

# Abolishing the Doctrine of Consideration - The Story of the Arra- Part 2

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## 20. LOWDEN (1565)

*Sharlington v Strotton* (1565)<sup>1</sup> concerned the conveyance of land by use by the owner to his brother and heirs, reserving a life interest (a liferent). The case was reported by Plowden and much use of the word '*consideration*' was made of - albeit, it should be noted that Plowden's reports were published in Law French in 1571 and translated in 1761. The case arose on a bill of trespass against Strotton and others for taking timber without authority from land subject to a use (a trust) contained in a deed. The crucial issue was whether the use was valid. Counsel for the P's (Fleetwood and Wray) argued that the use was invalid since there was no consideration. Plowden (appearing for the D's with Bromley - he described himself as an '*apprentice of the Middle Temple*') argued that the use was valid since a deed '*imported consideration*'<sup>2</sup> - a proposition of law accepted by later courts and one which still prevails today (the actual case held that natural love and affection was sufficient consideration but this was soon reversed).<sup>3</sup> So, what was consideration? And, why was natural love and affection treated as, in effect, having a money value (being a good price)?

### (a) Use of the Word 'Consideration'

The word '*consideration*' was used extensively in the case report. More than 100 times. Similar to St German, it was used - at various times - as a synonym for:

- a '*reason*' or '*basis*';<sup>4</sup>

<sup>1</sup> *Sharlington v Strotton* (1565) 1 Plow 298 (75 ER 454). See also Baker & Milsom, n 118, pp 488-92 and Simpson Equitable, n 100, pp 33-5.

<sup>2</sup> Ibid, p 309 'every deed imports in itself a consideration viz the will of him that made it, and therefore where the agreement is by deed, it shall never be called a *nudum pactum*.' G de C Pamiter, *Edmund Plowden* (1987) noted, p 83 'That, however, was not Plowden's main argument which he developed from Aristotle's treatment of the natural law in his Politics. The conclusion to which his argument led was that natural love and affection provided sufficient consideration to raise a use. That argument was accepted and judgment was given for the [D's].' Parmiter also noted that - in *Callard v Callard* (1597), after Plowden's death - the Exchequer Chamber reversed the judgment of the King's Bench and held that - to raise a use - a contract in consideration of natural love and affection had to be under seal. See *Callard v Callard* (1593) Cro Eliz 344 (78 ER 593). Also, Poph 47 (79 ER 164) and in Exchequer Chamber, 2 And 64 (123 ER 547). See also Baker Doctrine, n 2, p 1185.

<sup>3</sup> Bacon, n 46, p 165 'a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it: and therefore in *8 Reginae* [i.e. *Sharlington's Case*] it is solemnly argued, that a deed should raise an use without any consideration.' Also, 'I would have one case shewed by men learned in the law where there is a deed; and yet there needs a consideration'. Ibid, p 165. See also Jenks, n 91, pp 145, 155-8.

<sup>4</sup> e.g. *Sharlington v Strotton* (1565) 1 Plowd 298 (75 ER 454), at p 301 'The other way is, to keep the land in his hands without parting with it, and yet do such a thing as shall make the possession to be to the use of another, and that cannot be unless the thing imports in itself a good and sufficient *consideration* to make the possession to be to the use of another, which shall be upon a contract, or upon a covenant or a grant on *consideration*.' (*italics supplied*). The first instance is a '*reason*'; the second is a '*recompense*'. Ibid, p 301 'we ought to weigh the considerations here.' Ibid, p 302 'And none of the *considerations* contain a recompense here...' Ibid, p 302 'if uses might be so easily raised upon such *considerations* as these...' Ibid, p 303 'the considerations are in number four'. Ibid, p 304 'he followed nature for his guide, which is a sufficient consideration in our law.' Ibid, p 304 'the consideration of [X] here expressed for the provision... of his heirs males is a sufficient consideration to raise a use in the land.' Ibid, p 309 '*Nudum pactum est ubi nulla subest causa [reason] praeter conventionem; sed ubi subest causa sit obligatio et parit actionem*' (A bare contract is one where there is no cause [reason] beyond the agreement itself, but where there is such a [reason] then there is a legal obligation and a legal action is available.' Reference may also be made to a YB case 20 Hen VII 11 (i.e. 20 Hen 7 pl 20 fo 10b-11a, Seipp no 1504.020), see Salmond Essays, n 89, p 193 where it was said of a grant 'It was made on good consideration [reason], for the elder brother is bound by the law of nature to aid and comfort his younger brother.'

- a 'purpose' or 'motive';<sup>5</sup>
- a 'price', 'payment', recompense' or 'reward';<sup>6</sup>
- in 'exchange for' or in 'return for';<sup>7</sup>
- on 'reflection'.

These different senses were (often) used even in the same sentence. Thus, for example, Fleetwood and Wray (for the P's) argued that:

if a man is seised of land in fee, and bargains and sells the land to another *in consideration of* a certain sum [i.e. an agreed sum] paid to him, or agreed to be paid at a certain day, here is a contract<sup>8</sup> ...because he has done an act *upon consideration*, that is, he has bargained the land for [a fixed sum of] money....<sup>9</sup>

In the first instance, the words '*in consideration of*' are synonymous with in '*exchange for*' or in '*return for*'. Thus, a valid sale was made (it was alleged) if land was sold for an agreed price (a certain sum). In the second instance, '*consideration*' was used more as a synonym for '*price*' or '*payment*'. More specifically in this case, for '*money*' (a certain sum of money).

- However, in the second, instance, '*consideration*' might also have referred to '*reflection*'. That is, the parties had bargained (that is, haggled or negotiated) over the matter and had come to a mutual, fixed, intention - evidenced by their agreement on the sale of the land in question and the price for the same. Indeed, any reference to a bargain or a contract indicated that the parties were in a business transaction and that this was not a case where a gift was being asserted.

***In conclusion, the fact that the word 'consideration' was used in many senses in this case indicates (strongly) that there was no doctrine (pre-requisite) - as such - at this time.***

#### **(b) 'Consideration' as Synonym for 'Price' & 'Payment'**

Plowden used the word '*consideration*' as a synonym for the word '*payment*' or '*price*'. Indeed, he stated as such:

the law has provided that a contract by words shall not bind without consideration...As if I promise to give you £20 to make your sale *de novo*...<sup>10</sup>

Fleetwood and Wray (as reported) employed similar usage when they referred to an agreement subject to a condition:

the case of a covenant upon *consideration*, as if I...promise and agree with another that if he will marry my daughter, he shall have my land from henceforth, and he does so, there he shall have a use in my land, and I shall be seized to his use, because a thing is done whereby I have benefit, *viz.* the other has married my daughter, whose advancement in the world is a satisfaction and comfort to me, and therefore is a good *consideration* to make him have a use in my land.<sup>11</sup> (*italics supplied*)

<sup>5</sup> Ibid, p 302 'the like *consideration* they had in making the Act of Inrollments..'. [i.e. Statute of Enrolments 1536].

<sup>6</sup> Ibid, "the *cestui que use* may as well give or grant his use without *consideration*".

<sup>7</sup> Ibid, 'if a man grants to JS that in *consideration* of their long acquaintance...'. Ibid, p 305 the husband takes upon him to find the wife with everything that is necessary, and in *consideration* thereof the father shall bear the charge of the rent.' Ibid, p 307 'if A....covenants with B that in *consideration* that B will marry his daughter...'.  
<sup>8</sup> This was inaccurate since there was no delivery. Cf. the example of Robert Kelway (Keilwey, Sgt) cited by Anthony Gell c.1562, see Baker Doctrine, n 2, p 1190 'Note that *Kelway* said that if I give another twenty shillings, or a penny, in *consideration* that he to whom the gift is made should make an assurance to me of his manor of Dale for the sum of £20 to be paid later, and if he who takes the penny does not make assurance, the other may have an action on the case and recover damages to the value of the land, because it was a contract and there was *quid pro quo*.' Keilwey also thought that an agreed exchange of land for £20 *without* the 1d was invalid, for there was no exchange of 1d. This (it is asserted) is correct. See also Baker Doctrine, n 2, p 1197 (*Doige's Case* (1442 20 Hen VI pl 4 fo 34), land in return (exchange) for payment). Also, Stoljar Contract, n 101, p 19.

<sup>9</sup> *Sharington v Strotton* (1565) 1 Plowd 298 (75 ER 454), p 301. This follows Bracton -the sale of land with the price agreed. There is *consensus* and delivery of the land (if agreed to be paid and not paid, an action can be brought for the unpaid sum since *quid* (the land) has been delivered).

<sup>10</sup> Ibid, p 308. This satisfies Bracton's pre-requisite for a sale - that the price must be agreed or ascertainable.

<sup>11</sup> Ibid, p 301. See also, p 302 'The *consideration* ought to be to him who is seised of the land, for if he has no *recompense* there is no cause why the use of his land should pass.' (*italics supplied*). They argued that brotherly love was not the same as a recompense (thus, not good consideration, that is, not something to be taken, legally, into account 'not taken to be considerations worthy in law to make a use, for they are of no value or recompense'.).

This example reflected St German (*'an action lies at the common law..if a man say to another marry my daughter and I will give you £20. Upon this promise an action lies if he marries his daughter ...*). However, while St German referred to a fixed price (£20), Fleetwood and Wray referred to a value equivalent (*'my land'*) which, doubtless, could be expressed in £ if need be. In short, in both instances, the father had bought (paid a dowry for) the marriage, no different to any other service contract.

- As to the second instance of the use of the word '*consideration*' in the above example, while St German referred to a *quid pro quo* (*'this for that'*), emphasising delivery on the part of the promisee (i.e. he had married the daughter and therefore was entitled to delivery of the £20), Fleetwood and Wray referred to '*consideration*' emphasising more that the promisor had received (akin to a sale) a money (monetary) value or benefit (i.e. the preferment of the daughter, that is, having someone else to pay for her).

***In conclusion, both parties in the case used 'consideration' to refer, at times, to a price or payment.***

#### **(c) Validity of a Use - Deed Evidenced Consensus**

Counsel for the P's argued that the use was invalid since there was no '*consideration*', no payment. That is, brotherly love had no money value. In short, they were arguing that a use should be treated the same as a sale. The parties must agree on a price - similar to a dowry in which a man agreed to pay a man a fixed price (say £20 or land) to marry his daughter.<sup>12</sup> For the D's, Plowden (and Bromley), *inter alia*, argued that a deed precluded any argument about the money value of brotherly love since a deed was the product of mature reflection on the part of both parties. The deed manifested an intention to contract on the part of each - and it also evidenced their *consensus*, that they were *ad idem* (in accord) and that one could not now go behind the deed (the matter was closed, estopped). Thus, the P's counsel had argued:

in our case here...[X] was seized of the land in fee simple, and intended to raise uses in it without any transmutation of the possession [i.e. delivery of *seisin*], which he cannot do by the course of the common law, unless the circumstances pursued in the raising of such uses imports a good and sufficient *consideration* to support the same...<sup>13</sup> (*underlining supplied*)

Plowden answered this by treating '*consideration*' and '*intention*' as one and the same (and not the same as a '*recompense*' or a '*reward*' in this instance), *viz.*

every deed imports in itself a consideration viz the will of him that made it, and therefore where the agreement is by deed, it shall never be called a *nudum pactum*. And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be enquired, for it is sufficient to say that it was the will to make the deed.<sup>14</sup> (*underlining supplied*)

***In short, Plowden argued that a deed satisfied the pre-requisite of 'consensus' since it evidenced the will of the parties and their agreement on the matter - including any price on the value of brotherly love. Further, a deed, by its nature, prevented (estopped) any party asserting otherwise.***

#### **(d) Was Plowden Right ?**

Plowden argued that a deed, *per se*, was conclusive evidence of *consensus*. However, an equally good ground for winning his case would have been that a seal was an *arra* and that, from time immemorial, an *arra* evidenced that a person was bound.<sup>15</sup> An *arra* never permitted argument as to value since - although the *arra* symbolised

<sup>12</sup> See the case of 1477, see n 737.

<sup>13</sup> *Sharlington v Strotton* (1565) 1 Plowd 298 (75 ER 454), p 301. As a statement of the law of contract this is correct. Delivery was a pre-requisite (following Bracton). Thus, Plowden had to outsmart this by not denying it as such - but by asserting that the deed evidenced *consensus* and delivery and the parties could not now re-open these issues.

<sup>14</sup> *Ibid*, p 309. See also p 308 'And because words are often times spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration...And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying his good-will that the thing in the deed should pass from him to the other.' See also *Anon* (1535) Benloe 16, pl 20 cited by Simpson *Equitable*, n 100, p 34, n 150.

<sup>15</sup> This would have been highlighted if, instead of a wax impression of a signet ring, the ring itself had been handed over. For a case in this period see that of Sir Francis Englefield. A Catholic, he was given licence to go abroad by Elizabeth I (1558-1603). In 1563, he was commanded to return but did not do so. In 1587 he was attainted. (see also *Case of Sturton & Mordant* (1607) Moore (KB) 779 (72 ER

value - it could be of nominal (including no) value, such as a tally, a token *etc.* As to the meaning of 'consideration' - and its relationship to the *arra* - this may be viewed in the context of the arguments put forward by counsel for the P's and the D's in the case.

- If consideration means 'intention' (the 'will of him that made it [i.e. the deed]') - there is no need for a separate doctrine (pre-requisite) of consideration and any money (or money value) given is simply evidence of an intention - just as the *arra* is evidence of an intention to be bound;
- However, if consideration means 'price' or 'payment' then - separate to intention - this becomes an additional requirement (pre-requisite) of English law. However, from the start such a pre-requisite conflicts with the nature of an *arra* (including a deed) since an *arra* was never required to have any value.

#### (e) Conclusion

As with St German, it seems clear that no separate doctrine of consideration had developed by the time of this case since Plowden (and opposing counsel) used the word 'consideration' in many senses.<sup>16</sup> Further, if there had been such a pre-requisite, then Counsel for the P's (Fleetwood and Wray) would certainly have raised it. Plowden's argument was a good one in asserting that a deed prevented any re-opening of the issue as to the 'price' of brotherly love. However, he should have pleaded that the seal was an *arra*.

***In conclusion, Plowden developed the legal proposition that a deed - reflecting the mutual and mature intention of parties (that is, after discussions and reflection) - evidenced consensus. There is no indication in the case that he was seeking to develop a separate doctrine (pre-requisite) of consideration.***

#### 21. CASES IN THE PERIOD 1567-77

Baker - when considering the doctrine of consideration - stated:

there is no reason to suppose that sixteenth-century lawyers were unanimous as to the nature, let alone the intellectual sources, of the doctrine of consideration. Indeed, the one safe assumption to begin with is that if the matter had been plain then, it would be more readily identifiable now.<sup>17</sup>

One would agree, to an extent.<sup>18</sup> Baker also noted that:

- the development of any doctrine might be limited to the period 1535-1580,<sup>19</sup>
- the first appearance of an *in consideratione* clause in the *assumpsit* declaration could be dated (with reasonable precision) to 1539,<sup>20</sup>
- there were no discussions of the nature of 'consideration' before 1560.<sup>21</sup>

Further, *Sharington v Strotton* (1565), see **20**, elicits no evidence of a 'doctrine'. Not least, if there had been a clearly established principle, it would have been pleaded.<sup>22</sup> As for later cases, the following may be noted:

901)). Prior to going abroad, he had conveyed before witnesses his English estates by use to his infant nephew for life - the same to revert to him on the presentation of a gold ring to the nephew. An Act of 1593 (35 Eliz c 5) was directed at this 'gold ring' conveyance, intimating that the Crown accepted its validity. See GS McBain, *Abolishing Obsolete Crown Prerogatives relating to the Military* (2011) Nottingham LJ, vol 20 at p 34. Also, *Englefield's Case* (1591) 7 Co Rep 11b and Holdsworth, n 95, vol 7, p 178.

<sup>16</sup> Cf. Simpson Equitable, n 100 cites many examples of the word 'consideration' being used prior to this case. However, as with this case, on inspection, it is clear that the word is being used in many different senses.

<sup>17</sup> Baker Doctrine, n 2, pp 1176-7.

<sup>18</sup> One says 'to an extent' since it is asserted that counsel and judges were not seeking to develop any doctrine (pre-requisite) of consideration in this period. Rather, they were using 'consideration' to refer to evidence of *consensus* and delivery. Further, there were no legal text writers in this period writing on contract and interested in the law of evidence in respect of commercial matters.

<sup>19</sup> Baker Doctrine, n 2, p 1177 'With reasonable confidence...we can reduce our concentration to the half century from 1535 to 1585. By the 1580s the reports are full of discussions about consideration; usually the matter arose on a motion of arrest of judgment, but it could also be raised by a demurrer, or writ of error, or special verdict, or argument upon the evidence.' Cf. Holmes Common Law, n 87, p 253 'I am not aware that consideration is distinctly called *cause* before the reign of Elizabeth I [1558-1603]; in the earlier reports it always appears as *quid pro quo*.'

<sup>20</sup> Ibid, p 1178, 'The first appearance of the *in consideratione* clause in the *assumpsit* declaration may be dated with reasonable precision to 1539.' Cf. McGovern Quid Pro Quo, n 425, p 194 cited *Joscelin v Shelton* (1557) 3 Leon 4 (74 ER 503) as 'the earliest reported use of the word 'consideration' in *assumpsit*.' See also Ames Lectures, n 90, p 147. Also Brown, n 92, p 7. Cf. Simpson Equitable, n 100, p 1.

<sup>21</sup> Ibid, p 1182 'Not only are there no discussions of the nature of 'consideration' before 1560, but when the discussions do begin the profession seems already to be engulfed in a torrent of complex learning...'

- **Lord Grey's Case (1567)**. Lord Grey - in consideration of two (or, possibly, seven) shillings - agreed to pay his father's debt to P. The two shillings was an earnest (an *arra*). Dyer CJ indicated that *actual* delivery of the earnest did not have to be proved.<sup>23</sup> In this case, the word '*consideration*' was used in various senses. Thus, Gawdy used it in the sense of a '*reason*',<sup>24</sup> as did Dyer CJ.<sup>25</sup> However, Gawdy also used it - like Plowden - in the sense of '*evidence*' of an '*intention*', in that a past intention was not the same as a present one to bind a person. Thus, if the debt was already due it was insufficiently clear whether the surety was prepared to act as such, without further evidence of intention;<sup>26</sup>
- **Hunt v Bate (1568)**.<sup>27</sup> D's servant was arrested. Before condemnation and judgment P acted as surety, on his own head. Later, P brought an action on the case against D for his costs (£31). It was held no action lay since there was no consideration (reason) why D should be charged for the debt of his servant since he never requested P to act as surety. In this case reference was made to an earlier one where D promised P to pay £20 if he married P's kinswomen. This was held good since P did so following D's request. In that case, the word '*consideration*' appears to have been used to refer to a '*reason*'<sup>28</sup> as well as in '*exchange for*';<sup>29</sup>
- **West v Stowell (1577)**.<sup>30</sup> In this case, the word '*consideration*' was particularly used in the sense of '*evidence*' of intention, for the purpose of *consensus*. At a shooting match between Lord Effingham ('LE') and D, the latter promised P that - if LE won - he would pay him £10. For his part, P promised that - if D won - he would pay him the same. When LE won, P sought against the D for non-payment. Counsel asserted there was insufficient evidence to bind D<sup>31</sup> (doubtless, if an *arra* had been involved there would have been). Mounson J held there was a counter promise and '*so a good consideration*'<sup>32</sup> - which word one takes as his treating the same as '*evidence*'. Manwood J also held that an agreement had been reached.<sup>33</sup> It is asserted that '*consideration*' was not being used in this case in a legal sense to manifest any specific pre-requisite. Rather, both judges were indicating that they thought there was sufficient evidence arising from the '*communication*' (negotiation, that is, the discourse between the parties and their acts) to indicate that *consensus* had been reached. Here, the agreement (including on the price) was that - if LE won - D would pay P £10. There was also delivery - LE delivered by winning.

<sup>22</sup> Baker Doctrine, n 2, p 1195 cited *Lucy v Walwyn* (1561) 'in our case there is no consideration in fact or in law, for he who undertook to obtain the lease was to have nothing before the obtaining; so that there is no *quid pro quo*, but only *nudum pactum*, upon which an *assumpsit* cannot be'. However, Baker noted (one would agree) that the word '*consideration*' here is obviously not used as a term of art in this passage; it means '*the reason why I can sue*'. Also 'if the passage reflects current thought in 1561, there was evidently still no doctrine of consideration; the word was the name of the problem, not of its answer.' See also 19(a).

<sup>23</sup> Baker & Milsom, n 118, p 493 'Gawdy Sjt asked the court whether the consideration of two shillings was traversable; or, if we traverse [generally] *non assumpsit modo et forma* [as Baker & Milsom put it in a fn, the gist is that he did not undertake in the manner and form alleged by P]. Dyer CJ. No; for it is only alleged as a matter of course. It is now alleged so frequently in the Queen's Bench that it would be hard to stop it here.'

<sup>24</sup> Ibid, 'I think...whenever an undertaking is the cause of a debt the action lies well. For instance, where there is discussion (*communication*) of a bargain between them, and they agree on the bargain (namely, the sum and the day of payment) but one of them mistrusts the other's credit, if I say 'Do not doubt: if he does not pay at the day, I will', this is a good undertaking and a good *consideration* [reason] to charge me...'

<sup>25</sup> Ibid, 'if my kinsman, brother or friend is indebted to you, and I say to you that if he does not pay you I will, [i.e. to act as a surety] here if you forbear to sue in respect thereof and to charge my friend, this is a good *consideration* [reason] to charge me; for what goes in ease and for the benefit of my friend is my ease and benefit also.' (*italics supplied*)

<sup>26</sup> Ibid, 'when a debt was already due, it seems to me that it is not right to charge a man [i.e. to hold a man liable] upon such words [I will pay the debt of another] without any *consideration*, which ought to be proved.' (*italics supplied*) . Also, Jenks, n 91, p 60.

<sup>27</sup> 3 Dyer 272 (73 ER 605). See also Baker & Milsom, n 118, p 494.

<sup>28</sup> At p 272a, the opinion of the court 'there is no *consideration* [reason] wherefore [D] should be charged for the debt of his servant, unless the master had first promised to discharge the [P] before the enlargement, and mainprize made of his servant.' (*italics supplied*)

<sup>29</sup> Ibid, 'But in another like action on the case brought upon a promise of [£20] made to the [P] by the [D] in *consideration* that the [P], at the special instance of the said [D], had taken to wife the cousin of the [D], that was good cause [reason] although the marriage was executed, and past before the undertaking and promise, because the marriage ensued [followed] the request of the [D].' (*italics supplied*)

<sup>30</sup> 2 Leo 154 (74 ER 437). See also Baker & Milsom, n 118, pp 494-5.

