable to be indifferent to half a millenium's practice.

True appreciation of the ancient English requires a distinction in the meanings of the words "primitive" and "unsophisticated." There can be no denial of their underdeveloped technology and sparse resources. However, the shrewd insight they had into human con-

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155. 2 POLLOCK & MAITLAND, *supra* note 2, at 189.

duct and the artful applications of existing knowledge they devised disprove any possible naiveté of the era. The Anglo-Saxons had few legal principles, but the ones they had were understood and manipulated as cunningly as in any modern civilization.

The distinction Anglo-Saxon property law made between real and personal property is a tribute to their understanding. Permitting the successful assertion of title against a subsequent purchaser of land, but not adhering to the same rule in multiple sales of movable goods, demonstrates a comprehension of metaphysics and epistemology. It further demonstrates that law, even in an underdeveloped civilization, is responsive to the realities of life in that society.

Still another observation of the Anglo-Saxon legal system merits discussion. The adaptation of the *wed* ceremony (created to settle private feuds) to commercial activity demonstrates the subtlety of Anglo-Saxon reasoning. By adapting the widely-used peace treaty procedures to commercial acts, the Saxons gained for the enforcement of promises the added impetus of the drive for personal safety. This extension of an accepted practice to a new field was shrewd. The adaptation of the very procedures created to overcome the gravest shortcoming of Anglo-Saxon life to facilitate commercial transfers is the transformation of weakness into strength, and was thus consummate wisdom.

There is no intention to prove as absolute fact the points I have raised. The impossibility of such an undertaking was discussed in the introduction. The intention has been merely to raise a few thoughts about a primitive people whose legal system has gone relatively unheralded. In the development of Anglo-American law, Saxon contributions have been overlooked or discounted. It seems unfair to do so when one realizes the Anglo-Saxons transferred land by document and recognized testamentary dispositions centuries before Norman England.

## APPENDIX A

REIGNS OF THE SAXON KINGS—FROM B. THORPE, ANCIENT  
LAWS AND INSTITUTES OF ENGLAND (1840)

Athelbirht—Kent 560-616 (converted by Augustine 597)

Hlothar and Eadric—Kent 673-686 (total)

Wihtraed—Kent 690-725

Alfred—Wessex 871-901

Ine—Wessex 688-725

Edward the Elder, 901-924

Aethelstan, 924-940

Edmund, 940-946

Edgar, 959-975

Ethelred, 978-1016

Cnut, 1017-1035