<sup>31</sup> Ibid, p 495 'here is not any sufficient *consideration*; for the promise of the [P] to the [D] *no parit actionem*, for there is not any consideration upon which it is conceived, but [it] is only, *nudum pactum*, upon which the [D] could not have an action against the [P]. And then here is not any sufficient *consideration* for the promise of the [D].'

<sup>32</sup> Ibid, 'Mounson Justice conceived, that here the *consideration* is sufficient, for here this counter-promise is [a] reciprocal promise, and so a good consideration; for all the communication ought to be taken together.' For other reference to '*communication*', see *Southwall v Huddelston* (1522), SS, vol 119, p 153 'this was not a grant or perfect bargain at the start, but a communication'.

<sup>33</sup> Ibid, 'Manwood [Justice]. 'Such a reciprocal promise betwixt the parties between themselves at the match is sufficient; for there is *consideration* good enough to each: as, the preparing of the bows and arrows, the riding or coming to the place appointed to shoot, the labour in shooting, the travel [travail] in going up and down between the marks: but for the bettors by there is not any *consideration*, if the bettor doth not give aim.'

These cases, also, do not suggest there was a doctrine of consideration in place by 1577. The word '*consideration*' was used (as before) in different senses. It may also be noted that no reference in these cases was made to canon law, unlike St German, in 1528. Nor, to Roman law. Nor to Chancery practice. That said, these cases show some important evidential issues which later crop up in the doctrine of consideration.

- ***Arra***. In *Lord Grey's Case* (1567), the *arra* (that is, handing over a token sum of money to show *consensus* and delivery) became a legal fiction. Actual payment of the same was not required. This is (it is asserted), the basis of much of the doctrine of consideration;
- ***Past Consideration***. A past act was not the same as a present one. And, *consensus* required the present union of minds. Thus, to claim a debt on the basis of a past act (such as in *Hunt v Bate* (1568), above) was no good. There was no union of minds since Bate had never agreed to it;
- ***Promise & Counterpromise***. A promise is *evidence* of the intention of a party.<sup>34</sup> So too, a counterpromise. Thus, a promise and a counterpromise - if they meet - comprise a union of minds (*consensus*) (so too, incidentally, if the scenario is analysed in terms of an offer and acceptance or question and answer that coincide). Thus, promise and counterpromise evidence intention - which is how Mounson and Manwood JJ treated them in *West v Stowell* (1577).<sup>35</sup>

The above cases seem to be good examples of the courts using '*consideration*' to refer, in some instances, to the evidence to show *consensus*. However, they do not disclose the courts indicating any separate doctrine (pre-requisite) for a contract.

***In conclusion, cases up to 1577, disclose no evidence of the word 'consideration' being used in a technical, legal, sense. Nor as a pre-requisite for a contract.***

## **22. FRAUDULENT CONVEYANCES ACTS 1571 & 1584**<sup>36</sup>

These Acts are important since they referred to consideration in the sense of '*money*'. Also, more specifically, to '*good*' consideration which referred to money (or marriage)<sup>37</sup> not employed for the purpose of fraud. Thus, the Act of 1571 - which concerned fraudulent conveyances and assignments with an intent to defraud creditors - provided:

- S 1. Every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels (and every lease, rent, common or other profit or charge out of the same) and every bond, suit, judgment and execution relating to the same - was taken (only against that person(s), his heirs, successors, executors, administrators and assigns whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs by guileful, covinous or fraudulent devices<sup>38</sup> disturbed, hindered, delayed or defrauded) to be void - any pretence, colour, *feigned consideration*, expressing of use, or other thing to the contrary notwithstanding;
- S 2. Parties to feigned feoffments who willingly [intentionally] put in use, avowed, maintained, justified or defended the same as true, had or made *bona fide* upon *good consideration etc.*, were to incur forfeiture;
- S 5. The Act was not to extend to any estate *etc* had, made, conveyed or assured *etc* 'upon *good consideration* and *bona fide*'.

The Act of 1584, designed to prevent frauds upon purchasers, provided:

- Preamble. It referred to fraudulent conveyances coloured to appear to be made *bona fide*, for good causes, and upon *just and lawful consideration*;

<sup>34</sup> Cf. Atiyah Promises, ns 29-30.

<sup>35</sup> See also Stoljar Contract, n 101, p 53 'to speak of mutual promises was essentially to say that the parties had arrived at a bargain, provided that one promise was '*in consideration*' of the other, for this '*consideration*' referred to, just as it underscored, the existence of mutual benefits.' See also *Gower v Capper* (1597) Cro Eliz 543 (*assumpsit* will lie on mutual promises). Ibid, p 54.

<sup>36</sup> See also AJ Hunt, *The Law relating to Fraudulent Conveyances under the Statutes of Elizabeth* (2nd ed, 1897).

<sup>37</sup> Marriage was treated as a form of consideration. See also *Townsend v Windham* (1750) 2 Ves 1 (28 ER 1), *per* Hardwicke LC 'marriage...the best consideration that can be.' See also Hunt, n 795, p 10. Simpson Equitable, n 100, p 29 'Marriage was accepted as good consideration in *Assaby v Lady Anne Manners* (1516)[ 2 Dyer 235a (73 ER 520)]; the down-to-earth explanation here is the prevalence of property transactions on account of marriage, and the desire to give legal effect to a well-established social institution. At a more technical level it is possible to argue that marriage is a benefit, and run the analogy with *quid pro quo*; alternatively marriage can be accounted a good consideration in its own right, without enquiry as to whether it is beneficial or indeed detrimental.'

<sup>38</sup> The Preamble had previously referred to feoffments *etc* devised and contrived of malice, fraud, covin, collusion or guile to the end (purpose) of defrauding creditors *etc.*

- S 2. Fraudulent purchases made to deceive purchasers who had purchased for 'money or other *good consideration*' to be void;
- s 3. Persons who avowed (asserted) *etc.* that a purchase had been made '*bona fide* or upon *good consideration*' to be penalised;
- S 4. The Act not to void any conveyance *etc* made upon or for '*good consideration and bona fide*';
- S 5. This concerned lands first conveyed with a condition of revocation (or alteration) and afterwards sold for '*money or other good consideration*';
- S 6. This referred to mortgages made *bona fide* and upon '*good consideration*';
- S 8. This referred to a failure to record according to the Statute Merchant or the Statute Staple<sup>39</sup> and a person later purchasing an estate for money or '*other good consideration*'.

The concept of '*consideration*' in terms of '*money*' was, later, reflected in the doctrine of consideration. Further, '*good consideration*' was construed - for the purposes of the Acts - to refer to '*valuable consideration*.'<sup>40</sup> That is money (or marriage) not employed in transactions for fraudulent purposes.

### 23. CALTHORPE'S CASE (1574) - STONE v WITHPOLE (1589)

A series of cases in this period indicate the glimpses of what - later - was to be accepted as the doctrine of consideration.<sup>41</sup> However, this seems to have come by way of a sidewind and not as a result of a conscious effort by judges to develop a new pre-requisite for a contract. As to these cases:

#### (a) Calthorpe's Case (1574)

This case, which was settled by arbitration, related to an action for ejection prior to the Statute of Uses 1536.<sup>42</sup> In it, Dyer CJ stated:

A consideration is a cause or meritorious occasion, requiring a mutual recompense [*quid pro quo*], in fact or in law.<sup>43</sup> Contracts and bargains have a *quid pro quo*.

This seemed to be a reference to the fact that contracts (generally) were perceived in terms of (and, likely, were in most cases) an exchange (*this for that*). Further, Dyer CJ seems to have treated '*cause*', '*meritorious occasion*', '*reciprocal cause*', '*mutual cause*', '*mutual recompense*' and '*quid pro quo*' as synonyms. Thus, in effect, Dyer CJ was saying little more than that a pre-requisite for a contract was *quid pro quo*. This was correct in that a pre-requisite for a contract - following Bracton - was '*delivery*' (*this for that*) both in terms of the subject matter (*this*, for example being the exchange of a cow for *that*, being £5) as well as a component of *consensus* (*this* being the promise or offer of one party; *that* being the promise or acceptance of the other). Further, Dyer CJ stated that '*Contracts and bargains have a quid pro quo*'. This also reflected the law - gifts were not seen as an exchange, but as a unilateral act (albeit, they had to be accepted and delivery of the gift was, generally, required but it was not a mutual delivery).

***In conclusion, Dyer CJ was identifying consideration with quid pro quo (delivery) which he (correctly) asserted was a pre-requisite for a contract. Thus, in effect, he was asserting no more than that a material cause (pre-requisite) for a contract was delivery.***

<sup>39</sup> See McBain Law Merchant, n 134, pp 63-4, 83.

<sup>40</sup> *Twyne's Case* (1601) 3 Co Rep 80 (76 ER 809) at 83a 'although in the preamble it is said for '*money or other good consideration*', and likewise in the body of the Act '*for money or other good consideration*', yet these words '*good consideration*' are intended only of valuable consideration.'

<sup>41</sup> Baker Doctrine, n 2, 1177-8 '*Consideration* had achieved the status of a doctrine, and could already be defined as either a profit or benefit to the defendant [promisor] or a labour or charge to the plaintiff [promisee].'

<sup>42</sup> (1574, KB) 3 Dyer, 334b (73 ER 756).

<sup>43</sup> See also *Lord Gerard's Case* (1581), Baker Doctrine, n 2, p 1194 where Dyer CJ stated that '*un consideration est causa meritoria pur que il granteroit, et poet estre appell per bien causa reciproca, sc un mutuell cause...*'. See also JH Baker, *Reports from the Lost Notebooks of Sir James Dyer*, SS, vol 109 (vol 1), p xxx, n 82.

**(b) Webb's Case (1577)**

This case held the following:

In an action upon the case, the [P] declared, that whereas Cobham was indebted to JS and JS to the [D], the said [D] in consideration that the [P] would procure the said JS to make a letter of attorney to the [D] to sue the said Cobham, promised to pay and give the [P] £10. It was objected, here was not *any consideration* for to induce the *assumpsit*; for the [D] by this letter of attorney gets nothing but his labour and travel [*travaill*]. But the exception was not allowed of. For in this case not so much the profit which redounds to the [D], as the labour of the [P] in producing of the letter of attorney, is to be respected.<sup>44</sup> (*italics supplied*)

Here, it seems clear that *consensus* was reached - £10 to procure a letter of attorney. Further, there was *delivery*, *viz.* a letter produced by JS ('*quid*' requiring '*quo*'). Thus, there was a valid contract between P and D - albeit a third party was involved to execute the letter. However, this was no different (in law) between P executing the letter and handing it to D - in effect - D paying £10 to P for a letter of attorney. Yet, there is use of the word '*consideration*' and linking it specifically to the financial loss to P, who would (it seems) have had to have paid JS something. *Was this necessary?*

- This case was different to *Lucy v Walwyn* (1561) where the agreement was for D to pay 100s to P for him to procure S to lease land to D. In that case, reference was to a *quid pro quo*, but there was no delivery (of a lease) or payment. Here, there was delivery of a letter of attorney;
- However, was there a need to refer to a financial loss to P? It is asserted, '*no*', since - even without it - there was delivery. P had delivered his part (procuring the letter). Thus, D should have delivered his (the £10), pursuant to the agreement. As a result, '*consideration*' - in the sense of profit or loss - crept in on a sidewind, as it were, since the crucial issue was - had the parties reached *consensus* and had there been *delivery* - with the fact that P had suffered a loss (or D a profit) simply evidencing the same.

***Here, the labour of P (the promisee) was treated as delivery (quid). It was also reflected as a financial loss (charge) - since he would have had to pay the attorney (solicitor) for the letter.***

**(c) Sidenham v Worlington (1585)**

In this case,<sup>45</sup> an action on the case on a promise, P - at D's request - stood surety and bail for JS for a £30 debt which P had to pay. D promised P he would repay him. Not doing so, P brought the action against D. Anderson CJ did not think an action would lie, being past.<sup>46</sup> He was likely influenced by counsel for the D (Walmsley) who stated:

*consideration* will not maintain the action, because the *consideration* and promise did not concur and go together; for the *consideration* was long before executed, so as now it cannot be intended that the promise was for the same consideration. As if one gives me a horse, and a month after I promise him £10 for the said horse, he shall never have debt for the £10 nor *assumpsit* upon that promise, for there is neither contract nor consideration, because the same is executed.<sup>47</sup> (*italics supplied*)

Here, it is asserted that '*consideration*' was being used to refer to the debt. However, counsel (and Anderson CJ) would seem to be wrong in that P was aware of the £30 at the time of the debt (therefore, there was *consensus* - a union of present intentions, *viz.* '*P - I will pay the £30 debt as surety. Accepted.*'), as well as delivery (P paid up)). However:

Peryam J conceived that the action did well lie. And he said that this case is not like unto the cases which have been put of the other side. For there is a great difference betwixt contracts and this case. For in contracts upon sale the consideration and the promise and the sale ought to meet together; for a contract is derived from *con* and *trahere*, which is a drawing together, so as in contracts everything which is requisite ought to concur and meet together: *viz.* the consideration of the one side, and the sale or the promise on the other side. But to maintain an action upon an *assumpsit* the same is not requisite, for it is sufficient if there be a moving cause or consideration

<sup>44</sup> 4 Leo 110 (74 ER 763). See also Baker Doctrine, n 2, p 1178. Also, Stoljar Contract, n 101, p 49.

<sup>45</sup> 2 Leo 324 (74 ER 497). See also Baker & Milsom, n 118, pp 495-7.

<sup>46</sup> Baker & Milsom, n 118, p 496 'This action will not lie; for it is but a bare agreement, and *nudum pactum*, because the contract was determined, and not *in esse* at the time of the promise; but he said, it is otherwise upon a consideration of marriage of one of his cousins; for marriage is always a present consideration.' Wyndham J agreed with him. See also Godb 32 (78 ER 20).

<sup>47</sup> Ibid, p 496.



precedent, for which cause or consideration the promise was made. And such is the common practice at this day. For in an action upon the case upon a promise the declaration is laid that the [D], for and in consideration of £20 to him paid, *postea* (that is to say, at a day after) *super se assumpsit*, and that is good; and yet there the consideration is laid to be executed. And he said that [*Hunt v Bate* (1586), see 21] would prove the case...<sup>48</sup>

The reference to *Hunt v Bate* (1568, see 21), would appear to be both to the fact that, there, P had taken to act as surety off his own head (hence, not *consensus*, but delivery, since he paid) and to the example in the case of D promising P £ 20 to marry his kinswomen (*consensus* and delivery, since P satisfied the condition). Rhodes J agreed with Peryam (Periam) J:

And he said, that if one serve me for a year, and hath nothing for his service, and afterwards at the end of the year I promise him £20 for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon good consideration;<sup>49</sup> but if a servant hath wages given him, and his master *ex abundanti* doth promise him £10 more after his service ended, he shall not maintain an action for that £10 upon the said promise, for there is not any new cause or consideration preceding the promise (which difference was agreed by all the parties).<sup>50</sup>

Judgment was given for the P.<sup>51</sup> This would seem appropriate. *Consensus* had been reached - including on the price ('Pay £30 to JS and I will repay you'). That is, there had been a present union of minds on the matter (unlike *Hunt v Bate*). Further, there was delivery on P's part. He paid £30 to JS.

***In conclusion, this case indicated that the fact that a debt was paid subsequent to an agreement did not preclude a valid contract when there was also delivery - since the D had requested the debt to be incurred. This could also have been formulated in terms of quid pro quo (P had paid his quid - literally).***

#### **(d) Megott v Broughton & Davy (1586)**

One Mounson enfeoffed the two D's of land with the intention they convey it to whomsoever Mounson should choose to sell it to. Mounson later sold it to P but they did not convey it. P brought an action on the case against them. Wray CJ and Gawdy and Clench JJ held that the action lay.

For he [Wray CJ] said it was a *consideration*, since there was a trust reposed in them that they would convey to the [P]; and where there is a good *consideration* in the Chancery an action on the case will lie upon it here. And judgment was entered that it was a good *consideration* and that the action well lay.<sup>52</sup> (*italics supplied*)

Here, the word '*consideration*' could be taken to refer to a '*moving [motivating] cause*' (as Periam J referred to in (c) above). However, the court could - as well - have concluded (in modern terms) that it was inequitable not to sustain the action since Mounson had entrusted the money to the D's for a specific purpose which they had agreed to. Alternatively, the court could have concluded that the parties had reached *consensus* and there had been delivery ('*quid*') of the money by Mounson to them. Thus, following Bracton's pre-requisites, the outcome would have been the same. Further, that is the problem with many of these cases. On the scant evidence available they can be rationalised (*ex post facto*) in a number of ways. The key thing - then - is to determine what is the most likely *rationale*.

#### **(e) Sturlyn v Albany (1587) & Manwood v Burston (1588)**

In the first case, it was accepted that the adequacy of consideration to ground an action in *assumpsit* might be minute (in this case, showing a lease to another),<sup>53</sup> the court stating:

<sup>48</sup> Ibid. See also Nelson, n 56, vol 1, p 57.

<sup>49</sup> This would seem correct, since there was *consensus* and *delivery* (the work being done). Also, since there is no evidence of a gift (i.e. that the servant was doing the work for free) a salary could be implied as having arisen prior to the work starting. That is, there was a implicit agreement that the servant would work, the *quantum* to be determined at the end of it.

<sup>50</sup> Ibid. The second example was also a gift (*ex abundanti*) in that it was given out of pure liberality. In the first example, delivery preceded *consensus*.

<sup>51</sup> Ibid 'And afterwards, upon good and long advice, and consideration had of the principal case, judgment was given for the [P]. And they much relied upon the case of *Hunt and [Bate]*..'. See 21.

<sup>52</sup> Baker & Milsom, n 118, pp 497-8. Gawdy and Clench JJ had previously held 'There is a trust reposed in them; *ergo* it is a good consideration. For they take this [land] in trust for whomever he should sell it to, and thereupon they may have a *subpoena*; and therefore it is a good consideration.'

<sup>53</sup> A under lessee promised the original lessor to pay rent and arrears if the latter could show him the lease by which it was due. The lessor did so. This was held to be sufficient consideration to maintain an *assumpsit*. Here, there was *consensus* and delivery (one assumes the lease was physically handed over, for the lessee to inspect).

when a thing is to be done by the [P], be it never so small, this is a sufficient consideration to ground an action.<sup>54</sup>

In the second case, *Manwood CB* (a party to the case) opined:

There are three manner[s] of consideration upon which an *assumpsit* may be grounded: - (1) a debt precedent, (2) where he to whom such a promise is made, is damnified [loses money] by doing anything...although no benefit comes to the promisor; as I agree with a surgeon to cure a poor man (who is a stranger unto me) of a sore, who does it accordingly ... (3) or there is a present consideration.<sup>55</sup>

It may be noted that these cases also reflect, in measure, the nature of an *arra*. It could be minimal in value (indeed, of no value) and it was present.

#### (f) Stone v Withipole (1589)

P brought a writ on *assumpsit* against D. P counted that D's son owed him £104 for goods sold to him. And, that the son had agreed to pay and had made D his executrix. The son died and D had agreed to pay the sum if P would forbear until Michaelmas but she had not paid. D pleaded that her son at the time of the sale and promise was underage and Wray CJ held that an action would not lie - the contract had been made by an infant and void. Coke (counsel for D) argued that:

no consideration can be good, if not, that it touch [i.e. it must comprise] either the charge [loss] of the [P], or the benefit of the [D], and none of them is in our case. For the [P, promisee] is not at any charge for which the [D] can have any benefit, for it is but the forbearance of the payment of the debt, which she [D] was not compellable to pay.<sup>56</sup>

In another report of his case, Coke is reported to have stated:

The consideration is the ground of every action on the case, and it ought to be either a charge to [P] or a benefit to [D]. 17 Ed 4 5 [1477] where a man promised and assumed to a surgeon money for curing a poor man: that was a good consideration;<sup>57</sup> for although it is no benefit to [D, the promisor], yet it is a charge to the [P, the surgeon, the promisee], and where there is no consideration, there can be no good action; as where a man promises [to pay] a debt that he never owed, this is void.<sup>58</sup>

Others, such as St German, had referred to a 'loss' to the P [the promisee]. Also, in the context of a man paying a dowry to another to marry his daughter, with the D (the father) securing a benefit (profit)(see **18(d)**). However, Coke presented both sides of coin, as it were - loss to P or profit to D - and it would seem likely that he took this from *Webb's Case* (1577)(see **(b)** above). That said, this case (as *Webb's Case*) could have been, equally, couched in terms of their being no real *consensus* - D not being aware that she had no obligation to pay. Further, the detriment/benefit analysis could have been couched in terms of the pre-requisite of delivery (*quid pro quo*). The parties had agreed, but the forbearance was not a delivery of something as such. However, the court was not required to opine on such matters since the contract was void for incapacity.

#### (g) Conclusion

In conclusion, two important quotations in the cases in the period 1577-89 may be noted:

- *Webb's Case* (1577). Reference had been made to 'not...the profit which redounds to the [D, the promisor], as the labour of [the cost to] the [P, the promisee] in producing of the letter of attorney...';

<sup>54</sup> *Sturlyn v Albany* (1587) Cro Eliz 67 (78 ER 327). See also *Knight v Rushworth* (1596) Cro Eliz 469 (78 ER 707) at p 470 *per* Anderson CJ 'the smallness of a consideration is not material'. Here, it was held that a promise to pay the bond of a third party if the obligee went before a magistrate and gave an oath that the bond was rightly read to the obligor, was sufficient to maintain an *assumpsit*. Anderson CJ, at p 470 'The travail of coming before the magistrate is a very good consideration...'. See also Cheshire & Fifoot, n 79, p 54

<sup>55</sup> *Manwood v Burston* (1588) 2 Leo 203 (74 ER 479). See also Cheshire & Fifoot, n 79, p 42 and Ames Lectures, n 90, p 146. For the reference to the surgeon, see the cases in 1477, see n 739 and in 1458, see ns 737 & 739.

<sup>56</sup> 1 Leo 114 (74 ER 106). See also Baker Doctrine, n 2, p 1178, fn 6. Cf. *Richards and Bartlet's Case* (1584) 1 Leo 19 (74 ER 17). P (as executrix) sued for corn which was to be delivered by her deceased husband to D for £10. The corn was damaged after this agreement. It was agreed that - in payment of 33s 4d - D would be discharged from the former agreement. The court held 'no profit but damage comes to [P] by this new agreement, and [D] is not put to any labour or charge by it, therefore here is not any agreement to bind [P].' See also Hughes, n 53, vol 1, p 55 and Nelson, n 56, vol 1, p 57.

<sup>57</sup> See **18(d)**.

<sup>58</sup> Owen 94 (74 ER 924).

- *Stone v Withipole* (1589). Coke argued that 'The consideration is the ground of every action on the case, and it ought to be either a charge [loss] to [P] or a benefit [profit] to [D].'

The source of this was an example given in a case in 1477 of one promising a surgeon money to cure another (or a labourer to repair a road).<sup>59</sup> These examples, however, were predicated on:

- (a) the parties having reached *consensus* - including on the price (payment); and
- (b) one party having *delivered* his part of the bargain,

since these examples of the surgeon and of the labourer were no different to the example of the schoolmaster in the same case in which it was stated:

for if I promise a schoolmaster so much money to teach my son, which he does, he will have an action of debt; and so it is where I promise a physician or surgeon a certain sum to cure a certain poor man; or if I promise a labourer so much money to repair a certain road which is the highway, good action lies on this...(underlining supplied)

In the latter two examples, it is implicit that the surgeon cured the man and the labourer repaired the road.<sup>60</sup> Thus, both are owed money (a debt) because they acted on the agreement. Thus, there was *consensus* and delivery. *Webb's Case* was no different. P (the promisee) was owed money since he had paid another to issue a letter of attorney. *Stone v Withipole* was different since (leaving aside the point as to the infancy), D had not done anything to cause P an unpaid debt (a loss). She had not created it, but merely asked D to forbear for a while and any payment by her was gratuitous since she owed him nothing and had no legal obligation to pay her son's debt. Thus, all these cases did not need a pre-requisite that Coke stated was required for every action on the case - a loss to P or a benefit to D (the promisor). They could have - as easily - analysed the matter by asking. Had *consensus* been reached? And, had there been *delivery* (i.e. had a party acted on it)? In *Stone v Withipole*, forbearance by P was not delivery since no true *consensus* had been reached (D was unaware that her son, being an infant, had no legal obligation to re-pay and, thus, nor had she as executor).

***In conclusion, cases between 1577-1589 evidence the beginnings of a doctrine of consideration, in terms of profit and loss. However, it seems clear this was a process of evolution (pleading points) without it being specifically declared to be such. Further 'consideration' was still in used in a vague sense to embrace a number of things.<sup>61</sup> Therefore, it needs be asked - Why did the term 'consideration' come about in the legal context? This issue is now considered.***

#### 24. CONSIDERATION - WHY ?

Consideration was a home-grown, common law, concept.<sup>62</sup> Further, consideration was not the same as *quid pro quo*. Consideration tended to be directed at (evidence of) the pre-requisite of *consensus* while *quid pro quo* tended to be directed at (evidence of) the pre-requisite of delivery (exchange). Further, the former was a larger expression than the latter in that it reflected 'value' being given in a wider sense than just coins or the precise subject matter. They were not identical, as Baker pointed out:

Although the notion of a bargain, or *quid pro quo*, seems to have been responsible for ousting vaguer notions of *causa* from English law, it does not explain the whole story, for by the 1580s it was repeatedly being stated that a promise could be supported by considerations which did not amount to *quid pro quo*.<sup>63</sup>

<sup>59</sup> See 18(d).

<sup>60</sup> The earlier case of 1458, clearly indicates this, see ns 737 & 739.

<sup>61</sup> See also, for example, *Mildmay's Case* (1584) 1 Co Rep 175a (76 ER 379) the word 'consideration' was used in various senses, including for a 'reason.' Ibbetson *Assumpsit*, n 121, p 152 'By the 1560s we may say that no promise was actionable unless it was based on good 'consideration', but that it was anachronistic to talk of any doctrine of consideration much before this. The word is used in such a bewildering diversity of circumstances that any search for a settled technical meaning is completely hopeless, and even attempts to seek for the origins of the later doctrine in these earlier uses of the word are perhaps misguided. 'One would agree, save that the reference to the '1560s' might, perhaps, be to the '1570s'.

<sup>62</sup> Baker Doctrine, n 2, p 1193 'Of one thing we may be sure: the law of consideration was English.' C Mitchell & P Mitchell, *Landmark Cases in the Law of Contract* (Oxford and Portland, 2016), ch 2 by G McMeel, p 26 'assumpsit...is the source of the doctrine.' Ames Lectures, n 90, p 147 'Consideration...is a common law growth.'

<sup>63</sup> *Ibid*, p 1198. Cf. p 1192 'The value of the early discussions is...the testimony they bear to the widespread belief that good consideration was synonymous with *quid pro quo*.' This would also seem true since 'consideration' was not just 'delivery'. It went to *consensus* and the evidential proof of such became more diffuse.

Unfortunately, while *quid pro quo* died away - because delivery as a pre-requisite for a contract died away - '*consideration*' took on a complex (and unnecessary) life of its own as an additional pre-requisite, one not required for a contract in other legal systems.

- As to *why* the doctrine developed c. 1577, this relates to two of Bracton's pre-requisites for a contract (*consensus* and delivery) and their evolution over the centuries;
- Further, by 1567 (*Lord Grey's Case*, see **21**), pleading the delivery (or the quantum) of an *arra* had become a fiction. It was not necessary to show that money (even token money) was handed over and it was not necessary to show any value of it (not even a 1d or a farthing). '*Value*' in some form was sufficient.

#### (a) Evolution of Bracton's Pre-requisites

Bracton had laid down various pre-requisites for a contract (see **12**). As well as being oral or in writing, to be valid, he held that: (a) the contracting parties had to have capacity; (b) there must be subject matter (identifiable and alienable). These pre-requisites were rarely in issue. However, there also had to be:

- (i) *consensus*;
- (ii) delivery; and
- (iii) for a sale, a fixed price that was agreed or ascertainable.

A simple way to evidence *consensus* in Anglo-Saxon and medieval times was the *arra*. By 1577, things had changed:

- ***Arra***. By 1567 (*Lord Grey's Case*) it was unnecessary to plead that an *arra* (usually 1d or a 1s) had actually been delivered. It had become a fiction for the purpose of pleading.<sup>64</sup> Further, an '*arra*' - while often being a small coin - did not have to be of any value at all. It was simply factual evidence of a party being bound. It *symbolised* value. Thus, it was inevitable that the word *arra* would be replaced (in time) by a more expansive term to refer to evidence of a person being bound. '*Consideration*' was, in large part, that term;<sup>65</sup>
- ***Delivery***. It had long been accepted that delivery of *seisin* (possession) of the subject matter could be effected by delivery of a deed in some instances (incorporeal hereditaments and chattels). However, by Elizabethan times, delivery of the latter had become symbolical. The deed did not have to be physically handed over.<sup>66</sup> Nor, the subject matter. If the deed said that there had been delivery, this raised an estoppel. In short, delivery could be a term of the deed. What applied to a deed, applied, over time, to contracts generally. An agreement to deliver - or a term in an agreement that delivery of payment or the subject matter had been made - was sufficient. Thus, delivery as a separate pre-requisite began to die away (and, today, it is not a pre-requisite of a contract). One would suggest that - by 1845 - delivery as a pre-requisite was, manifestly, dead;<sup>67</sup>
- ***Quid Pro Quo***. The '*quid pro quo*' was the exchange required to satisfy the pre-requisite of delivery.<sup>68</sup> Words, otherwise, counted for nothing.<sup>69</sup> Thus, if a person bought a cow in a market for £1 and there was immediate exchange (delivery), there was '*this*' (the (£1)) for '*that*' (the cow). However, many business transactions were not immediate. Thus, the *arra* acted as the '*quid*' for the price/payment to effect the delivery. As Sjt Jenny put it in

<sup>64</sup> Ibid, p 1179. Baker noted that a device in assumpsit pleadings was 'to say that the undertaking had been given in return for (*pro*) a small sum of money, usually twelve pence [1 shilling]. This last device was probably in many cases a fiction...' Also, fn 10 'In 1567 it was said to be a common-form fiction, and untraversable'. See also cases cited by Baker at p 1181. Indeed, it is likely that reference to payment of it in pleadings (often to a nominal shilling) was - even in Elizabethan times - sufficient to raise an estoppel although no sum had been exchanged. Ibbetson Assumpsit, n 121, p 154. The 1s may also, in small transactions, comprised part payment. See also Baker Spelman, n 118, p 288.

<sup>65</sup> Consideration also covered other matters, see **48(f)**.

<sup>66</sup> Coke, n 47, vol 1, 36a. 'as a deed may be delivered to the party without words, so may a deed be delivered by words without any act of delivery, as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Go and take up the said writing, it is sufficient for you, or it will serve the turn; or Take it as my deed, or the like words, it is a sufficient delivery.' See also *Chamberlain v Stanton* (1588) Cro Eliz 122 (78 ER 379) and *Thoroughgood's Case* (1584) 2 Co Rep 9a (76 ER 408).

<sup>67</sup> '*Manifestly dead*' since the Real Property Act 1845 enacted that corporeal hereditaments were to lie in grant, not in livery, see **34**. See *McBain Gift*, n 209, p196. This was a decisive break with the past (indeed, back to the Anglo-Saxon times). Land was now transferred by (document) grant and not orally with symbolic transfer of it, represented by a sod of earth or a twig.

<sup>68</sup> *Southwall v Huddelston* (1522), SS, vol 119, p 155, *per* Fitzherbert J 'even though there are words of granting, it is still only a bargain [i.e. negotiation, communication], since it is a chattel in return for money by way of sale [he gave as an example, an agreement to buy a horse for £20], which is not perfect unless there is *quid pro quo* at once [exchange, delivery].'

<sup>69</sup> See YB 16 Edw IV fo 9 pl 5 (1476), Seipp no 1476. 033 where Sjt Jenny said '*si jeo die a vous que jeo dona ou paya a vous xx li a certain jour nihil operatur per ceux parols*.' See also Baker Doctrine, n 2, p 1193.

1476 'every agreement...ought to have 'quid pro quo' such as a penny (*denier*) or another thing in satisfaction.'<sup>70</sup> Since the *quid pro quo* evidenced the pre-requisite of delivery, it was inevitable that, when the latter died out, so would the former and become merged into the more generic concept of consideration - especially when the delivery of an *arra*, itself, had become a mere matter of form (pleading) by 1567 and it did not need to be physically handed over;

- **Sale - Fixed Price.** A fixed price was required to be agreed for a sale. However, this pre-requisite was (really) a part of the pre-requisite of *consensus*, which applied to agreement on essential matters generally. That is, there was no *consensus* if the parties had not agreed, in a sale, on the price - since the price was so central to the same that a lack of it was good evidence that the parties had not come to a decision on the matter. This agreement on the price, by analogy, was extended by the courts to service and other contracts. If the parties had not agreed on payment it was pretty good evidence to a court they had not reached *consensus* and, hence, no contract had been concluded.<sup>71</sup>

## (b) Conclusion

In conclusion, the *arra* and delivery were fading away. Further, agreement on the price (payment) was merging with *consensus* - not unexpected since it was, in reality, a separate component of the same, the lack of which was (usually) evidence of the fact that *consensus* had not been reached. The result was that the key issue was now - *consensus*. And, good evidence that *consensus* had been reached included:

- an exchange (*quid pro quo*) had been made since it evidenced that a party had regarded itself as bound - by having effected delivery on its part;
- value - in terms of money or money's worth - had been paid since it, also, evidenced the same;
- a party (P, the promisee) had sustained a loss by acting on what (it was thought) was agreed;
- a party (D, the promisor) had secured a profit by the other party acting on what (it was thought) was agreed;
- promise and counter-promise.

A good generic word - for the purposes of pleading - was '*consideration*'. It was sufficiently wide to connote any form of evidence presented to the court in the pleading to seek to prove to the court that *consensus* had been reached and, thus, why an errant party (one in breach of contract) should now pay damages or be obliged to comply with what he had agreed. Further, the fact that '*consideration*' was intimately linked to the *arra* and to *consensus* is disclosed by certain crucial features of '*consideration*' viz.

- **Nominal.** Like the *arra*, consideration could be of nominal. Indeed (in fact) of no value. This was no different to a deed where the impression of a wax seal (an *arra*) was of no value.<sup>72</sup> Later writers tended to emphasise that '*consideration*' was of nominal value (a *tomtit*, a *peppercorn* etc). However, this was a legal fiction. A single peppercorn had none<sup>73</sup> - nor the wax impression of a seal on a deed.<sup>74</sup> Thus, both an *arra* and consideration could be nominal. Further, this is hardly surprising given the disastrous state of the coinage - where much legal tender was nominal in fact (being debased or clipped) and a huge volume of commercial transactions were effected using private tokens which (in law) were (technically) of no value;
- **Past.** Having given an *arra* in respect of a past transaction was inadequate since it did not evidence a present intention to be bound - vital to show that the parties had achieved *consensus*. Thus, for both an *arra* and consideration, a past intention was insufficient unless - in some way - it could also be said to reflect a present intention, such as in the case of a request which was accepted;

<sup>70</sup> Ibid, Seipp translation 'but in every agreement (accord) it ought to have 'quid pro quo', such as a penny (*denier*) or another thing in satisfaction, as if an agreement (accord) be made that the one party would make an acquittance to the other party, and that he by the making of this acquittance would be quit (acquitted) against him to whom he made the acquittance, but it is not so here, etc.'

<sup>71</sup> This was not invariable. Common innkeepers and common carriers were obliged by law to provide a service, and their prices were regulated to a considerable extent. See n 34. Thus, a reasonable sum could be implied, if precise payment was not agreed. As a result, a pleading was not defective in not specifying the consideration (payment). See also McGovern Informal Contracts, n 592, p 1159.

<sup>72</sup> Today, it is even more nominal. Company share documents, nowadays, simply say '*sealed*' - ignoring even a LS (*lex sigilli*) or the impression of a seal. Doubtless, the intention is to effect an estoppel.

<sup>73</sup> Cf. *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 'A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.' Indeed, metal detecting in areas where there were (likely) English fairs and markets suggests just that. A great quantity of small bits of copper, lead and nails can be found. This suggests that the *arra* (token) may have been discarded on the ground after a sale was concluded (being worthless) and, then, picked up by others when they, in turn, were about to conclude a sale. Further, many tokens were jettons (see 5), pieces of leather, tallies (pieces of wood) etc.; things of no worth.

<sup>74</sup> Textbooks on commercial law invariably refer to '*nominal*' value and cite examples of a small coin or a *tomtit*. However, this is misleading since '*nominal*' can mean no value. Consideration (even in Elizabethan times, in the form of an *arra*) would have been adequate if a party handed over an old shoe, a twig, a peppercorn, a wax seal or a copper ring, intending the same to comprise evidence of his being bound (a wedding was no different, it was valid regardless of the value of the ring (*wed*) exchanged). And, today, a statement in writing - even if not in a deed - saying for '*consideration, the receipt and adequacy of which the parties acknowledge*' would (almost certainly) raise an estoppel.

- **Gift**. This was no different to a contract in terms of offer and acceptance in early times. However, it was unilateral in that there was no exchange. The beneficiary did not have to do (or give) anything in return (apart from accept the gift) since it derived from the pure liberality of one party.<sup>75</sup> An *arra* was evidence that a transaction was not a gift since an *arra* was intimately associated with merchants and an invitation to trade (to treat, that is, to enter into a business transaction). Similarly, '*consideration*' was not required for a gift and, indeed, was good evidence that a gift was not intended.<sup>76</sup> Thus, both an *arra* and consideration were (are) not required for a gift. Indeed, both comprised (comprise) evidence militating against such an assumption;
- **Promise**. A promise was not the same as a contract since there was no *consensus* - there being no acceptance/counter-promise by the other party. And - even if there were mutual promises - they had to be *ad idem* as well as any other pre-requisites for a valid contract (including a fixed price for a sale) having to be met.<sup>77</sup> Otherwise it was an empty pact (*nude contract*). However, both an *arra* and consideration converted a *nude contract* (whether oral or in writing) into a contract (assuming the other requisites for the same were met). The *arra* converted it since (like a deed) its delivery sealed the matter, it evidenced the parties being bound. Consideration - when formulated as promise and counter-promise also did so (if the parties were *ad idem*) since it evidenced *consensus*.

Therefore, the key thing for both the *arra* and consideration was that they manifested (were evidence of) a mutual intention to be bound.

***In conclusion, 'consideration' - like the arra - was evidence pleaded before the king's court that the parties were bound. However - up to Stone v Withipole (1589) at least - it seems clear it was not a term of art as such, since the word was still used in different senses by counsel, judges and writers. Thus, it was, at most, a pleading point (pleading 'slang' - much like the term quid pro quo) used in the king's court.<sup>78</sup> Further, there is no evidence that they treated the word, as such, as a distinct pre-requisite.***

## 25. THE PERIOD 1589-99

In the later Elizabethan period, the problems with coinage meant that, still, a huge number of commercial transactions were being effected by using a private currency since legal tender was still in short supply. The value of such coins was nominal. This, doubtless, assisted the fact that '*consideration*' - when it became a distinct pre-requisite could, also, be such. Caselaw in this period also indicates that the doctrine of consideration had yet to be worked out.

### (a) Coinage

Snelling stated:

In Queen Elizabeth's time we are informed that there were frequent complaints made of private persons, such as grocers, vintners, chandlers, alehousekeepers and others stamping and using tokens of lead, tin, latten, and even of leather for farthings and halfpence, to the great derogation of the princely honour and dignity, and as great loss of the poor, since they were only to be repaid to the same shop from whence they were first received, and no where else; of which abuse that great queen, who was singularly attentive to the coinage, was very sensible, as also that there was a great want of farthings and halfpence.<sup>79</sup>

<sup>75</sup> McBain Gift, n 209.

<sup>76</sup> Today, consideration does not, necessarily, prevent a gift being such. Thus, in *Mansukhani v Sharkey* (1992) 24 HLR 600 a transaction was a gift even though consideration was given. In *Howard v Earl of Shrewsbury* (1867) 2 Ch App 760 a gift was '*coloured*' as a purchase. In *Esso Petroleum Co Ltd v Custom & Excise Commissioners* (1973), [1973] 1 WLR 1240, Pennycuik VC stated: 'the nature of the transaction depends upon the terms upon which the parties entered into it and not upon the label which the parties attached to it...I do not think that the fact this transaction is described as '*a gift of free coins*' advances this contention very far. One has to look at the terms of the transaction.'

<sup>77</sup> See e.g. St German, n 715 (*text*), 'if I say to another, '*I sell thee [you] all my land (or all my goods)*', and nothing is assigned that the other shall give or pay for it [i.e. no price is agreed] that is a nude contract.' This is because, even if the parties agreed on a sale, it still required the price to be fixed. See also Bracton, see 12.

<sup>78</sup> Baker Doctrine, n 2, p 1201 'The technical '*doctrine of consideration*' in which these principles came to be enshrined in the time of Elizabeth I [1558-1603] was occasioned by nothing more arcane than fertile ambiguity resulting from a little shift of wording by the pleader. It is true enough that the life of the law has not been scholastic logic: it has been the conversion of loose words into jargon.'

<sup>79</sup> Snelling, n 533, p 2.

Although Elizabeth I (1558-1603) sought to suppress base money and foreign coinage, this does not seem to have achieved much success.<sup>80</sup> She initiated a policy of coinage reform in 1560.<sup>81</sup> In 1561, silver three-halfpenny and a silver three-farthing piece (tiny coins) were issued.<sup>82</sup> This did not satisfy the need for small denomination currency and private currency still circulated.<sup>83</sup> Although Elizabeth did not permit copper coinage, in 1577, she allowed the City of Bristol (the second biggest city after London at the time) to issue copper farthings (£30's worth annually) for circulation in the city and 10 miles around.<sup>84</sup> Such was not a success, it seems.<sup>85</sup> Even prior to this - the cities of Bristol, Worcester and Oxford struck lead and 'latten' [leather] farthings, while in London 'no less than 3000 people made their own lead tokens.'<sup>86</sup> A draft Proclamation was prepared c.1600, to issue to introduce as legal tender copper farthings and halfpence as well as to ban former tokens.<sup>87</sup> This Proclamation noted that Elizabeth I [1558-1603] had received complaints of:

a long continued and yet very intolerable and arrogant disorder used by private persons in making tokens of lead and tin, and generally coined and put out instead of our small monies by grocers, vintners, chandlers, alehouse keepers, and diverse other persons, therein manifestly derogating from our princely honor and royal dignity, which complaint we have considered of as very just and reasonable.<sup>88</sup>

However, this draft Proclamation remained unpublished and no copper currency was issued as legal tender in her reign.<sup>89</sup> The effect was that a huge number of commercial transactions were still being effected using a private currency. Further, for smaller (everyday) transactions the use of a token coin or a handshake (or a drink to wet the bargain) was (likely) still prevalent as an *arra*.

#### **(b) Further Caselaw - 1589-99**

Further cases in which reference was made to consideration may be noted in the period 1589-99. Thus:

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<sup>80</sup> See PL Hughes & JF Larkin, *Tudor Royal Proclamations* (Yale UP, 1969), vol 2, p 150 (*Devaluing Base Coins*, 27 September 1560); p 155 (*Prohibiting Traffic in Coin; Devaluing Foreign Coin*, 9 October 1560); p 165 (*Calling in Base Coins, Reforming Coinage*, 19 February, 1561); p 169, *Calling in Last Base Coins* by 20 July, 12 June, 1561).

<sup>81</sup> Davies, n 148, pp 205-6 'Following a series of detailed investigations in which the Queen herself was directly involved, an agreed plan was adopted and a series of royal proclamations was issued between 27 September and 9 October 1560 - the current equivalent of a modern 'white paper' - announcing the government's intention to proceed with the recall, revaluation and recoinage of all the base moneys, and warning the public that the legal punishments against exporting or melting coins would be carried out with the greatest severity. These proclamations also gave details of the 'crying down' or devaluation of the existing coinages (to an extent sufficiently less than their precious metal content so as more than to cover the costs of the whole operation). The less debased coins were devalued by 25 per cent, while the most grossly debased types were devalued by more than 50 per cent. A final date, 9 April 1561, was given after which the debased coins would no longer be legal tender, and further to speed the change a bonus of 3d per £1 was given on certain types exchanged before the end of stipulated dates between January and August 1561. To assist the public in sorting out the tangle of the various issues goldsmiths throughout the country were appointed as agents for such exchanges.'

<sup>82</sup> Hughes & Larkin, n 839, vol 2, p 179 (*Announcing New Small Coins: Outlawing Foreign Coins*, 15 November, 1561). Also, p 263 (*Prohibiting Debased Foreign Coins*, 1 June 1565).

<sup>83</sup> Fletcher, n 149, p 38 'On evidence of finds [of tokens] dated to Elizabeth's reign, what many of them made (or had made) were crudely cast and rather thick lead discs, almost all bearing one or two initials in Roman style. Genealogical research in some districts has confirmed the initials belonged to landowners. We cannot tell whether those finds are tallies or local token coinage, but it is worth noting that large numbers of casual labourers who often worked for less than one penny a day needed payment for their efforts at picking, harvesting and carrying farm produce, or hauling boats along rivers, or dragging carts out of mud, and many similarly menial yet essential tasks. A local token currency in fractions of a penny, however much frowned upon by higher authorities, would have suited local needs admirably.'

<sup>84</sup> *Ibid*, pp 6 & 38-9. The Crown also issued base (nominal) money in Ireland in 1601, see Earl of Liverpool, n 132, p 130. See also Davies, n 148, p 208.

<sup>85</sup> Snelling, n 533, p 4 'the city of Bristol struck a copper farthing by authority, and as several persons in the said city did strike tokens also in lead and brass without any authority, uttering them to their private use, and which many times were refused to be accepted again by them, whereby many inconveniences did grow to the poor; therefore an order was sent from the lords of the privy council to the mayor and aldermen for the time being, to call in all the said tokens, and to require those that uttered them to change them for current money, to the value they were first uttered at, and none to make any for the future without licence from the mayor, who is directed to take care that the former abuses, be reformed: this order is dated May 12, 1594.'

<sup>86</sup> *Ibid*, p 4. See also Cotton, *Postuma* (1679), p 199. Cf. Davies, n 148, p 209 asserted there were some 3,000 unofficial minters of coins by 1612 (in the reign of James I).

<sup>87</sup> Hughes & Larkin, n 839, vol 2, p 223 'we do by these presents straightly forbid and command that none of the said former tokens or any such like of what device or invention soever, at any time from or after the Feast of All Saints next coming, shall be made or used without our special warrant and commission in that behalf; upon pain that the person and persons making or using the same shall suffer imprisonment of their bodies by the space of one whole year, and shall moreover pay such fine to our use as shall be assessed by our Privy Council in our Star Chamber at Westminster.'

<sup>88</sup> *Ibid*, vol 2, p 223. See also Fletcher, n 149, p 39 and E Fletcher, n 185, p 43-45.

<sup>89</sup> Snelling, n 533, p 3.

- ***Retchford v Spurning (1591)***. P alleged he paid £6 to D, for him to discharge a debt of such sum P owed G. D failed to pay. This incurred a loss to P of £11 (P spent £5 defending a suit by G). On an action on the case it was objected there was no consideration since D had derived no benefit from the money he was to deliver to G. The court held that an action lay since - D's having the money in his hands for only a day or an hour - was '*such a profit to [D] that it shall be called sufficient consideration to have an action on the case*'.<sup>90</sup> Here, the word '*consideration*' was used akin to the word '*recompense*' or '*payment*' - although it could also be construed to refer to evidence;
- ***Livet v Hawes (1599)***.<sup>91</sup> In an action of *assumpsit* it was declared that - in consideration of P agreeing with D that P's son would marry D's kinswoman and in consideration of P agreeing to assure to her, lands of £10 pa for their marriage - D assumed (promised) P to give his son £200. The marriage took place. Also, P's assurance. However, D did not pay the £200. It was moved in arrest of judgment that the action should have been brought by the son and not the father.<sup>92</sup> Popham CJ (with Fenner J) so thought.<sup>93</sup> It was adjudged for the D.

In both cases, there was (clearly) *consensus* (an agreement reached) between P and D - for D to receive money (£6) and to pay £200, respectively. Further, there had been delivery by P (his paying the £6 and his paying £10 pa, respectively). Therefore, Bracton's pre-requisites of *consensus* and delivery were met. Further, the payment of the £6 and £10 comprised an *arra* (indeed, more - full payment). Thus, these cases - indeed, all the cases previously cited from *Sharington v Strotton (1565)*<sup>94</sup> - in which the word '*consideration*' was used - do not suggest that '*consideration*' was being employed as a separate pre-requisite. Further, all the cases (it is asserted) can be explained in terms of Bracton's pre-requisites of '*consensus*' and '*delivery*' - with reference to '*consideration*' being to the evidence for the same. Thus, it is likely that the doctrine (pre-requisite) of consideration developed after 1599 and one would suggest that it has a lot of do with the jumbled analysis of legal writers such as West (1594-1647) and the civilians, Fulbecke (1601-2) and Cowell (1607). This is now considered.

***In conclusion, the period from Sharington v Strotton (1565) to 1599 does not elicit the development of a 'doctrine' of consideration. That is, consideration being a distinct pre-requisite for a contract.***

## 26. WEST (1598)

West, in the second (enlarged) edition of his *Symboleography* (1598)<sup>95</sup> analysed the law on contract in some detail. His work was popular and continued until 1647. Therefore, it is likely that his observations had influence.

### (a) Contracts

West stated:

A covenant [agreement] is the consent [*consensus*] of two or more, in one self thing [i.e. in respect of a subject matter], to give or to do some what [some thing]<sup>96</sup>...

A consent [*consensus*] in covenant [an agreement], is sometime alone [nude], and sometime with *cause*. A sole consent [nude *consensus*] consists in promise and agreement. A promise is a covenant offered by one freely, which

<sup>90</sup> Baker & Milsom, n 118, p 501. Coke argued in this case that an action lay 'if a man promises to make me a house without consideration.' However, Gawdy J denied this. See also *Greenleaf v Barker (1590)* Cro Eliz 194 (78 ER 449) where the court held that 'every consideration must be for the benefit of the [D], or some other at his request, or a thing done by the [P], for which he laboureth, or has prejudice.' See also *Bagge v Slade (1614)* 3 Bulstr 162 (81 ER 530) per Dodderidge J 'If the consideration puts the other to charge, though it be no ways at all profitable to him, who made the promise, yet this shall be a good consideration to raise a promise.'

<sup>91</sup> Cro Eliz 619, 891 (78 ER 860, 652).

<sup>92</sup> Baker & Milsom, n 118, p 502 'it was said on the other side that the promise is only made with the father, and all considerations [reasons for bringing an action] arise on his part, and the son is a stranger thereto; and therefore the son cannot maintain the action, but the father.'

<sup>93</sup> Cro Eliz 891 (78 ER 652), at p 652 'Popham [CJ] was of opinion, that the action ought to have been brought by the son, and not by the father; for the promise is made to the son's use, and the ordinary covenants of marriage are with the father to stand seised to the son's use, and the use shall be changed and transferred to the son as if it were a covenant with himself. And the damage for non-performance thereof is to the son.'

<sup>94</sup> *Sharington v Strotton (1565)* 1 Plowd 298 (75 ER 454). See also Baker & Milsom, n 118, pp 488-92.

<sup>95</sup> W West, *The First Part of Symboleography* (1598). The first edition was published in 1590 and 1594. The second was enlarged. *Symboleography* he described, s 1 as 'an art or cunning, rightly to form and make written instruments.'

<sup>96</sup> This was under the heading, West, n 854, s 4, '*Of Covenants and Agreements, and who may make them*'. See also s 1 'instruments of agreements or contracts'. Ibid, s 3 'the covenant or agreement.'



is of none effect in the law to produce an obligation, if there be no *cause* why it should be done.<sup>97</sup> (*italics supplied*)

The verbal formulation of West is opaque. However, in effect, it seems that he was seeking to distinguish a contract from an agreement.<sup>98</sup> The latter required a '*cause*' to produce an obligation.<sup>99</sup> That is, to be legally enforceable. West's reference to '*sole*' seems to be to '*nude*' since he also stated, under the heading '*Of Bare Agreements*':

An agreement by sole consent [*nude consensus*], is a covenant [an agreement] consisting within the bounds and limits of his pleasure that makes it: and therefore it is called with us *nudum pactum*, which of his [its] own nature breeds no obligation. As if JS promise to pay £20 to PL not having *quid pro quo* 9 H 5 fol 14.<sup>100</sup> For if a man promise to do or make any thing, and no agreement being made what he shall have for his labour, it is *nudum pactum*, 13 H 6 36 [1425].<sup>101</sup> Of which sort bin [be] all natural obligations: as recompensing, requiting, and other bare promises without lawful consideration...A covenant or agreement which has a cause, is termed a contract which is nothing else but an agreement with a lawful cause or consideration. Doct[or] and Stud[ent] lib 2 cap 24.<sup>102</sup> A cause is a business which being approved by law, makes the obligation rise by the contract, and the action upon the obligation.<sup>103</sup>

Therefore, to West, a contract was an agreement with consideration (a '*cause*'). Further, the '*cause*' must also not be unlawful (others would, later, call this '*good consideration*'). West used the presence of '*consideration*' to distinguish between a contract and a '*nudum pactum*' (an empty agreement) which was enforceable at law. Further, from the above reference he identified '*consideration*' with *quid pro quo* (exchange). Therefore, to him, a pre-requisite for a contract was delivery. Mere promises ('*JS promise to pay £20 to PL*') was not enough. In the second example, however, ('*no agreement...what he shall have for his labour*'), this goes more to *consensus*, than to delivery. So, he may not have seen *quid pro quo* as the exclusive element. Under the heading '*The Substance of Contracts*'<sup>104</sup> West stated:

...The substance of all contracts consists in consent [*consensus*], as their matter, and in the cause or business, as their form...true contracts be those, which are by mutual consent of both parties...<sup>105</sup> true contracts be distinguished by their cause, which is common to them all in general, namely that in all contracts, something be given or done, but in some, law has set and distinguished the business or cause in certain limits, in which it has forsaken the common nature. And an act so long as it appears not, whether it may be referred to any certain business defined within certain limits, or no, is left in [t]his general kind, and that common nature: as for example, when I give JS money that he may give me something of his, in general *certes* this contract is *I give, that he may give*.<sup>106</sup>

<sup>97</sup> This was under the heading, West, n 854, s 8, '*Of Bare Promise*'.

<sup>98</sup> See also Jenks, n 91, pp 194-5 'It seems likely that the expression '*contract*' came into English law through the writers who borrowed their language largely from the Roman sources, and with them, of course, *contractus*, as distinguished from *pactum*, means an agreement upon which a normal action can be brought...It looks, then, as if there were a tendency to separate '*contract*' from '*specialty*' on the one hand, and from mere '*agreement*' on the other.' One would agree.

<sup>99</sup> The substance of an '*obligation*' was that, s 2, it 'should...bind another to us, to give, do, or perform some thing.'

<sup>100</sup> 9 Hen 5 pl 23 fo 14b (1421), Seipp no 1421.074 (Common Pleas, Debt). See also Ralph V. Rogers, *Year Books of the Reign of King Henry the Fifth* (privately printed, Wurzburg 1948), pp. 44-45 (pl. 87) (following the text printed by Wight in 1605). In this case in the Common Pleas, P asserted he had a £10 debt in the Exchequer against one T. Then, that D came to P and said (i.e. an oral offer) that - if P released execution against T - D would become P's debtor for this sum. Therefore, P released T. D asserted it was insufficient in law to bring an action for the debt against him and Cokayn JCP upheld this. Seipp provides the following commentary '[D] tricked [P] into releasing on the record a debt of 10 pounds recovered against one T. in the Court of Exchequer, by an oral promise to become [P's] debtor for the same amount of 10 pounds, a promise unenforceable in Common Pleas because bare words (nude pact) applied Latin maxim '*Ex nudo pacto non oritur actio*' (cf. D.2.14.7.4: *nuda pactio obligationem non parit*; gloss igitur to D. 2.14.7.4: *nuda pactio non pariat actionem sed exceptionem*; *pactum nudum non pariat actionem*; C.2.3.10; Bracton, f. 99, 2:283: *ex nudo pacto non nascitur actio*; f. 16, 2:64: *ex nuda promissione non nascitur actio non magis quam ex nudo pacto*) [see also Bracton at 12]. Seipp says '*tricked*' in his commentary. However, this is supposition. See also *Southwall v Huddelston* (1522), SS, vol 119, p 155, *per* Fitzherbert J.

<sup>101</sup> This appears to be a mis-reference to 3 Hen 6 pl 33 fo 36b-37a, Seipp no 1425.033 (D pleaded that P did not state how much D was to be paid for agreeing to build a mill).

<sup>102</sup> See St German, n 705, pp 228-33 (*What is a nude contract or a naked promise after the Laws of England*). See also 18.

<sup>103</sup> West, n 854, ss 9 & 10.

<sup>104</sup> Contracts, he had described, n 854, s 1 as 'instruments of agreements.'

<sup>105</sup> West had indicated that contracts were sometimes express or *feigned* (implied), reflecting whether the promise was expressed or implied. West, n 854, s 11 'For consent [a promise] is sometimes used indeed [made in fact], and sometimes feigned [implied], as in law: so [too] of contracts, some be true [express] and some be feigned [implied].'

<sup>106</sup> *Ibid*, s 11. West continued 'But when law has severed and defined by certain notes this business, wherein a certain price is given for a certain thing, and has given thereunto a particular name, it may be called buying and selling.'

What was West trying to say in all this ? One would suggest that his is a muddled interpretation of Bracton in which West accepted Bracton's pre-requisites of '*consensus*' ('*mutual consent of both parties*') and *quid pro quo* (exchange, delivery). However, instead of Bracton's '*vestment*', he referred to '*consideration*'. Elsewhere, he continued on the theme of the need for *quid pro quo*. Thus, he noted that a mutual stipulation without *quid pro quo* did not make a contract. Under the heading '*Of Contracts named of the Civil Law, of Stipulation*', he stated:

Such are contracts named of the law of nations: those follow which are of the civil law, which contracts are either made by word or writing. Stipulation is a contract made by words only, by an interrogation or question proceeding, and a fit answer to the same following, for the giving or doing of something or business: as, Givest you - I give; Will you do this - I will; which is no binding contract in our law: if no lawful consideration precede, but *nudum pactum*, of which before.<sup>107</sup>

Finally, under the heading '*Of the Cause of Consideration of Deeds*', West stated:

The consideration of instruments is the motive cause, for which the instruments are made, as money or other goods, affection natural or such like...<sup>108</sup>

Here, however, West introduced another element since his wording refers more to the '*motive*' or '*purpose*' for a contract, which goes back to his former reference to a '*lawful consideration*' - this being a likely reference to illegal or immoral contracts not being enforceable. To West, then, '*cause*', '*consideration*' and '*motive cause*' were synonyms. However, in his rather mangled interpretation of the pre-requisites for a contract he appears to have added to Bracton, since - while the former indicated that an agreement was '*nude*' (naked) if it did not have certain '*vestments*' (pre-requisites) - West appears to have added (possibly, unintentionally) one that Bracton did not posit *viz.* consideration when he stated blandly that:

A covenant or agreement which has a cause, is termed a contract which is nothing else but an agreement with a lawful cause or consideration.<sup>109</sup>

Possibly, West did this on the basis of an observation of Periam J in *Sidenham v Worlington* (1585) as to a '*moving cause or consideration precedent*' (see **23(c)**). Or, by reference to cases in which Dyer CJ seems to have treated '*cause*', '*meritorious occasion*', '*reciprocal cause*', '*mutual cause*', '*mutual recompense*' and '*quid pro quo*' as synonyms (see **23(a)**). However, there is no evidence that Periam J or Dyer CJ were seeking to propose a new pre-requisite for a contract.<sup>110</sup> Indeed, Dyer CJ seems to have used it as no more than a reference to *quid pro quo*. Therefore, West was trying to '*squeeze*' into the expression a number of things, '*consideration*' :

- (a) as a reference to *quid pro quo* (exchange, delivery);
- (b) needing to be lawful (good) - excluding illegal and immoral acts;
- (c) evidencing *consensus* (the need to agree the price of work - if not, no consideration),
- (d) the '*motive*' or '*reason*' for a contract - such as money, goods, natural affection.

In short, it is clear that the word '*consideration*' was, in legal terms (if West is a good guide), at the time he was writing, very open-ended, and seeking to cover a number of issues.

## **(b) Buying & Selling**

Under the heading '*Of Buying and Selling*', West stated:

Contracts of property are buying and selling... And buying or selling *Emptio, venditio*, is a contract by consent [*consensus*] of the having of a thing, by or for a certain price. In which he that must deliver the thing is named the seller, and he that ought to pay the price thereof, the buyer. The substance of this contract consists in the thing sold, and in the price thereof...<sup>111</sup> (*underlining supplied*)

<sup>107</sup> Ibid, s 30.

<sup>108</sup> Ibid, s 55. West also noted, s 56 'when instruments are sealed and subscribed, they must be openly read and published in the hearing of divers substantial credible witnesses, and afterwards delivered in their presence, as the acts and deeds of the parties. These things so finished, the sealing and delivery of such deeds must be certified upon the back side thereof, or in some other convenient place thereof, thus: sealed and delivered in the presence of ABCDEF *etc* and choose always such young witnesses which can subscribe their own names if you can get them.' This indicates that, although witnesses were not required for the validity of a deed, they were still being, often, used.

<sup>109</sup> See n 862.

<sup>110</sup> Dyer was familiar with Glanvill and Bracton and (likely) owned a copy of the latter, SS, vol 109, pp xxviii-xxx. He was not an innovator, Ibid, p xxviii, and it is difficult to envisage him making a major change to the law by such short remarks.

<sup>111</sup> West, n 854, s 22. See also *Southwall v Huddelston* (1522), SS, vol 119, p 155, *per* Fitzherbert J 'Where no day is appointed...nothing is certain.'

This reflected Bracton and the need for a fixed price. Under the heading '*What things may be sold*', West stated:

The price in buying and selling in [is] money. For one thing given for another, is not price, neither if it so happen, it is [is it] buying and selling, but exchanging, *permutatio*. The price is certain when it is either expressed in the bargain, how much it is, or ought to be. Or if not certainly expressed, yet some relation is made to some thing, whereby it may be made certain. As if the vendor says, he sells it for so much as he bought it, or for so much as JS shall arbitrate: it is certain enough til JS has denied to declare the price thereof, 14 H 8 19 [1522]<sup>112</sup> ... The payment of the money and delivery of the thing sold are effects of buying and selling, but not the very substance thereof, 14 H 8 19 [see above] for buying and selling is perfected, by the certain appointing of the thing to be sold and the taxation [determination] of the price thereof, with the mutual consent of the buyer and seller, which consent in and about one selfsame thing works all.<sup>113</sup>

The first proposition reflected prior caselaw. There had to be a fixed price but it did not need to be specified in the contract providing that it was otherwise ascertainable.

### (c) Conclusion

West's analysis of contract (possibly) reflected the rather confused jurisprudential thinking of his time (1598) which also suggests (as do the subsequent texts of Fulbecke and Cowell, see below) that commercial law at this period was a '*work in progress*' - or, more politely, evolving. There may have been uncertainty and West may have added to it by the lack of clarity which he brought to the simple issue of what were the pre-requisites for a contract. It would *appear* that he created a new one, extending a drafting point, although he (probably) did not intend to.

- **Separate Pre-Requisite** ? So, what - previously - had been evidence of the parties having reached *consensus*, now seems to have become a separate pre-requisite. There now had to be a '*cause*' (consideration) to make an agreement a contract and, thus, actionable. Further, reference to a '*moving cause*' probably helped cement the idea that this was a synonym for a '*pre-requisite*'. This was exacerbated by Fulbecke and Cowell (see below) referring to a '*material cause*'. In short, '*consideration*' may have become a pre-requisite by way of a sidewind, through (poor) text writing which (slowly) seeped into judicial thinking. As it is, it may be that West was simply trying (without citing him) to follow Bracton in saying that agreements needed '*vestments*' to become contracts - and that these included *consensus* and delivery;
- **Meaning of the Word**. Further, West seemed unsure what he meant by the term '*consideration*' - since he used it in different senses. He indicated that consideration was the cause '*for which instruments are made, as money or other goods, affection natural or such like.*' This suggests that he took the term to be the '*purpose*' or '*motive*' of a contract - as opposed to any *quid pro quo* (which he, then, must have taken to be simply the need for an exchange to satisfy Bracton's delivery). He also referred to '*lawful*' consideration. It may be that he was simply seeking to indicate that the courts would not uphold illegal or immoral contracts (or, possibly, that '*moral*' grounds would be insufficient). However, overall, he seems to have linked it to the need for *quid pro quo* (exchange, delivery). As it is, up to the last edition of his text in 1647, he did not provide further enlightenment (see 28(b)).

***In conclusion, perhaps, by the later 1590's, the idea began to prevail that 'consideration' - also referred to as a 'cause', 'moving cause', 'material cause', 'consideration precedent', 'meritorious occasion', 'reciprocal cause', 'mutual cause', 'mutual recompense' and 'quid pro quo' - was a pre-requisite for a contract. Leaving aside this verbiage, this seemed to mean little more than that a pre-requisite for a contract was exchange (delivery, 'this for that') and that the purpose of a contract also mattered since the courts would not enforce contracts that were illegal or immoral.***

## 27. THE PERIOD: 1601-36

It is asserted that the '*doctrine*' of consideration - while there were glimpses of it from c.1577 onwards - really developed in the 17th century. It did so because - regardless of forms of action and pleadings - legal writers in the 17th century (especially in legal dictionaries) made (and repeated) the expansive statement that '*consideration*' was the '*material cause*' of a contract (that is, what we would likely term a pre-requisite today). However, it was still uncertain what this '*material cause*' was. Was it a synonym for *quid pro quo* ? Or did it relate to value (the price/payment in some form, also, sometimes referred to as '*recompense*' or '*reward*') ? Or

<sup>112</sup> This may be to *Southwall v Huddelston* (see n above), p 161 *per* Brudenell CJ 'If... I give you my land, yourself paying as much as John at Style should say, and John at Style is present at the same time and will not say anything, this bargain is not perfect and is no bargain, but if this John at Style was not present, the bargain would have been perfect until John at Style refused to say how much I should have.' See Sandars, n 252, p 363.

<sup>113</sup> *Ibid*, ss 23 & 24.

was it a matter of loss to the P (promisee) or profit to the D (the promisor) ? (If one looks forward to Blackstone in 1766 (see 31), the precise meaning of consideration was still confused). Noteworthy in promoting the concept of a '*material cause*' were the civilian writers, Fulbecke and Cowell. The position as to coinage may also be noted.

**(a) Coinage**

James I (1603-25) came from Scotland, where regal copper coins had been minted since the 15th century.<sup>114</sup> When he became king of England he was exposed to what seemed to be an eternal problem of debased legal tender - as well as the absence of small coinage as legal tender - resulting in extensive use of private currency to settle business transactions. In 1613, he issued a patent to Lord Harrington of Rutland to issue copper farthings and sought, by Proclamation, to suppress the making or use of private coins.<sup>115</sup> In particular, his Proclamation recorded the past problems with using a private currency.<sup>116</sup> The Earl of Liverpool noted that James I did not require his subjects to accept this currency issued under licence.<sup>117</sup> However, the patent was abused and withdrawn in 1644 (the coins were also, often, counterfeited and melted down or exported).<sup>118</sup> The result was that most currency used in business transactions - whether of legal tender or not - was nominal in value.

**(b) Fulbecke (1601-2)**

Fulbecke, in his *Parallele or Conference of the Civil, Canon and Common Law of England* (1601-2),<sup>119</sup> stated:

A consideration which is the proper material cause of a contract, may in the concluding of bargains [contracts] be either expressed or implied.<sup>120</sup>

Fulbecke cited no authority for this statement, which reflected a civilian approach.<sup>121</sup> He also indicated that a contract - in civil law - did not require mutual consideration but did require *consensus* (a union of wills)<sup>122</sup>

<sup>114</sup> Fletcher, n 149, p 39 'James I...had already issued copper money; indeed his forebears had lived with coppers in Scotland for several centuries, and the Scottish denomination known as '*turners*' had circulated in northern England as token farthings long before James came to the English throne.'

<sup>115</sup> Snelling, n 533, pp 6-7 (10 April 1613). See also Proclamations of 19 May 1613, 20 June 1614, 26 April 1615 and 17 March 1616. See also Mathias, n 188, p 11 and Davies, n 148, p 209.

<sup>116</sup> E Fletcher, n 185, p 50 'In times past some toleration has existed in my realms of tokens of lead commonly known by the name of farthing tokens, that pass between vintners, tapsters, chandlers, bakers, and other like tradesmen and their customers; whereby such small portions and quantities of things vendible...might be conveniently bought and sold, without enforcement to buy more wares than would serve for use and occasion. But we object that the manner of issuing [these lead tokens] and the use of them, as they pass only between customers, does not that public good which might, by a more general use, be effected. They are subject to counterfeiting, loss, and deceit; for sometimes they are refused as doubtful things, and sometimes, by the death or removal of those who gave them, are lost and discredited. And also, that it is some derogation to the royal prerogative that such tokens should be allowed to have currency, in any degree, with the lawful money of the realm.'

<sup>117</sup> Earl of Liverpool, n 132, pp 129-31 'Copper coins, or, as they were originally called, copper tokens, were first made by royal authority in the 11th year of James I, that is, 1613. Coins of this metal were introduced into our monetary system to prevent the currency of private tokens, made chiefly of lead, of which there were at that time very great quantities in circulation. The practice of making tokens of lead first began in the latter end of the reign of Queen Elizabeth, who would never suffer tokens of any kind to be made by royal authority. King James, when he authorised the making of these copper farthings or tokens, prohibited by proclamation the use or currency of all private tokens. But he did not oblige his subjects to take the copper farthings or tokens made by his authority, otherwise than '*with their own good liking*'; and he expressly says in his proclamation, that he did not intend to make them '*monies or coins*.' These copper tokens continued to be current...to 1672, when copper halfpence, which were then first coined at the royal mint, were ordered to pass in all payments under the value of a sixpence.'

<sup>118</sup> Whiting, n 184, p 14. Also, Fletcher, n 149, pp 6 & 39. At p 40 'The first Harrington issues were on small flans with a surface coating of tin, possibly to continue the fiction of a silver coinage. In 1634 Lord Maltravers purchased the licence; but due to widespread forgery the design changed to include a small brass plug, which made forgery very difficult. Similar patents granted in the reign of Charles I (1625-1649) were used to defraud merchants and shopkeepers who paid too much for the copper content, then suffered greater loss when the patentees refused to change their farthings for silver, claiming that all returned farthings were forgeries. Public outrage caused Parliament to suppress the issue in 1644 and make plans for an alternative official farthing. But the execution of the king in 1649 removed the exclusive royal prerogative of coining money.' Davies, n 148, p 210 'by 1630 the general state of the silver in circulation had once more grossly deteriorated to an unacceptable level - not this time by conscious debasement, but simply through a combination of natural wear and tear and official neglect.' *Ibid*, p 212. See also Davies, pp 240-3.

<sup>119</sup> W Fulbecke, *A Parallele or Conference of the Civil law, the Canon law and the Common Law of this realme of England* (1601-2). There was a second edition in 1618.

<sup>120</sup> *Ibid*, (1st part), p 6. At p 5 'A contract has a material substance whereof it is made, as well as other things, and the material cause of a contract is the thing for which we do contract...some material cause is requisite.'

<sup>121</sup> BP Levack, *The Civil Lawyers in England 1603-1641* (Oxford, Clarendon Press, 1973), pp 136-7. Whether Fulbecke was qualified as a civilian is unclear. However, his approach was that of the neo-Bartolists. See also W Fulbeck, *Fulbeck's Direction, or Preparative to the*

whereas the common law 'requires in all contracts a mutual consideration.'<sup>123</sup> The latter he, clearly, took as an additional pre-requisite and he seems to have linked it to *quid pro quo* (exchange), although he also (like West) in the quotation cited above saw consideration (at the same time) embracing reference to the reason or motive for the contract.

#### (c) Cowell (1607)

Fulbecke was followed by the civilian, Cowell who, in the first edition of his dictionary, *The Interpreter* (1607) stated:

Consideration (*consideratio*) is that with us, which the Grecians called [*synallagmata* [exchange]]: that is, the material cause of a contract, without the which no contract binds. This consideration is either expressed, as if a man bargain to give 20 shillings for a horse: or else implied....<sup>124</sup>

Cowell was not well regarded at the time of the first edition of his dictionary (especially by Coke).<sup>125</sup> However, his dictionary was to go through a number of editions (the last, in 1727) and his statement was to be repeated in a number of other, later, influential dictionaries, including that of Jacob (1st ed, 1729; last ed, 1835) which stated:

Consideration (*consideratio*). Is the material cause, or *quid pro quo*, of any contract, without which it will not be effectual or binding...<sup>126</sup>

Cowell, generally, based his dictionary on an older one, *The Terms of the Law (Les Termes de la Ley)*.<sup>127</sup> The first edition of this dictionary in 1525 (see **18(h)**) had not (originally) referred to a '*material cause*'. Rather, it had defined a contract as a '*bargain or covenant between two parties, where one thing is given for another, which is called quid pro quo*'. However, it was to take up Cowell's reference to '*material cause*' in later editions.<sup>128</sup>

#### (d) Subsequent Cases

Two cases in 1607 and 1616 may also be referred to:

- ***Gilbert v Ruddeard* (1607)**. An action on the case on *assumpsit*. P declared T was indebted to him and T had given £50 to D to pay P in part payment. P asked D for the money but D refused to pay. Popham CJ held there was an

*Study of Law* (intro P Birks)(Wildwood House, 1987), p 215 where he noted that '*Pactum* is the consent of two or more in a matter which pleases both parties. *Pollicitatio*, is when there is not the consent of two, but only one agreeth.' Cf. Simpson, n 4, pp 382 & 387 and Simpson Innovation, n 65, p 259.

<sup>122</sup> Fulbecke, n 878 (2nd part), p 18 'It is not necessary, that there be mutual consideration, but so there be a mutual consent [i.e. *consensus*], it is sufficient in our law, and it is therefore called a contract: because by covenanting *diversae voluntates in unum contrahuntur* [diverse wills in one unite].'

<sup>123</sup> Ibid, 'our law requires in all contracts a mutual consideration, and one part of the contract challenges and begets the other.' He cited *Hunt v Bate* (1568), as an example where this was absent, see **21**. It seems Fulbecke was not treating this the same as *consensus*, about which (1st part), p 1 he had stated 'The chief ground of contracts is consent, so that the persons which contract must be able to consent, and consent grows of knowledge and a man's free will, directly by sufficient understanding...'

<sup>124</sup> J Cowell, *The Interpreter* (1607)(*consideration*). He continued 'as when the law itself enforces a consideration; as if a man come into a common inn, and there staying sometime, takes both meat and lodging, or either for himself and his horse: the law presumes, that he intended to pay for both, though nothing be further covenanted between him and his host: and therefore if he discharge not the house, the host may stay [detain] his horse.' By the last edition of Cowell (1708), the following had been added 'Also, there is a consideration of nature and blood, and valuable consideration: And therefore if a man be indebted to divers others, and yet in consideration of natural affection, gives all his goods to his son or cousin, this shall be construed as a fraudulent gift, with the Act of 13 Eliz. cap 5 [i.e. Fraudulent Conveyances Act 1571, rep 1925, see also **22**] because this Act intends a valuable consideration.'

<sup>125</sup> Sweet & Maxwell, *A Legal Bibliography* (1955), vol 1, pp 7-8, fn summarised the position: 'It [Cowell's dictionary] is an enlargement of '*Les Termes de la Ley*'. Some of the author's enemies, among whom were Sir Edward Coke, discovered that the Interpreter contained what they represented were dangerous doctrines, and it was suppressed and publicly burned in 1610. Previous to Jacob's [law dictionary] it was the best law dictionary.' See also Levack, n 880.

<sup>126</sup> Jacob, n 142 'Consideration (*consideratio*). Is the material cause, or *quid pro quo*, of any contract, without which it will not be effectual or binding.' See also **Appendix B**.

<sup>127</sup> The first edition of this dictionary by J Rastell was in 1525, the last in 1721.

<sup>128</sup> See e.g. J Rastell, *Les Termes de la Ley* (1708 ed)(*consideration*) 'Consideration is the material cause of a contract without which no contract can bind the party.'

implied agreement by the D to pay P which bound him in *assumpsit*.<sup>129</sup> Tanfield J referred to '*consideration*', in the nature of '*reason*' or '*evidence*' (proof),<sup>130</sup>

- ***Hodge v Vavisor (1616)***.<sup>131</sup> P brought *indebitatus assumpsit* against D asserting that D was indebted to him for various goods (clothes) which he had ordered from him and that, in consideration thereof, D undertook to pay for them, which he had failed to do. D pleaded non *assumpsit*. Judgment was given for P. It was held that an existing enforceable debt (or a balance on account stated) was sufficient consideration to support a promise to pay it. Croke J<sup>132</sup> as well as Houghton J<sup>133</sup> and Doddridge J<sup>134</sup> used the word '*consideration*' - albeit in different senses. That said, their words can be construed as the court finding sufficient evidence (consideration) to come to a conclusion that *consensus* had been reached.<sup>135</sup>

In both these cases, there was clearly agreement (*consensus*) between the parties. Further, *delivery* since, pursuant to the agreement, T had delivered money to an agent (D) to give to P (in the first case) and, in the second, P had delivered goods to D. Thus, on the basis of Bracton (see 12) this was enough. Thus, reference to consideration in terms of a separate pre-requisite would not have been necessary. As it is, there is no suggestion that the judges perceived it to be such. Also, if consideration was simply a synonym for *quid pro quo* - this was satisfied, since P had given - money (and goods) to D.

#### (e) **Grotius (1625)**

At this juncture, reference may be made to Hugo Grotius (1583-1645), the Dutch jurist and professor at the University of Heidelberg. His text, *The Rights of War and Peace (De Iure Belli ac Pacis)* which was published in 1625 contained material on the law of contract which influenced many subsequent English legal writers, including Blackstone. In a title '*On Contracts*', Grotius emphasised the exchange element of them, stating:

Among such human acts as turn to other mens advantage, some are single and uncompounded, others are mixed and compounded. Those that are single, are either gratuitous, and done for nothing, or permutatory, and by way of exchange...Acts permutatory, or by way of exchange, either regulate and adjust the shares, or make things common: the Roman lawyers rightly distinguish those acts which regulate the shares into these, *do ut facias, facio ut facias, facio ut des*: I give you this, that you may give me that; I do this for you, that you may do that for me; I did this for you, that you may give me that...<sup>136</sup> And accordingly we say, that in cases where I give this that you may give that, I either immediately, and upon the spot, give one thing for another, as in the way of bartering which is an exchange, properly so called, and the most ancient method...of trading and commerce; or I give money for money...or give goods for money as in buying and selling...The bargain of my doing this, for your doing that, or work for work, may be as various as the actions whereby any reciprocal advantage may be procured...

Now all acts, advantageous to others, except those which are of mere generosity, are called contracts...In all contracts nature demands an equality, insomuch that the aggrieved person has an action against the other, for overreaching him...Nor should there be only an equality of knowledge between the persons bargaining, but also a mutual freedom of will...As to buying and selling...the bargain and sale is good, from the very moment of the contract; and though the thing be not actually delivered, yet may the property be transferred, and this is the most simple way of dealing...Letting and hiring...very much resembles buying and selling, and is guided by the same rules...<sup>137</sup>

<sup>129</sup> Baker & Milsom, n 118, p 503 'When the debtor delivers the money to the [D] to deliver to the [P], there is implied (*include*) an agreement by the [D] to deliver it to the [P], which agreement will bind him in *assumpsit* to the person who ought to receive the money'. He referred to *Southcote v Bennet* (1601) 4 Co Rep 83. Ibid, p 274.

<sup>130</sup> Ibid, p 504 'here there is another consideration [*reason*] besides the debt due to the [P], for he is to come to the [D's] house to fetch the money; and that is good consideration in itself.' See also (1608) 3 Dy 272b(n)(73 ER 607).

<sup>131</sup> 3 Bulstr 222 (81 ER 188). See also *Johnson v Cullamore* (1617) 3 Bulstr 208 (81 ER 175).

<sup>132</sup> Baker & Milsom, n 118, p 504 'If a man owes to another so much for certain goods, and he demands of him when he will pay him for them, who answers at such a time, and the other agrees unto it, this is good; and the law will here imply a tacit *consideration* by the law annexed unto it.' (*italics supplied*).

<sup>133</sup> Ibid 'In *consideration* that the [P] hath built a house for the [D], he did assume and promise to pay him so much, this is executed; here the *assumpsit* is for money, this is to be paid upon request; here the [D] is clogged with a debt continually, and therefore this is here a good *consideration* [reason, evidence] to raise a promise.' (*italics supplied*)

<sup>134</sup> Ibid, p 505 'Here is a promise made for the payment at a day certain, till which time the same was forborne, and therefore this is a good *consideration* [evidence, proof].'

<sup>135</sup> This would seem reasonable. Since the goods were delivered at D's request (and not as a gift), it is not inappropriate to assume that *consensus* had been implicitly reached (even though an actual promise was made later). See also Stoljar Contract, n 101, p 64.

<sup>136</sup> For the reference to Justinian's Digest, see Watson, n 252, vol 2, 19.5 (*The Actio Praescriptis Verbis and the Actio in Factum*) especially 5. Paul 'They [the actions] arise in these forms: Either I give to you in order that you give or I give that you do or I do that you give or I do that you do...'

<sup>137</sup> H Grotius, *The Rights of War and Peace* (ed R Tuck, Liberty Fund, 2005), book 2, pp 729-30, 734-5, 736, 739, 745, 751.

The writing of Grotius was useful in that it confirmed Bracton in respect of a pre-requisites of a contract: viz. (a) subject matter ('*all acts, advantageous to others*'); (b) capacity of the parties; (c) agreement (*consensus*) - the product of a '*deliberate mind*'; also, '*mutual freedom of will*'; also, acceptance);<sup>138</sup> (d) delivery ('*by way of exchange*').<sup>139</sup> Since Grotius was widely read, it is likely that his civilian concept of contract being - essentially - a form of exchange, influenced English legal writers and accentuated their own perception of a contract being, in essence, an exchange (*quid pro quo*).<sup>140</sup> However, it is asserted that this was not (in England) used to distinguish a contract from a gift. Rather, it was the basis for holding that promises alone did not make contracts (nor gifts). A pre-requisite (for both in fact) was delivery. As to the form in which a promise (giving rise to a contract) was to be made, Grotius stated:

As to what concerns the manner of promising, it requires...an external act, that is some sufficient sign to testify the consent of the will, which may sometimes be done by a nod, but generally by word of mouth or writing.<sup>141</sup>

The view of Grotius that only '*writing*' was required - which was repeated by other civilian writers - influenced Wilmot J in *Pillans v Van Mierop* (1765) (see 30).

#### **(f) Coke (1628)**

Coke - in his *Institutes of the Laws of England* (his Commentary on Littleton, volume 1) which was published in 1628, when discussing leases with an annual reservation of rent, stated (he quoted Littleton and then commented):

*'it behooves that the lessor be seised in the...tenements at the time of his lease; for it is a good plea for the lessee to say that the lessor had nothing in the tenements at the time of the lease'. And the reason for this is, for that in every contract there must be quid pro quo, for contractus est quasi actus contra actum; [a contract is an act as it were against an act] and therefore if the lessor has nothing in the land, the lessee has not quid pro quo, nor any thing for which he should pay any rent...'*<sup>142</sup>

Thus, Coke identified contracts with delivery. Elsewhere, in his work, Coke noted that a '*purchase*' comprised a conveyance for '*money or some other consideration*.'<sup>143</sup> which latter word he appears to have used as a reference to a '*recompense*' or '*payment*'. Coke also cited the Fraudulent Conveyances Act 1584.<sup>144</sup>

#### **(g) Doderidge (1631) & Spelman (c. 1630-41)**

A justice of the king's bench (1612-28), Doderidge J - in his text, *The English Lawyer* (1631) - defined a contract, stating:

A contract is an agreement between parties concerning goods or lands for money or other recompense, where the general matter *ex qua* [out of which] is the agreement, which is chiefly respected in contracts.<sup>145</sup> the

<sup>138</sup> As to capacity, Grotius mentioned this in his chapter on promise, bk 2, ch 11 ('*Of Promises*') although he seems to have only specifically mentioned the promisor, see n 896, p 709. In respect of acceptance, p 705, he quoted Homer, *Iliad* 'He who receives the promise, seizes upon, and binds the promisor'. Also, Ovid, *Metamorphoses* (2nd book) 'where the promiser says to the promised, *vox mea facta tua est*, my word is become yours'. Grotius continued, pp 706-7 '[the Romans] made a stipulation in form, an undoubted sign of a deliberate mind...But there may be naturally other signs of a deliberate mind, besides this stipulation. And indeed, as for that which is made without deliberation, we do not allow it to have any power of obliging at all...Nay, and as to what is done deliberately, but not with an intent to transfer a proper right to another, we deny that from thence there arises naturally a right to any man to demand any thing of us in strictness [i.e. in law].'<sup>139</sup> As to acceptance, *Ibid*, p 719-20 (a promise must be accepted before it can be binding).

<sup>139</sup> This included delivery of documents, according to Grotius, n 896, pp 882-3 'Tis also a question, whether... a contract ought to be accounted perfect before the writings are engrossed and delivered...To me it is plain, that unless it be otherwise agreed on, the writings are to be deemed as the memorial only of the contract, and not as any part of the substance of it.'

<sup>140</sup> H Grotius, *Commentary on the Law of Prize and Booty* (ed MJ van Ittersum, Liberty Fund, 2006)(*De Jure Praedae*), p 355 'the general principle underlying all contracts [he cited the Greek, the principle of exchange], is in itself derived from nature; whereas various specific forms of exchange, and the actual payment of a price [he cited the Greek, the money-making process], are derived from law or tradition ...'. Thomasius, n 702, p 299 'Commerce is nothing other than the mutual exchange of things (by which I also mean labour).'

<sup>141</sup> Grotius, n 896, p 717.

<sup>142</sup> Coke, n 47, vol 1, 47b (s 58).

<sup>143</sup> *Ibid*, vol 1, 18b 'A purchase is always intended by title, and most properly by some kind of conveyance either for money or some other consideration...'. *Ibid*, 3b '*Purchase*' in latin *perquisitum*, of the verb *perquirere*'.

<sup>144</sup> *Ibid*, 3b (s 1 'Note, that purchasers of lands, tenements, leases, and hereditaments for *good and valuable consideration*, shall avoid all former fraudulent and covinous conveyances...etc'. See also *Twyne's Case* (1601) 3 Rep 80 (76 ER 809).

<sup>145</sup> J Doderidge, *The English Lawyer* (printed by the assignees of I More, 1631), p 136 also stated, p 136 'The sufficient and necessary cause of a contract is consent [i.e. agreement] of parties, for in contracts the consent is chiefly to be regarded, as has been said.' Doderidge also

matter *circa quam* [about which], concerning goods or lands: the form or difference, for money or other recompense, for that makes it a contract; for the want of recompense causes it to be but *nudum pactum, unde non oritur actio*. The causes efficient, the parties contracting; the final cause Bracton does notably express ['stipulations and obligations were devised to enable everyone to acquire that which is to his interest'].<sup>146</sup> In the reports of my Lord Dyer, 16 El 336b n34a [*Lord Gerard's Case* (1581, see n 802)] a consideration is thus described. A consideration is a cause or occasion meritorious requiring mutual recompense in fact or in law: where the matter is an occasion meritorious, the form mutual recompense *etc.* not to trouble our selves over long in this kind.<sup>147</sup>

Doderidge also defined a contract of sale.<sup>148</sup> It is noteworthy that Doderidge cited Bracton and that, following Bracton, he emphasised that there had to be an agreement between the parties ('*consensus*') which was '*chiefly to be regarded*.' In the case of sale (like Bracton) he also indicated that the price had to be '*agreed upon*.' In the case of consideration, he defined it in terms of 'exchange - a mutual '*recompense*'. For his part Spelman (1562-1641), an English legal historian (antiquarian), wrote various works which were not published until after his death. They included a tract '*Of Ancient Deeds and Charters*' which he left in manuscript and which he (likely) worked on in the latter part of his life. His reference to '*consideration*' was to the price. Thus, he stated:

The first manner of conveying lands from one to another was not in writing, but by a verbal contract publicly pronounced by the parties before a multitude of witnesses inhabiting thereabout; wherein the land sold, and the *consideration* [price] given for the same, were certainly declared.<sup>149</sup>

Spelman also noted that, in old deeds, the consideration was expressed to be for money or service, using the Saxon word '*gersuma*' which signified a '*price*' or '*reward*'.<sup>150</sup> Thus, Spelman associated consideration with value.

#### **(h) Finch (1636)**

Finch, in his *Law or a Discourse Thereof* (1636),<sup>151</sup> defined a contract as follows:

Contract is a mutual agreement for the very property of personal things, .... Of this kind of contracts are buying and selling, borrowing and lending, and such like, and in all these cases an action of debt lies.<sup>152</sup>

As for consideration, Finch stated:

An assumption or promise does then only bind, when it is made upon good consideration of another thing. *Cestui que use* may grant his use without consideration, as he may his horse or other chattel: but he cannot raise a use

cited, p 164) '*contract ne poit estre, si ne soit que chescun partie sont agreee*'. See YB 17 Ed fo 4 pl 2 fo 1a-2b (Seipp no 1477.013) where Sjt Pygot said 'It cannot be a perfect bargain unless each party be agreed.'

<sup>146</sup> Bracton, n 42, vol 2, p 287.

<sup>147</sup> Doderidge, n 904, p 131. He also stated, p 132 'All considerations are either executed with a recompense past, or else executory with a recompense after to be made and performed.' Doderidge, in his analysis of the contract, was (likely) following St Thomas Aquinas who, in identifying the 4 causes of virtue, looked to material, formal, efficient and final causes. For Doderidge, these were the: (a) material cause (goods, lands - today, we would refer to the subject matter); (b) formal cause (the manner of the contract - exchange); (c) efficient cause (the parties contracting such as the buyer and the seller); (d) final cause (i.e. the purpose - to enable everyone to acquire that which is to his interest). The first three are little different to 4 Bracton's pre-requisites *viz.* (a) subject matter; (b) delivery (exchange); (c) the contracting parties having capacity; (d) *consensus* (the parties contracting). See J Pilsner, *The Specification of Human Actions in St Thomas Aquinas* (OUP, 2006), p 147. Thus, the English doctrine is really an amalgam of Aquinas' formal cause (exchange) and final cause (purpose) - in that delivery was a pre-requisite and consideration must be good (i.e. the purpose must not be immoral or illegal).

<sup>148</sup> *Ibid*, p 125 'In a contract of sale, the material causes are the things sold, and the price agreed upon; the form is the manner of the contract, absolute or conditional, perpetual or temporary; the efficient causes, the parties contracting, the buyer and the seller; the end or final cause [i.e. the purpose] is to transfer property from the one to the other, to supply each other's indigence: the matter *ex qua*, is either permanent or transient.'

<sup>149</sup> Spelman, n 219, p 233. He clearly meant the price since he referred to the sale of land to Abraham (see 6(c)) as an example, 'So bought Abraham the field and cave...for 400 shekels of silver.' Spelman, p 234, also stated that the essential parts of a deed included '*the consideration*', clearly, referring to the price. Elsewhere, he used the word as a synonym for '*reflection*' e.g. p 237 'they determine the laws of God and worldly affairs with due consideration.'

<sup>150</sup> *Ibid*, p 243 (wording is missing from the manuscript, however, Spelman's sense seems clear). Bosworth, n 145 (*gersume*) 'treasure.'

<sup>151</sup> Finch, n 66. This work was originally published as H Finch, *Nomotechnia: un Description del Common Leys d'Angleterre* (1613). This was in Law French. It was published by Finch in English (as *Law or a Discourse thereof*) in the same year and also in 1627. The last edition of the work was in 1759 (H Lintot, 1759).

<sup>152</sup> *Ibid*, ch 19, p 180.



without good consideration and this consideration must be some *cause or occasion meritorious*, amounting to a mutual recompense [*quid pro quo*] in deed or in law.<sup>153</sup> (*italics supplied*)

It is likely reference to a '*cause or occasion meritorious*' was to the formulation of Dyer CJ in *Calthorpe's Case* (1574), see 23(a).<sup>154</sup> It may be noted that Finch used the phrase to refer to '*good*' consideration (West had referred to '*lawful*' consideration).

### (i) Conclusion

If one considers the definitions of legal writers in the period 1590-1636, they (at base) followed Dyer CJ in their definition of consideration.

- **Calthorpe's Case (1574)** - Dyer CJ - 'cause or meritorious occasion, requiring a mutual recompense [*quid pro quo*], in fact or in law';
- **Lord Gerard's Case (1581)** - Dyer CJ - *un consideration est causa meritoria pur que il granteroit, et poet estre appelle perbien causa reciproca, se un mutuell cause..*(a consideration is a meritorious cause wherefore it is granted and it can very well be called a reciprocal cause; that is to say, a mutual cause);
- **West (1598)** - 'The consideration...is the motive cause, for which the instruments are made, as money or other goods, affection natural or such like.' Also 'lawful cause or consideration'. Further, '*nudum pactum*, which of his [its] own nature breeds no obligation. As if JS promise to pay £20 to PL not having *quid pro quo*...';
- **Fulbecke (1601)** - 'A consideration...is the proper material cause of a contract'. Also, 'our law requires in all contracts a mutual consideration, and one part of the contract challenges and begets the other.';
- **Cowell (1607)** - 'Consideration (*consideratio*) is that with us, which the Grecians called [*synallagmata* [exchange]]: that is, the material cause of a contract.';
- **Doderidge (1631)** - Quoted Dyer CJ (see above) 'a consideration is a cause or occasion meritorious requiring mutual recompense in fact or in law...';
- **Finch (1636)** - 'consideration must be some *cause or occasion meritorious*, amounting to a mutual recompense [*quid pro quo*] in deed or in law'.

However, the references to '*cause*', '*meritorious occasion*', '*reciprocal cause*', '*moving cause*', '*material cause*' were all superfluous since - with regard to what this actually was - it seems clear that they were asserting that a pre-requisite for a contract was *quid pro quo* (exchange). However, this exchange - all, also, seem to have accepted could be in the form of payment (money). They would all have, also, been aware of the Fraudulent Conveyances Acts 1571 and 1584 which referred to '*consideration*' and '*good consideration*' (i.e. valuable consideration) - meaning money or money equivalent. The Statute of Enrolments 1536 also required valuable consideration to be given. For their part, Coke (1628) and Spelman (pre-1641) referred to consideration in terms of '*money*', '*price*', '*payment*' and '*reward*'. In the case of the former, reference can also be made to *Stone v Withipole* (1589) - the loss to P (promisee) or profit to D (promisor). Thus - despite all the verbiage - it seems clear that all accepted that, for a contract, a pre-requisite was delivery (exchange, '*this for that*'). And that the exchange could involve money or something else (such as a promise for a promise). And that the exchange could be actual (in fact, that is, '*in deed*') or presumed in law. For example, as to the latter, marriage being treated as consideration (which it was for the Fraudulent Conveyances Acts 1571 and 1584).

- Thus, it is not clear that any of these writers - despite the (very) opaque nature of their writing - were asserting that a contract, beyond Bracton's '*consensus*' and '*delivery*', required a separate, additional component called '*consideration*'. Indeed, the latter phrase was being treated, in most cases, as a synonym for '*quid pro quo*' (exchange or delivery) with additional reference to '*good*' consideration to screen out illegal or immoral contracts (that is, by reference to the motive or purpose of a contract);
- However, the very nature of the opaque writing of these legal writers indicates that they - in quoting or referring to Dyer CJ - were uncertain as to what the former actually meant and, therefore, they left matters uncertain. Hence, all the confusion which was - in time - to produce a separate pre-requisite of consideration after what had, originally, been no more than a pleading point in the action of *assumpsit*. In short, a legal wild goose chase.

***In conclusion, it is asserted that caselaw up to 1636 does not support the idea of judges (nor Coke in his writing) treating 'consideration' as a distinct pre-requisite for the making of a valid contract. Further, the***

<sup>153</sup> Ibid, s 42. Finch also stated, s 29 'Affection for the provision for the heirs males that one shall engender, brotherly love etc. are good considerations to raise an use; but long acquaintance and familiarity are not.' Cf. the need for a deed, see n 761.

<sup>154</sup> In the 1613 edition of Finch the title to the section referred to '*quid pro quo*.' (s 48, p 9)

*judges did not use the word in an identical sense. As for the legal writing, it was obscure. In so being it could create an impression that 'consideration' was other than a synonym for 'quid pro quo' - which latter expression was that there must be an exchange (this for that), reflecting the need for delivery as a pre-requisite for a valid contract, laid down by Bracton c. 1250.*

## 28. THE PERIOD: 1641-75

The Civil War (1642-9) created an explosion of private coinage, as Fletcher noted:

The Civil War wrought havoc with the economy. Before and after the belligerence, neither Charles I [1625-49] nor the Commonwealth [1649-60] possessed sufficient coinage or foresight to produce low denomination coins in adequate numbers to deter counterfeiters and to meet the needs of small enterprises struggling to find and retain customers in hard times...From the mid-1640's to the early 1670's perhaps as many as 20,000 tavern keepers, grocers, tobacconists, and other retailers throughout the land issued their own copper token farthings, half pennies and (occasionally) pennies.<sup>155</sup>

When Charles II (1660-85) came to throne he issued new silver coinage. However, he omitted to issue a half penny (the price of a coffee in a coffee shop).<sup>156</sup> This ensured the continuance of smaller denomination token money. For example, Lincoln City council authorised the issue of a '*Lincoln half-penny charged by the mayor*' in 1669.<sup>157</sup> It was not until 1672 - following a Proclamation<sup>158</sup> - that the Royal Mint began to issue copper farthings, followed by half-pennies in 1673.<sup>159</sup> However, although attempts were then made by the Government to suppress private coinage (which was usually of copper or brass) it continued since the supply of copper legal tender to more remote parts of England and Wales was inadequate. Whiting noted:

In the seventeenth century tradesmen and local councils needed small change to facilitate trade. By the eighteenth century the towns were able to supply themselves with regal coins [legal tender], but the new industries were developing in remote parts of the country where distributive costs were high, so that industrialists in those parts had to solve their own particular shortage.<sup>160</sup>

There were also considerable problems of counterfeiting<sup>161</sup> - not helped by the fact that, while counterfeiting coin of the realm was high treason, to mint tokens (or copy foreign coins) was not a crime.<sup>162</sup> There were also problems when the issuers of these tokens refused to accept them back.<sup>163</sup>

### (a) Nov (1641)

Nov, in the first edition of his *Principal Grounds and Maxims* (1641), stated:

<sup>155</sup> Fletcher, n 149, p 6, 44. See also Whiting, n 184, p 17; Snelling, n 533, pp11-2 and Davies, n 148, p 243.

<sup>156</sup> Ibid, p 44.

<sup>157</sup> Ibid, p 18.

<sup>158</sup> Snelling, n 533, p 36 (Proclamation of 16 August 1672) followed by those of 17 October 1673 and 12 December 1674. These contained a prohibition on issuing tokens with strict orders to prosecute.

<sup>159</sup> Ibid, p 19. At p 46 Fletcher quotes the Proclamation of 1672 'Our subjects would not easily be wrought upon to accept the farthings and half pence of these private stampers if there were not some kind of necessity for small coins for public use, which cannot well be done in silver, nor safely in any other metal, unless the intrinsic value of the coin be equal, or near to that value for which it is made current...[The Mint will]...make half-pence and farthings to contain as much copper in weight as shall be of the true intrinsic value ..after charges of coining and uttering are deducted.' See also Davies, n 148, p 244.

<sup>160</sup> Ibid, p 20. Also, p 22 'The only alternative to counterfeiting regal coinage was to mint trade tokens.' Shop tokens, issued by grocers' shops, were common. Ibid, p 34 'Inevitably it was in the food trade that shopkeepers found the need to issue tokens most pressing. Grocers' shops, which were really the general stores of the day, tended to produce most of the food shop tokens...'. There were also tokens issued by butchers, bakers, haberdashers, furriers, booksellers *etc.* as well as those issued by trades and crafts, such as weavers, clothiers, shearmen, farriers, blacksmith, ironmongers, carriers, inns, coffee houses *etc.* See generally, Whiting, n 184, ch 2.

<sup>161</sup> Fletcher, n 149, p 46 who stated of the proclamation of Charles I *re* copper coins: 'Fine words; but only 40,000 of the new coppers were minted up to 1676. Counterfeiting with lower weights had become widespread by the end of the century. A new wave of tokens was bound to follow in the next century [which it did]'. Ibid, pp 20-1.

<sup>162</sup> Ibid, p 47. To mint tokens, *per se*, was not a felony as noted by P Colquhoun, *Police of the Metropolis* (1796) cited by Whiting, n 184, p 21. See also p 176 *re* mulling, false edging, counterfeiting and specious tokens.

<sup>163</sup> As to how private currency circulated, see Snelling, n 533, p 30 'We think it can admit of little doubt that tradesmen and shopkeepers in the same town, agreed, in some manner, to take and circulate each others tokens; and for that purpose might have a particular box, with several partitions, called a parting box, to keep them separate; and when full, make a recharge of them for silver, or probably for such of their own as were in those other persons hands...'. J Evelyn, *Numismata* (1697) 'tokens which every tavern and tipping house (in the days of the late anarchy among us) presumed to stamp and utter for immediate exchange, as they were payable through the neighbourhood...though seldom reaching further than the next street or two.' Ibid, Snelling, n 533, p 13.

A contract is properly where a man for his money shall have by the assent [agreement] of another, certain goods, or some other profit at the time of the contract, or after. In all bargains, sales, contracts, promises, and agreements, there must be *quid pro quo* presently, except day be given expressly for the payment, or else it is nothing but communication [negotiation].<sup>164</sup>

Here, Noy - in particular - was referring to sales with regard to his reference to '*a man for his money shall have...goods*' and even his reference to *quid pro quo* (exchange) was in the context of sale (immediate payment save where a payment day was agreed). In respect of consideration, under the heading '*Ex nudo pacto non oritur actio*' he stated:

No man is bound to his promise, nor any use can be raised without good consideration. A consideration must be some cause or occasion, which must amount to a recompense in deed [fact], or in law, as money, or natural affection, not long acquaintance, nor great familiarity.<sup>165</sup>

The reference to '*cause or occasion*' reflected Dyer CJ (see **23(a)**). Noy also noted that natural affection or brotherly love were '*good causes or considerations*' to raise a use.<sup>166</sup> Finally, he referred to past consideration.<sup>167</sup>

#### **(b) West (1647) & Hughes (1660)**

The last edition of West was in 1647. In respect of matters of contract, it was not materially different to what had been expressed in the 1598 edition indicating much as to the absence of jurisprudential analysis in the interim period of 50 years. Hughes - in the only edition of his Abridgment (1660) - did not provide any analysis of consideration but simply listed cases under headings such as: '*Action upon the Case upon Assumpsit and Promise*', '*Agreement and Disagreement*', '*Bargain and Sale*', '*Considerations [for Uses]*', '*Deeds*' and '*Exchange*'.<sup>168</sup>

#### **(c) Statute of Frauds (1677)**

Mention should be made of this Act since - although it did not deal with the doctrine of consideration as such - to prevent fraud, it required various legal transactions to be in writing rather than by *parol* (oral).<sup>169</sup> Being required to be in writing had the effect, then, of enormously increasing the number of transactions effected by way of deed since - although '*signed writing*' was referred to in some sections, it was still common (and not difficult) to use a seal. Since deeds did not require consideration (it was presumed or '*imported*') this decreased, in practice, the doctrine of consideration to, relatively, minor insignificance - at least up to when Blackstone wrote (1766, see **31**) - which also, in part, explains the lack of analysis in legal writings on the doctrine. In particular, the following sections of the Act may be noted:

- **S.1**. This required many interests in land to be made by a signed writing. Otherwise, they were accorded the status of estates at will;<sup>170</sup>

<sup>164</sup> See WN[oy], *A Treatise of the Principal Grounds and Maxims of the Lawes of England* (1641), p 102. As to an earnest, Noy stated, pp 102-3 'If the bargain be that you shall give me £10 for my horse, and you do give me a penny in earnest, which I do accept: this is a perfect bargain, you shall have the horse by an action of the case, and I shall have the money by an action of debt.' See also, p 106. Cf. T Hobbes, *Leviathan* (1651 rep Penguin, 1985, ed CB MacPherson), pp 192-3 'The mutual transferring of right, is that which men call contract...When the transferring of right, is not mutual' but one of the parties transferreth, in hope to gain thereby friendship, or service from another, or from his friends; or in hope to gain the reputation of charity, or magnanimity; or to deliver his mind from the pain of compassion; or in hope of reward in heaven; this is not contract, but gift, freegift, grace: which words signify one and the same thing.' He also noted, p 201 'It appears also, that the oath adds nothing to the obligation. For a covenant, if lawful, binds in the sight of God, without the oath, as much as with it...'

<sup>165</sup> *Ibid*, p 10.

<sup>166</sup> *Ibid*, p 7.

<sup>167</sup> *Ibid*, p 106 'If a thing be promised, by way of recompense for a thing that is past; it is an rather [rather an] accord than a contract, *etc* upon an accord, there lies no account, but he unto whom the promise is made have may [may have a] charge [loss], by reason of the promise, which he has also performed; then he shall have an account for the thing promised, though he that made the promise have no profit thereby; as if a man say to another man, heal such a poor man, or make such a highway *etc.*'

<sup>168</sup> Hughes, n 53.

<sup>169</sup> See generally P Hamburger, *The Conveyancing Purposes of the Statute of Frauds* (1983) 27 *American J of Legal History*, vol 27, no 4, p 354.

<sup>170</sup> S 1 '...all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery of seisin only, or by parol, and *not put in writing, and signed by the parties* so making or creating the same, or their agents lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or in equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.' (*italics supplied*)

- **S. 3.** This required assignments, grants and surrenders of interests in land (excluding copyhold) to be by deed or note in writing, signed by the party assigning *etc.*<sup>171</sup>
- **S. 4.** This required signed writing for, *inter alia*, any contract or sale of lands, tenements or hereditaments or any interest in (or concerning) them;<sup>172</sup>
- **S. 7.** This required trusts of land to be in writing signed by the party;<sup>173</sup>
- **S. 17.** This provided that no contract for the sale of any goods (wares and merchandises) for £10 or more was good unless: (a) the buyer accepted part of them (or give an earnest); or (b) a note (or memo) in writing of the sale was made and signed by the parties.<sup>174</sup>

#### (d) **Sheppard (1663-75)**

Sheppard (a Cromwellian) was keen to promote the law and his text, *Actions upon the Case for Deeds* (1663),<sup>175</sup> as well as (the only edition of) his *Abridgment* (1675) would, likely, have had a good circulation - albeit, they were popular works and not regarded as of much legal scholarship.<sup>176</sup> In his *Abridgment*, Sheppard followed Cowell (see 27(c)), in providing that consideration was the material cause of a contract. He stated:

Consideration is a term of law of use and considerable in gifts, grants and contracts. And in a contract it is said to be the material cause of a contract with[out] the which no contract is binding.<sup>177</sup>

Sheppard's reference to consideration as a '*term of law*' indicates that the word, by now, had become a legal, technical, term. Sheppard indicated that consideration could be: (a) express or implied;<sup>178</sup> (b) executed or executory; and (c) natural or valuable.<sup>179</sup> In respect of a contract, he stated:

<sup>171</sup> S 3 'no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements, or hereditaments shall...be assigned, granted or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law.' (*italics supplied*)

<sup>172</sup> S 4 'no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate or whereby to charge the [D] upon any special promise to answer for the debt, default or miscarriage of another person or to charge any person upon any agreement made in consideration of marriage or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them or upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought, or some memorandum or note shall be *in writing, and signed* by the party to be charged therewith or some other person thereunto by him lawfully authorised.' (*italics supplied*)

<sup>173</sup> S 7 'all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by *some writing signed by the party* who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.' (*italics supplied*).

<sup>174</sup> S 17 'no contract for the sale of any goods, wares, and merchandises for the price of £10 sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be *made and signed by the parties* to be charged by such contract, or their agents thereunto lawfully authorised.' (*italics supplied*). This section was repealed in 1954.

<sup>175</sup> W Sheppard, *Actions upon the Case for Deeds* (1st ed, 1663; 3rd ed (final ed), 1680). In comparison to earlier texts, Sheppard's style is simpler and almost chatty. He also summarised a number of the cases on *assumpsit* in this text.

<sup>176</sup> Holdsworth was critical of his writing, n 95, vol 5, p 377.

<sup>177</sup> Sheppard, n 55, p 426 (*consideration*). Sheppard also stated 'That the law does much look upon the ground and consideration of a thing, so that in customs, contracts, conveyances, and the like; so that thereby nothing is wrought, no interest is transferred, no right is removed, no duty is accrued, no custom is continued, but where there shall appear some ground or consideration of it. But for obligations, matters of pleasure, matter of trust, an authority, and limitation, it is little looked upon.' Cf. 1663 version where Sheppard defined consideration, p 19 'the consideration of the promise, which is said to be a cause or occasion meritorious, requiring mutual recompense in deed, or in law: or the material cause of the contract, without the which the same is not binding.'

<sup>178</sup> *Ibid*, 'These are either expressed or implied. Expressed, as where one gives 20s for a horse, or sells his land for £20 or in exchange for other land, or one promise for £20 to do a thing. Implied, as where the law its self enforces a consideration, as where one comes into a common inn, and there stays for a while, taking both meat and drink and lodging or either of them for himself or his horse, the law presumes he intends to pay for it though no agreement be between the host and him for it. And therefore if he discharge not the house the host may stay his horse or sue him for it.' The same applied in respect of a tailor (it is to be remembered that, for tailors, in times past, the client usually supplied the cloth to have it made up).

<sup>179</sup> *Ibid*, 'There is also a consideration of nature; as natural love and affection, advancement of blood, and the like. And a valuable consideration of money land or goods. If one without expressing of any consideration, covenant to stand seised of land to the use of his wife, children or child, brother or cousin; in these cases by the naming of them only to be their kin, there is an implied consideration, and thereupon the use will rise, which by way of covenant cannot arise without some valuable or invaluable [nominal] consideration.'

Contract (largely taken) is an agreement between two or more about something to be done, whereby both parties are bound each to other, or one is bound to the other. But (more strictly) it is taken for an agreement between two or more for the doing or having of one thing for another. Or (more exactly or properly) it is taken for an agreement for the buying and selling of goods or cattle whereby the property of the thing sold is altered [transferred]...A contract is, where a man for his money is to have by consent of another [the] land or goods of another.<sup>180</sup>

Sheppard indicated that a contract might be: (a) real or personal; (b) express or implied; (c) absolute or conditional; (d) oral or in writing.<sup>181</sup> He continued:

Some contracts also have in them a consideration,<sup>182</sup> called *quid pro quo*, where there is in the agreement something that is a recompense in deed or in law, and [this] is the material cause of the engagement, by which it is made obligatory.<sup>183</sup> And so it is where it is executed with a recompense, or is so certain that it gives an action, or other remedy for the recompense: as where you sell me your horse for £10 laid down or received; or where I agree that you shall have my horse for £10 and for this you promise to pay me my £10 for my horse; or I covenant by a parol agreement to make you a lease of land for 3 years for £20 laid down in land, or promised by you to be paid to me. And this agreement is said to be with a lawful cause and consideration in it. Some contracts are also alone, and without consideration; and this if it be verbal, or by writing not sealed and delivered, and is said to be but *nudum pactum ex quo non oritur actio*. For *nudum pactum* is said to be where there is an agreement or promise to do a thing, and no recompense or consideration given or promised for or in lieu of it as where one sells me a horse, and is upon [i.e. it is specified in] the agreement to have nothing for his horse; or one promise to give me a horse, build me a house, or do any other such thing by a day and I neither give nor promise any thing for it. So where he promises me 20s so that he will be my debtor for 20s and there is nothing to induce it, that he shall do something for me or the like. *But if there be any thing to be done or given by me, though never so small a matter, as a penny, or pennies worth, a pint of wine or the like, to induce the promise it may be good, otherwise not.*<sup>184</sup> And then it is said to be a naked promise, and is void in law and no action will lie upon it.<sup>185</sup> (*italics supplied*)

Sheppard indicated that some contracts were executory.<sup>186</sup> Also, that the word 'contract' was (often) used in a large sense to also cover deeds. Thus, he stated:

If the contract be by word it has two considerable parts. The consideration of the promise, and promise it self. This word contract is also sometimes more largely taken and applied to agreements by deed in writing as well as to agreements by word of mouth.<sup>187</sup>

Finally, Sheppard also considered conveyance by way of bargain and sale<sup>188</sup> - noting that valuable consideration had to be given. However, Sheppard (as with others prior to him) was not very consistent in his definition of

<sup>180</sup> Ibid, p 283 (*bargain and sale and contract*). W Sheppard, *The Faithful Councillor* (1653), p 86 'a contract taken largely, is an agreement between two or more, concerning something to be done, whereby both parties are bound each to other, or one is bound to the other. But more strictly it is taken for an agreement between two or more, for the buying and selling of some personal goods, whereby property is altered.' See also similar wording in his 1663 text on *Actions upon the Case*, p 17.

<sup>181</sup> 'A contract is sometimes made by word of mouth only, and sometimes it is in writing, and if it be in writing not sealed and delivered, then it is all one with the verbal contract.' This formulation of Sheppard was not a good one. However, it (likely) influenced others, such as Blackstone and Skynner LCB in *Rann v Hughes* (1778), see 32.

<sup>182</sup> Cf. in his 1663 text, n 934, p 18, Sheppard stated 'Some contracts also are clad with a consideration...'. The word 'clad' may hark back to Bracton's 'vestment'.

<sup>183</sup> Sheppard Touchstone, n 576, p 91 'Two things only seem to be necessary to the making up of a good and binding contract, such as a one to produce an action. 1. That there be a good consideration; for if there is none, or no good consideration (that is) there be no benefit to the party by whom, nor prejudice or trouble to the party to whom the promise is made, the contract is void; and so also it is where the consideration is unlawful. 2. The agreement must be perfect [i.e. *consensus*]; for if it be only in inception, that there be a treaty and no perfection, it is but a communication [negotiation], which will not bear up an action.' Sheppard did not mention here that a contract also required a subject matter, capacity and delivery.

<sup>184</sup> Cf. *Nurse v Barns* (1663) T Raym 77 (83 ER 43). P rented certain mills from D pursuant to an oral (parol) contract for 6 months at a rent of £10. After he had moved in his stock, the D refused to let him remain in possession. The jury assessed damages at £500 although it was admitted that £10 was the fair rent for the mills. The court refused to alter the verdict. Jenks, n 91, p 139 'From that time it has never been doubted that the amount of the consideration is no measure of the damages for breach of the contract.'

<sup>185</sup> Sheppard, n 55, p 284.

<sup>186</sup> Ibid, 'Some contracts also are executed; as where one does promise and pay me £10 in recompense of a house I have built for him at his request, and the like: or it is executory only, as where all or part of the thing agreed upon it is to come, as that you should build me a house, and or that if you bring me in so much corn by such a day, that I shall pay you so much money, or the like.... And every executory contract is said to imply in it an *assumpsit*, the which strictly and properly is nothing else but a special kind of agreement or a voluntary promise made by word of mouth, or by writing not sealed and delivered as a deed, by which a man does assume or take upon him to do or pay any thing to another.'

<sup>187</sup> Ibid, p 284.

consideration since he also noted - as to valuable consideration - that the crucial issue was a loss to the promisee as opposed to a gain to the promisor. I quote from his 1663 text on *Actions upon the Case for Deeds*;

the consideration that shall be said to be valuable and good to raise an action upon it, the same must import some gain to him that makes it, or to some other at his request; or some loss to him to whom it is made or both. And if there be in it matter of loss, labour...to him to whom the promise is made, it matters not whether there be any matter of gain at all to him that makes the promise.<sup>189</sup>...And yet in a special case the goodness of the work done may supply the consideration, and make the party chargeable...one consideration may be a good consideration for another promise, so as they be made together at the same time, otherwise not...That the consideration that the law looks upon as good and valuable, is such as has something in it, present, or to come; or has something of both in it, and is not past. For if the motive or inducement of it be past, generally it is not good, not binding at all.<sup>190</sup> (*italics supplied*)

#### (e) Conclusion

Analysis of the law of contract in the period 1642-75 was scant (as may be expected due to the Civil War). However, this was also due to pleadings being formulaic and lawyers sticking to the same wording (script). Thus, Jenks categorised the period from the close of the Year Books (1535/6) to the accession of George III (1760) as a formulary period.<sup>191</sup> In respect of the meaning of 'consideration', to Sheppard it was a pre-requisite of a contract ('a material cause') without which the contract was not binding. As to what consideration was, both he (and Noy) associated it with *quid pro quo* ('some contracts also have in them a consideration, called *quid pro quo*...') - albeit Sheppard's reference to 'some' did not suggest exclusivity. To Sheppard, a nude contract (*nudum pactum*) was one lacking 'recompense or consideration.' However, consideration could be minimal ('any thing to be done or given by me, though never so small a matter, as a penny, or pennies worth, a pint of wine or like'). Noy had a similar view (*If...you do give me a penny in earnest, which I do accept, this is a perfect bargain...*). This linked consideration to the *arra* (including, a drink to seal the bargain). Further, Sheppard was not just looking at the king's court (or pleading practice there). Therefore, he would have been aware that the *arra* - in ordinary, everyday, life - was still being used in markets and fairs and that it would have been treated as adequate consideration. Thus, in practice, the issue of 'consideration' would not have been problematic since people could use deeds and *arras* and - for most people - the king's court was not resorted to (and, indeed, so doing would have been problematic during the Civil War and aftermath, in terms of travel and cost).

***In conclusion, in the period 1642-75, consideration was stated by various writers to be a 'material cause' (pre-requisite) for a contract, without which it would simply be an agreement or promise that was not legally enforceable. As for what was needed to satisfy this pre-requisite, generally, reference was made to quid pro quo.***

## 29. THE EIGHTEENTH CENTURY

Given the absence of legal texts dedicated to commercial law in this period (as in the past) there was no detailed analysis of the doctrine of consideration. The following may be noted:

### (a) Pufendorf (1673) & Heineccius (1738)

<sup>188</sup> Ibid, p 283 'Bargain and sale does signify the transferring of the property of a thing from one to another upon valuable consideration. And this does herein only differ from a gift, that this may be without any cause or consideration at all, and that has always some meritorious cause moving it, and cannot be without it. The word also is sometimes applied to the assurance or conveyance whereby this is done and made, which is called a deed of bargain and sale, which bargain and sale may be with or without any writing. But bargains and contracts are mutual agreements and covenants of parties concerning some thing each to other. And this bargain and sale may be, and sometimes is, of land; and to this it is most properly applied, and is where a recompense is given by both the parties to the bargain of the land: as where one bargains and sells his land to another for money, and the money is a recompense to the other for the land. And this is a good contract and bargain, and is become one of the common assurances of the nation.' Sheppard noted that bargain and sale by deed inrolled, avoided the need for livery of seisin of the land. He continued 'this also maybe, and sometimes is, of movable things, as trees, corn, grass, oxen, kine, household stuff, and the like, the property whereof is and may be altered by this kind of conveyance as well as by gift or grant.'

<sup>189</sup> Sheppard, n 934, p 20-1. That is, that loss to the promisee is the key thing.

<sup>190</sup> Ibid, pp 21-2.

<sup>191</sup> Jenks, n 91, p 108 'formulary period, in which the success of the parties depends not more on the merits of their cases than upon the skill of their advisers in framing those cases according to technical rules of art. And so strictly were those rules drawn, so refined and exact their application, that the *formulae* produced under them are really our best guides to the state of the law in the period. It is a case in which, to use Sir Henry Maine's phrase, substantive law is 'secreted in the interstices of procedure.' See HJ Maine, *Dissertations on Early Law and Custom* (1883), p 389 'So great is the ascendancy of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.'

In 1673, Samuel Pufendorf (1632-94), a German jurist and one time professor at Heidelberg, published his *De Officio Hominis et Civis*, an abridgment of his *De Jure Naturae et Gentium* (Of the Law of Nature and Nations), published in 1672. The former work was translated by Andrew Tooke (professor of geometry at Gresham College) in 1691 as *The Whole Duty of Man, According to the Law of Nature*.<sup>192</sup>

- Pufendorf was much influenced by Grotius (see 27(e)) and followed him closely *vis-a-vis* his statements on contract. Pufendorf considered the duty of men in making contracts (pacts (*pacta*) or agreements) which he distinguished from promises;<sup>193</sup>
- He indicated that a contract required voluntary (free) consent, which could be expressed in writing.<sup>194</sup> It also required the parties to have capacity.<sup>195</sup> The consent of the parties, Pufendorf noted, had to be mutual.<sup>196</sup> He also noted the rather loose use of the words 'agreement' and 'contract' - such that they were, often, used interchangeably.<sup>197</sup>

For his part, Heineccius (1681-1741) - a German jurist who was a professor of philosophy and jurisprudence at Halle (Germany) - in 1738, published his Methodical System of Universal Law (*Elementa Iuris Naturae et Gentium*) which was translated by the Scots philosopher, George Turnbull in 1741.<sup>198</sup> In respect of a contract (*pact*), Heineccius noted:

A pact being the mutual consent of two or more in the same will or desire; i.e. an agreement of two or more about the same thing, the same circumstances; the consequence is, that this internal consent must be indicated by some external sign. But such signs are words either spoken or written, and deeds [acts]...'<sup>199</sup>

He also noted that a contract required capacity and *consensus*.<sup>200</sup>

***In conclusion, these civilian writers indicated that a valid contract was made if there was capacity and consensus and that, evidentially, it could be satisfied by oral expression or in writing. No additional formality (unlike an English deed was required). It is likely that they influenced persons such as Blackstone (see 31) and Mansfield CJ in Pillans v van Mierop (see 30).***

#### **(b) Wood (1720)**

Wood - in the first edition of his *An Institute of the Laws of England* (1720) - a text which continued until 1772 and which was superseded by the work of Blackstone<sup>201</sup> - treated all contracts as a form of purchase. He stated:

<sup>192</sup> The translation had editions in 1698, 1705, 1716 and a final edition in 1735. For the 1735 edition see S Pufendorf, *The Whole Duty of Man, According to the Law of Nature* (ed I Hunter & D Saunders, Liberty Fund). See S Pufendorf, *On the Duty of Man and Citizen according to Natural Law* (ed J Tully, trans M Silverthorne, Cambridge UP, 1991), for a translation of the 1673 edition.

<sup>193</sup> Pufendorf, n 951, p 110 'Our word may be given, either by a single act, where one party only is obliged; or by an act reciprocal, where more than one are parties. For sometimes one man only binds himself to do somewhat [something]; sometimes two or more mutually engage each other to the performance of such and such things. The former whereof is called a promise, the latter a covenant or contract.' See also Tully, n 951, p 69. Gifts, *Ibid*, p 136, was when things were transferred 'either *gratis* or freely.'

<sup>194</sup> *Ibid*, p 111 'Moreover, that promises and contracts may have a full obligation upon us...tis especially requisite that they be made with our free consent...And this consent is usually made known by outward signs, as, by speaking, writing, a nod or the like...'. See also Tully, n 951, p 70. Cf. Grotius, see 27(e).

<sup>195</sup> *Ibid*, p 112. Pufendorf also considered mistake, guile and fear (duress).

<sup>196</sup> *Ibid*, p 116 'not only in contracts, but in promises the consent out to be reciprocal; that is, both the promisor and he to whom the promise is made must agree in the thing. For if the latter shall not consent, or refuse to accept of what is offered, the thing promised remains still in the power of the promisor. For he that makes an offer of any thing, cannot be supposed to intend to force it upon one that is unwilling to receive it, nor yet to quit his own title to it; therefore when the other denies acceptance, he who proffered it loses nothing of his claim thereto.' See also Tully, n 951, p 74.

<sup>197</sup> *Ibid*, p 145 'A pact or agreement [*pactum*] in general, is the consent and concurrence of two or more in the same resolution [*placitum*]. But because oftentimes simple agreements are contra-distinguished to contracts [*contractus*], the difference seems chiefly to consist herein, that by contracts are understood such bargains as are made concerning things and actions, which come within the compass of commerce, and therefore suppose a property and price of things. But such covenants as are concluded upon, about other matters, are called by the common term of pacts or agreements. Although even to some of these is promiscuously given the name of pacts and contracts.' Pufendorf cited Grotius, see 27(e). See also Tully translation, n 951, p 97.

<sup>198</sup> JG Heineccius, *A Methodical System of Universal Law* (ed T Ahnert)(Liberty Fund, 2008, originally pub for G Keith *et al*, 1763).

<sup>199</sup> *Ibid*, p 300.

<sup>200</sup> *Ibid*, pp 301-2. In the case of consent, Heineccius stated, p 303 'since a pact consists in the consent of two or more to the same thing, it is very plain that this rule must hold not only in bilateral, but likewise in unilateral pacts; and therefore a promisor is not bound, unless the other signify that the promise is agreeable to him.'

<sup>201</sup> For Blackstone's criticism of Wood, see W Blackstone, *An Analysis of the Laws of England* (1756), *Preface*, p vi.

A purchase is always intended by title, either for some consideration, or by gift...All contracts are comprehended under this word purchase. For it is not much argued in the laws of England (as in the civil law) what difference there is betwixt a contract, promise, gift, loan, or a pledge, a bargain, a covenant *etc* since the intent of the law is to have the effect of the matter argued, not the terms.<sup>202</sup>

This definition of all contracts being comprehended within the term '*purchase*' was idiosyncratic and not followed by others. The tendency not to distinguish various commercial concepts which Wood noted had, first, been made by St German in 1528 (see **18**). The fact that Wood repeated it speaks much as to commercial law not being of great import for legal analysis when compared to other areas of law such as land law, criminal law and constitutional law. In respect of the doctrine of consideration, Wood stated:

The consideration is the motive or cause of the contract. As in consideration of natural love and affection, for settlement in the stock or blood, for money paid or secured to be paid for payment of debts, for marriage already had or to be had *etc.*<sup>203</sup> There is a *good* consideration, and a *valuable* consideration. Natural love and affection is a good consideration, but not a valuable consideration, as money, marriage *etc.*<sup>204</sup> (*italics supplied*)

In the context of the Fraudulent Conveyances Act (1571) (see **22**), Wood noted that the consideration must be '*valuable*' for the purposes of this Act.<sup>205</sup> Such a term, generally, was used in the context of this Act and related legislation.<sup>206</sup> Finally, in the case of sale, instead of referring (as Bracton and other earlier writers had done) to an agreed (or fixed) price, Wood referred to valuable consideration, something other writers tended not to follow but which accurately sums up the nature of '*price*'.<sup>207</sup>

#### (c) **Nelson (1725) & Bacon (1736)**

Nelson, in the only edition of his Abridgment (1725), accepted the definition of consideration provided in *Stone v Withipole* (1589) (see **23**)<sup>208</sup> as opposed to a reference to *quid pro quo*. Nelson provided no further analysis. Instead, he cited long lists of cases - especially where consideration related to marriage agreements and in respect of uses - cases which show that, at times, there was little rhyme or reason for holding that '*consideration*' had been provided in one scenario but not in another.<sup>209</sup> It is also noteworthy that Nelson's abridgment had no title on '*Agreement*' or '*Contract*' - an indication commercial law had not developed much as a distinct area of law. Unlike Nelson's abridgment (above) Bacon, in his more influential Abridgment (1736), which continued until 1832, had a separate title for '*Agreement*'. He treated an agreement (contract) as form of exchange, stating:

An agreement is the consent of two or more persons concurring, the one in parting with, and the other in receiving some property, right or benefit.<sup>210</sup>

<sup>202</sup> Wood, n 69, vol 1, p 377. Wood treated a *deed* as an instrument on parchment or matter 'comprehending contract betwixt party and party' and he treated a *covenant*, p 392, as 'an agreement made by the consent of two or more to do or not to do'. He seems to have also treated a contract the same as an agreement, Ibid, p 395 'every contract or agreement.' [he cited the *Countess of Rutland's Case* (1604) 5 Co Rep 25b at 26]. In the case of deeds Wood noted, p 402, that 'If a deed is sealed and delivered, there is no necessity of signing it, tho' it is usually done.' Cf. Blackstone, see n 1020.

<sup>203</sup> Ibid, p 386. Wood referred to *Twyne's Case* (1601) 3 Rep 80 (76 ER 809) at 83.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid, p 386 'in a deed a consideration may be good, and the deed not made *bona fide*; because the deed may be fraudulent and accompanied with a trust. The consideration of nature and blood is a *good* consideration; but not such a *valuable* consideration, as money, marriage *etc* which is intended in the statute [Act].'

<sup>206</sup> Related legislation being the Statute of Frauds 1677 (see **28(c)**) and the Fraudulent Conveyances Act 1584 (see **22**).

<sup>207</sup> Wood, n 69, vol 2, p 542 'A sale or selling is a transferring of the property of goods and chattels from one to another upon valuable consideration. A gift may be without a consideration; but a sale can never be without a valuable consideration.' Wood also noted (following Noy, see **28(a)**), p 543 'If the bargain is, that you shall give me five pounds for my horse, and you give me a penny in earnest, which I accept, this is a perfect sale.'

<sup>208</sup> I say this since Nelson cited the case, n 56, vol 1 (*Action on the Case*), p 57 'The consideration is the ground of an action on the case upon a promise, and it must be either a charge to the [P] or a benefit to the [D]...'

<sup>209</sup> See, e.g. vol 1, *Action on the Case* (pp 57-90), *Covenant* (pp 553-75), *Deeds* (pp 620-6). See also vol 3, pp 487-504 (*good consideration of a use etc*) and vol 5 (title, *Uses and Trusts*).

<sup>210</sup> Bacon, n 58, vol 1 (*Agreement*), p 67. This definition, with minor amendment, was repeated in the last edition of Bacon in 1832 (vol 1, p 130). In a side note Bacon cited Sgt Pollard in *Reniger v Fogossa* (1551), see n 751. Under the title '*Covenant*', Ibid, p 526, Bacon stated: 'Covenants, contracts and agreements, are often used as synonymous words, signifying an engagement entered into, by which one person lays himself under an obligation to do something beneficial to, or to abstain from an act, which if done, might be prejudicial to another.' See also Viner, n 57, (1751), vol 5, p 504 'A contract is an agreement entered into by several persons, inducing an obligation by its own nature.' Cited by Swain, n 102, pp 13-4. Cf. Bellewe, n 68, p 3 'a pact or covenant, in the general sense of it, comprehends all things about which men agree in their transactions, negotiations, and intercourse with one another. Yet it is not here to be extended so largely, as to take in every agreement of opinion; but such only as induce an obligation, or contain a conveyance of some right.'



In a side note, Bacon noted the older use of the word '*agreement*' to refer to preliminary documents (drafts) or negotiations as opposed to the final contract.<sup>211</sup> In respect of consideration, Bacon stated:

As men have a right in their acquisitions, so may they dispose of them at their pleasure, and without valuable consideration; [i.e. a gift] but if a man promises to convey lands, or to give goods without valuable consideration, or without delivering possession of them [i.e. delivery], this alters no property, nor has the party any remedy in law or equity, being *nudum pactum unde non oritur actio*. But if it be done by deed duly executed, under seal, this is good in law, though there be no consideration or no delivery of possession; because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting.<sup>212</sup>

When discussing *assumpsit*,<sup>213</sup> Bacon stated:

Consideration is defined as a cause or occasion meritorious, that requires a mutual recompense [*quid pro quo*] in fact or in law. Therefore if a man promises so much money at a day to come to build a house or a church, without consideration, this is a naked promise, and will not oblige. Also idle and insignificant considerations are looked upon as none at all; for where-ever a person promises without a benefit arising to the promisor, or a loss to the promisee, it is looked upon as a void promise.<sup>214</sup>

What is interesting is that - despite more than 250 years passing, the law had, in effect, progressed no further in its definition of consideration since Bacon viewed it in two aspects: (a) following the formulation of Dyer in *Calthorpe's Case* (1574) (see **23(a)**) that delivery (exchange, *quid pro quo*) was required; and (b) following Coke in *Stone v Withipole* (1589) (see **23(f)**) that value be given, in terms of '*benefit... to the promisor, or a loss to the promisee*'. The former (it is asserted) referred to Bracton's pre-requisite, the latter reflected the *arra* becoming a legal fiction for pleading purposes in the king's court. Bacon also expressly referred to the pre-requisite of delivery for a contract, but he also noted that a deed did not require delivery.<sup>215</sup> In another title '*Bargain and Sale*', Bacon stated under the heading '*Of the Consideration*':

If a man bargains and sells lands for divers good causes and considerations, it is void, unless money be averred; for selling *ex vi termini* [by definition] supposes a transferring a right of something for money, the common medium of commerce; but if there be no such consideration it may be an exchange, a covenant to stand seised, grant *etc.* but it can be no sale within the statute [Statute of Enrolments 1536].<sup>216</sup> If there be a consideration of money expressed in the deed, no averment nor evidence can be admitted against it, for the affirmative is proved by the deed; and it is impossible to prove the negative. If the deed says for a competent sum of money, it is sufficient, without averring the sum, for it is a sale if there be any money.<sup>217</sup>

#### (d) Conclusion

Wood (in 1720) referred to consideration as the '*motive or cause of the contract*' and Bacon (in 1736) referred to it as '*a cause or occasion meritorious*.' These expressions stem from Dyer CJ. As to its meaning, Bacon referred to *quid pro quo* (following Dyer CJ) and both he and Nelson to a loss to P or a benefit to D - following *Stone v Withipole* (1589).<sup>218</sup> It is also interesting that - in all the legal writing in this 250 year period - legal writers simply set down on the law on consideration without considering the source of it or whether it was, at base, evidential or substantive.

<sup>211</sup> Ibid, 'though a contract executed with all the solemnity required by law, may properly be called an agreement, yet in the more common acceptation of the word, articles, minutes, and escrow *etc* containing something preparatory to a more solemn and formal execution, are called agreements.' Cf. Bellewe, n 68, p 17 'The agreement ought also to be compleat and perfect; for *pacta contractum preparatoria* are not binding, either in law or equity.'

<sup>212</sup> Ibid, p 71. Cf. Bellewe, n 68, p 51 'a deed imports a valuable consideration.'

<sup>213</sup> Ibid, p 163 'An *assumpsit* is an action the law gives a party injured, by the breach or non performance of a contract legally entered into; it is founded on a contract either express or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract.'

<sup>214</sup> Ibid, p 170.

<sup>215</sup> Ibid, p 71 (*Voluntary Agreements*) 'if it be done by deed duly executed, under seal, this is good in law, though there be no consideration or no delivery of possession; because a man is estopped to deny his own deed, of affirm any thing contrary to the manifest solemnity of contracting.'

<sup>216</sup> i.e. 27 Hen 8 c 10 (rep). Ibid, p 273 'Bargain and sale is a contract in consideration of moneys, passing an estate in lands by deed indented and enrolled: this manner of conveying lands is created and established by the [Statute of Inrolment 1535]...'

<sup>217</sup> Ibid, p 276. Bacon also noted, Ibid, 'Though the deed may be either in parchment or paper, yet the inrolment must be in parchment only, for that is implied when an inrolment is to be in any of the courts of record at Westminster; and in the clause of enrolment by the clerk of the peace, it is particularly provided, that he shall sufficiently inroll and ingross it in Parliament.' See also n 584.

<sup>218</sup> See **23(a)** and **23(d)**.

### 30. PILLANS v VAN MIEROP (1765) & HAWKES v SAUNDERS (1782)

This case<sup>219</sup> is an important one since Mansfield CJ and Wilmot J treated consideration to be evidential.<sup>220</sup> Here, the P's - at the suggestion of one White - wrote to the D's. They asked whether the D's would accept a BOE for £800 to be drawn by the P's against the D's on White's credit. The D's agreed to this in writing.<sup>221</sup> However, they later refused to accept the BOE drawn by the P's who brought suit. The D's argued that consideration for its undertaking was lacking.<sup>222</sup> The court held for the P's on two grounds: (i) the D's promise was in writing; thus, no consideration was required (it noted the case was between merchants); (ii) there was consideration in that the P's were '*deluded and diverted from using any legal diligence to pursue White.*' (i.e. forbearance).<sup>223</sup>

#### (a) Analysis of Mansfield CJ and Wilmot J

Mansfield CJ asked if any case could be found '*where the undertaking holden to be a nudum pactum was in writing.*'<sup>224</sup> None was cited. Mansfield CJ then opined that - when an agreement was made in writing - no objection could be made as to a lack of consideration. He stated:

A *nudum pactum* does not exist, in the usage and law of merchants. 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 *etc.* there was no objection to want of consideration. And the Statute of Frauds [1677] proceeded upon the same principle. In commercial cases amongst merchants, the want of consideration is not an objection.<sup>225</sup>

Wilmot J opined that:

The question is, '*whether this action can be supported, upon the breach of this agreement.*' I can find none of those cases that go upon its being *nudum pactum*, that are in writing; they are all upon parol.<sup>226</sup>

He then considered the nature of a *nudum pactum*, referring to Roman law<sup>227</sup> and to Bracton (see 12) as well as to Grotius,<sup>228</sup> Pufendorf<sup>229</sup> and Vinnius<sup>230</sup> (all civilian writers) to indicate that writing was sufficient. Wilmot J then stated that writing:

was intended as a guard against rash inconsiderate decisions; but if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding...Our own lawyers have adopted exactly the same idea as Roman law. Plowden, 308b, in the case of [*Sharlington v Strotton*] mentions it:<sup>231</sup> and no one contradicted it...its being, in this case, reduced into writing, is a sufficient guard against surprise; and therefore

<sup>219</sup> 3 Burr 1663 (97 ER 1035). See also Swain, n 102, pp 91-93; McMeel, n 821, Stoljar Contract, n 101, pp 102-4.

<sup>220</sup> See also *Mayor of Yarmouth v Eaton* (1763) 3 Burr 1402 (97 ER 896)(making a port) *per* Denison J at p 1407 'The consideration is self-evident; *viz.* the benefit to the subject.'

<sup>221</sup> At p 1272 *per* Wilmot J 'that they will.' See also McMeel, n 821, p 31

<sup>222</sup> *Ibid.*, p 1665 'for one man to undertake '*to pay another's debt*', was a void undertaking; unless there was some consideration for such undertaking; and that a mere general promise, without benefit to the promisor, or loss to the promisee, was a *nudum pactum*.'

<sup>223</sup> *Ibid.*, p 1667. See also McMeel, n 821, pp 36-8 also referring to the judgments of Yates and Aston JJ.

<sup>224</sup> *Ibid.*, p 1668.

<sup>225</sup> *Ibid.*, p 1669. See also Holmes Common Law, n 87, p 259 and McMeel, n 821, p 35.

<sup>226</sup> *Ibid.*, p 1670. For Justinian on stipulations, see Watson, n 252, ch 45(verbal contracts, stipulations which also refers to those in writing e.g. 45.30, Ulpian 'if a man writes that he has guaranteed them, everything is regarded as having been carried out in a proper manner'. *Ibid.* 52 'In contractual stipulations the parties supply the form of the contract.'. Jolowicz, n 252, p 433 'even before 212 [Roman law had] gone some way towards the Greek view, by admitting that, if there were a document alleging a stipulation, that document should be taken as *conclusive* proof that a stipulation had been entered into.' Buckland, n 252, pp 433-4 'It was usual to express the stipulatio in a written note or *cautio*.' See also Zimmermann, n 252, pp 80-1 and Walker, n 252(*stipulatio*) 'In Justinian's law the only requirement remaining was the simultaneous presence of the parties and even this was assumed if the parties had been in the same place on the day mentioned in the document.'

<sup>227</sup> *Ibid.*, p 1670 'There would have been no doubt upon the present case, according to the Roman law; because here is both stipulation (in the express Roman form) and writing.' See also Swain, n 102, pp 92, 182.

<sup>228</sup> H Grotius, *The Rights of War and Peace* (1646 ed)(OUP, 1925). Wilmot J cited Bk 2, ch 11 (*Of Promises*) and was, likely, considering the text to n 900 in particular.

<sup>229</sup> S Pufendorf, *On the Law of Nature and Nations* (1668 ed)(OUP, 1934). Wilmot J cited 3,chapter 5. In the abridged version (*The Whole Duty of Man*), see text to n 958.

<sup>230</sup> Vinnius (also called Vinnii or Vinnen, 1588-1657) was a Dutch jurist and law professor at Leiden. He wrote a commentary on Justinian's Institutes (*In quatuor libros institutionum imperium commentarius academicus et forensis*), a chapter of which (*De Obligationibus*, Of Obligations), 4th ed (1665), p 596, Wilmot J referred to.

<sup>231</sup> See n 773.

the rule of *nudum pactum* does not apply in the present case. I cannot find, that a *nudum pactum* evidenced by writing has been ever holden bad.<sup>232</sup>

In a later decision, *Williamson v Losh* (1775), an unreported case, Mansfield CJ also stated:

the doctrine as to *nuda pacta* was borrowed from the civil law, intended only to guard against rash promises and such as were given inconsistently or made in consequence of surprise...and he could not find one case in which it had been determined that a gift or promise to give, in writing attested by witnesses had been set aside as a *nudum pactum*.<sup>233</sup>

#### **(b) Whether the Analysis Correct**

There are certain things about this case which are a pity:

- **London Custom**. It is a pity that London custom (both P's and D's were London merchants) in respect of the action of covenant not requiring a deed but writing being sufficient<sup>234</sup> - was not pleaded. This would (it seems) have settled the matter. By London custom - regardless of the law merchant - writing would have been sufficient;
- **Merchants - BOE**. It had been accepted that - by virtue of the law merchant - BOE and promissory notes, generally, did not require consideration and both parties were merchants. Yates J made this point.<sup>235</sup> However, in many ways, it should have been made clearer since it was a deciding point;
- **Consensus/Delivery**. It was also a pity that there was no discussion of the pre-requisites for a contract since there was - clearly - *consensus* (an exchange of signed letters) and there had been delivery. That is, the BOE had been delivered to the D's for acceptance pursuant to the written agreement. Therefore, Bracton's pre-requisites for a valid contract were satisfied. So too, if reference is made to *quid pro quo* (exchange);
- **Seal = Signature**. Further, the seal on a document - as well as a signature on a document - were identical in fact. Both were tokens or marks. That is, evidence of a party agreeing to be bound. In short, both were *arras* and, indeed, had been treated as such in Biblical, Roman and Anglo-Saxon times (in the case of a mark or sign or subscription, albeit the full signature of a person - as we know it - was not used).<sup>236</sup> The only reason for the seal not being a signature (as previously explained) was that the Normans imported the same into England since they were illiterate and could not sign their names; nor did they adopt the practice of the Anglo-Saxons - executing a document by means of a cross (see **9(b)**).

As it is, it is asserted that Wilmot J was correct both as to (later) Roman law on stipulation and as to Bracton being the first legal writer to refer to a *nudum pactum*. Further, Mansfield CJ would also seem correct in that Counsel (obviously) could find no case where a contract in writing<sup>237</sup> (as opposed to an oral one) was held to be a *nudum pactum* and no one seems to have referred to one since. Indeed, it would have been rather extraordinary if this had been the law - since the king's court had accepted since 1294<sup>238</sup> that a *simple* tally (i.e. not sealed or with writing) was binding in the case of merchants or citizens of certain towns.

- Also, even if this prevailed at common law - as Mansfield CJ pointed out, this case was a commercial case between merchants. And, to hold that a signed agreement between merchants was a *nudum pactum* under the law merchant would - it is asserted - have been absurd when, in other courts and by mercantile or local custom, even a handshake or an oath before transaction witnesses had long been binding (see **14(e)**).

<sup>232</sup> Ibid, 1671. Wilmot J also stated, p 1666 'The mere promise 'to pay the debt of another' without any consideration at all, is *nudum pactum*: but the *least spark* of a consideration will be sufficient.' (*underlining supplied*). See also Von Mehren, n 111, pp 1055-6.

<sup>233</sup> See Swain, n 102, p 93. Also, J Chitty, *A Practical Treatise on Bills of Exchange etc, Notes* (5th ed, 1818), pp 93-4; J Oldham, *The Mansfield Manuscripts*, vol 1, pp 224-5; Swain, n 102, p 111 and McMeel, n 821, p 38, n 65.

<sup>234</sup> See n 590 (Mayor's Court in London allowed actions of covenant without a deed). Jenks, n 91, p 135 noted 'It is somewhat curious that Lord Mansfield, in *Pillans v van Mierop*, did not refer to the custom of London.' Jenks quoted Rastell, *Termes de la Ley* (1575 ed) as stating 'no writ of covenant shall be maintainable without specialty but in the City of London, or in other such place, privileged, by the custom and use.' (*spelling modernised*).

<sup>235</sup> This point was made by Yates J at p 1674 'bills of exchange are considered, and are declared upon as special contracts [specialties]...the declaration sets forth the bill and acceptance specifically: and that thereby the [D's], by the custom of merchants, became liable to pay it.'

<sup>236</sup> Thus, if the D's - instead of placing, their signatures on the written document - had placed their thumbprints or a cross or made a subscription (such a '*Agreed*' in the handwriting), surely this would have been adequate as a mark, as much as an illiterate was able to do so in the case of a thumbprint or cross (and, as various Anglo-Saxon kings did, see n 345 ? And, if they had just initialled it ?

<sup>237</sup> Wilmot J was, clearly, envisaging that the writing had been executed by being signed.

<sup>238</sup> See n 595.

As to '*consideration*' being evidential - as Mansfield CJ indicated -<sup>239</sup> it is asserted that this is correct since, in truth, '*consideration*' was a pleading point in *assumpsit*. It was not a pre-requisite as such (and, indeed, had not even existed as an evidential concept *pre-1539*).<sup>240</sup> As it is, the propositions of Mansfield CJ and Wilmot J were rejected in *Rann v Hughes* (1778), see 32. McMeel indicated that this was '*tragic*'<sup>241</sup> and it was - since it produced an absurd situation that - if the agreement had been by deed<sup>242</sup> - there would have been no problem. So too, if the agreement to accept had been oral and evidenced by a tally to record the debt. Or, they had shaken hands (or drank) on it. Or, they had exchanged a peppercorn or other token as an *arra*.<sup>243</sup> Also, the case seemed to fall within an exception, anyway - by the law merchant and London custom, writing was sufficient.

(c) **Hawkes v Saunders (1782)**

In this case,<sup>244</sup> D (an executrix) was sued on a promise to pay a legacy. Assets had come into her hands which were more than sufficient to pay which '*in consideration thereof she promised to pay*.'<sup>245</sup> Mansfield CJ rejected the view that consideration involved a detriment to the promisee or a benefit to the promisor on the basis that it was too narrow and stated:

Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was actually made. *A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration...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.<sup>246</sup>

This assertion that moral consideration (consideration of honour) was sufficient, prevailed until *Eastwood v Kenyon* (1840), when Denman CJ indicated that such, in effect, annihilated the doctrine.<sup>247</sup> He stated:

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors...the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.<sup>248</sup>

### 31. **BLACKSTONE (1766)**

(a) **Coinage in 18th Century**

<sup>239</sup> See also Kiralfy, n 1, pp 192-3 '[Mansfield CJ] held that consideration was only of evidential value. It was one means of determining whether the parties had entered into a binding agreement. In fact it was rather to be treated as equivalent to the provisions of the Statute of Frauds [1677], which required certain contracts to be evidenced in writing. There is growing material to support Mansfield's views; the seal on a deed was originally evidence, so probably was the bargain in debt, and want of consideration is some evidence against the claim of a contract having been made. However, the law had since come to require some test of formal validity; the seal was regarded as a solemnity and consideration was a useful test to mark of business contracts from social agreements and casual promises.'

<sup>240</sup> See n 779.

<sup>241</sup> McMeel, n 821, p 49 'It remains tragic that Lord Mansfield's suggested alternative route of writing in a commercial context was not embraced whole-heartedly.'

<sup>242</sup> Simply showing the letter of acceptance would, then, appear to have been enough, see *Sturlyn v Albany* (1587), n 813.

<sup>243</sup> Why a peppercorn? One would surmise that - peppercorns when in bulk, being of value in medieval times - a single peppercorn symbolised value.

<sup>244</sup> 1 Cowp 289 (98 ER 1091). See also McMeel, n 821, p 40.

<sup>245</sup> See also analysis of this case by Lord Wright, n 106, p 1242.

<sup>246</sup> 1 Cowp 289 (98 ER 1091) at p 290. See also Jenks, n 91, p 58; Lorenzen, n 105, p 638 and Swain, n 102, pp 144-6. See also Oldham, n 992, vol 1, p 225 citing *Bromfield v Wilson* (1772), p 304.

<sup>247</sup> 11 Ad & E 438 (113 ER 482). Lord Wright, n 106, p 1244 'His decision was the death blow to that idea.' See also Jenks, n 91, p 59. Also, *Beaumont v Reeve* (1846) 8 QB 483 (115 ER 958).

<sup>248</sup> At pp 450-1. Cf. Lord Wright, n 106, p 1244 'But none of these mischiefs could arise if judges and juries did their duty in taking care that a voluntary engagement was only enforced if it was sufficiently established as being deliberate and serious; and if [Denman CJ] had looked abroad to the experience of Scotland or Holland, he might perhaps have found his apprehensions allayed. He might also have reflected on the fact that obligations by deeds were in England enforceable, though gratuitous, and that promises supported by a peppercorn or other nominal consideration, were also enforceable.' See also Lorenzen, n 105, p 638 and Swain, n 102, p 146. Also Simpson Innovation, n 65, p 263 'not really persuaded that a virtual abolition of consideration along the lines suggested in *Eastwood v Kenyon* would have produced much in the way of disaster.'

By the time Blackstone was writing the coinage was in a particularly bad state. This, even though an Act of 1741 had made it a crime to coin (or counterfeit) copper legal tender - which copper tender the Crown had been issuing since 1613 (see 28).<sup>249</sup> However, such did not affect the issue of private tokens, providing they did not seek to mimic legal tender.<sup>250</sup> Fletcher commented:

By the middle of the [18th] century half of all coppers in circulation were counterfeit; by 1787 a Royal Mint official declared that '*only eight percent of all copper coins in circulation bear some tolerable resemblance to the king's coin.*'<sup>251</sup>

Further, there was an inbuilt resistance to copper coins - even those issued by the Royal Mint - as not being true money.<sup>252</sup> Thus, the problem of private tokens which were of no legal worth being used in business transactions, continued.

### **(b) Blackstone - Contracts**

Blackstone, in his *Commentaries on the Laws of England* (1765-9), considered the law of contract and his writing was, subsequently, much followed. In respect of contracts (in the second volume of his work published in 1766), he stated:

A contract, which usually conveys an interest merely in action, is thus defined: '*an agreement, upon sufficient consideration, to do or not to do a particular thing.*'<sup>253</sup> From which definition there arise three points to be contemplated in all contracts; 1. The agreement: 2. The consideration: and 3. The thing to be done or omitted, or the different species of contracts [i.e. the subject matter]...<sup>254</sup> First then it is an agreement, a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability [capacity] to make a contract: as where A contracts with B to pay him 100 £ and thereby transfers a property in such sum to B.<sup>255</sup>

It may be recalled that:

- Bracton had 7 pre-requisites for a contract. *viz.* (a) a thing (i.e. subject matter); (b) words; (c) writing; (d) consent; (e) delivery; (f) conjunction; (g) capacity of the contracting parties - albeit (f) was discarded by latter writers and (b) and (c) related to the form of the contract. Thus, substantive pre-requisites were actually 4 - capacity, subject matter, *consensus* (agreement) and delivery;
- By the time of Blackstone, delivery was no longer a pre-requisite and it is clear Blackstone agreed with the remaining three. Blackstone's formulation, though, also added in '*consideration*'.

Blackstone noted that a contract might be express or implied - the latter importing a price or *quantum meruit*, where required.<sup>256</sup>

### **(c) Blackstone - Consideration**

<sup>249</sup> Snelling, n 533, p 44. This was 16 Geo 2 c 28 (1742) (2 months imprisonment) for issuing (uttering) any '*false and counterfeit*' money. See also Swain, n 102, p 51, ns 71,72.

<sup>250</sup> Davies, n 148, p 294 'Token coins were not in actual practice, and with some exceptions, illegal, providing that they were not copies of the designs on the official coinage, in which case they were counterfeits carrying the direst penalties, including death to the manufacturer and to the user of the counterfeits.'

<sup>251</sup> Quoted by Fletcher, n 149, p 47. Fletcher also stated 'Awash with false and featureless money' is how one Londoner described the capital [London] at the start of George III's reign in 1760. 'And of good money none to be had.'

<sup>252</sup> Joseph Harris (an assay master of the mint) in 1751, in an *Essay on Money and Coins*, stated: 'Copper coins with us are properly not money, but a kind of token passing by way of exchange instead of parts of the smallest pieces of silver coin; and useful in small home traffic.' Quote from Mathias, n 188, p 14 who stated 'It [copper] was a common metal, without easily agreed standards of purity, yet with many utilitarian uses. There was a fluctuating supply, which led to disturbing price changes. In a sense, therefore, all copper coins were '*token*' money and substitutes for gold and silver coins.' See also Davies, n 148, p 245.

<sup>253</sup> Blackstone did not indicate from whom he took the quotation. Thus, it was (probably) his own. See also Swain, n 102, p 32.

<sup>254</sup> Blackstone, n 49, vol 2, p 442.

<sup>255</sup> *Ibid*, p 442.

<sup>256</sup> *Ibid*. He stated '*Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or to perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman, without agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions and covenants; *viz.* that if I fail in my part of my agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal.'

Blackstone then considered the nature of consideration, stating:

Having thus shewn the general nature of a contract, we are, *secondly*, to proceed to the *consideration* upon which it is founded; or the reason which moves the party contracting to enter into the contract. '*It is an agreement, upon sufficient consideration.*' The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal.<sup>257</sup> This thing which is the price or motive of the contract, we call the consideration:<sup>258</sup> and it must be a thing lawful in itself, or else the contract is void. A good consideration, *we have before seen*, is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another.<sup>259</sup> This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for *any valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity: for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.<sup>260</sup> (*italics supplied*)

The wording in italics referred to a prior passage in which Blackstone stated:

[a] deed must be founded upon good and sufficient *consideration*.<sup>261</sup> Not upon a usurious contract,<sup>262</sup> nor upon fraud or collusion, either to deceive purchasers *bona fide*,<sup>263</sup> or just and lawful creditors;<sup>264</sup> any of which bad considerations will vacate the deed. A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to ensure, or to be effectual, only to the use of the grantor himself.<sup>265</sup> The consideration may be either a *good*, or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded in motives of generosity, prudence, and natural duty: a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant,<sup>266</sup> and is therefore founded in motives of justice. Deeds, made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bona fide* purchasers.<sup>267</sup>

As to what comprised '*consideration*', Blackstone was unclear and gave a number of explanations as to the meaning -which likely reflected the lack of certainty prevailing in his time (also, Blackstone himself, was more an expert in criminal, land and constitutional law).<sup>268</sup>

- Blackstone stated that consideration comprised '*the reason which moves the party contracting to enter into the contract.*' However, he also stated that civilians held that - in all contracts -, there had to be something given in exchange (something that is '*mutual*' or '*reciprocal*'). He then stated that consideration was '*this thing which is the price or motive of the contract.*' Later (see **(d)**), he also used the words 'compensation' as well as 'degree of reciprocity'. However, (a) reason (cause); (b) exchange; (c) price; (d) motive; and (e) compensation (recompense); are not synonyms. They mean different things. Blackstone also cited no authorities for his propositions;

<sup>257</sup> Blackstone quoted Gravin, book 2, s12 '*In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur.*' ('in all agreements... an exchange is comprised'). The reference is to G Gravina (1664-1718), an Italian jurist, whose *Origines Juris Civilis* was published in 1713 (3 vols). This observation of Gravin followed Grotius, see **27(e)**.

<sup>258</sup> Repeated in GC Clark, *An Alphabetical Epitome of the Common Law of England* (1778), p 72 (*consideration*).

<sup>259</sup> Blackstone quoted Coke in *Twyne's Case* (1601) 3 Rep 80 (76 ER 809) at 83.

<sup>260</sup> Blackstone, n 49, vol 2, pp 443-4. See also Swain, n 102, p 114.

<sup>261</sup> Blackstone noted, n 49, vol 2, p 295, that 'a deed is a writing sealed and delivered by the parties.' He also noted, p 305, 'it is requisite that the party, whose deed it is, should *seal*, and in most cases I apprehend should *sign* it also.' However, signing was not actually a legal requisite along with sealing, unless legislation expressly provided - despite Blackstone considering it a good idea. Blackstone also indicated, p 307, that a deed should be delivered, though he failed to note Coke's indication that *actual* delivery of the deed was not required (see n 825). Finally, Blackstone indicated, p 307, that 'The last requisite to the validity of a deed is the attestation, or execution of it in the presence of witnesses: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed.' In fact, attestation was not (and is not) a pre-requisite of a deed.

<sup>262</sup> Blackstone referred to 13 Eliz c 8 (Usury Act 1571, rep 1854).

<sup>263</sup> Blackstone referred to 27 Eliz c 4 (Fraudulent Conveyances Act 1584, rep 1925), see **22**.

<sup>264</sup> Blackstone referred to 13 Eliz c 5 (Fraudulent Conveyances Act 1571, rep 1925), see **22**.

<sup>265</sup> Blackstone referred to Perkins s 533. See J Perkins, *A Profitable Book* (last ed, 1642), s 533 'if [a] tenant in fee simple at this day [do] infeoff a stranger thereof without any consideration *etc* the feoffee is seised unto the use of the feoffor and his heirs, for the law in this case does not make any consideration, for the feoffee shall not hold of the feoffor *etc*. but he shall hold of him of whom his feoffor held, by force of the statute of *quia emptores terrarum*...'. [*Quia Emptores* (1290) 18 Edw 1].

<sup>266</sup> Blackstone referred to Coke in *Twyne's Case* (1601) 3 Rep 80 (76 ER 809) at 83.

<sup>267</sup> Blackstone, n 49, vol 2, pp 296-7.

<sup>268</sup> Cheshire & Fifoot, n 79, p 43, n 3 (in 1946) asserted that Blackstone, in his Lectures, had defined '*consideration*' as 'the recompense given by the party contracting to the other' but that he had changed this in his Commentaries under the influence of Mansfield CJ.

- In the case of (a) and (d), these tended to reflect general use - as well as canon law use - of the word. More, particularly, it seems clear that Blackstone (and others) were using them, less with the regard to '*consideration*' as a whole and more with regard to '*good* consideration'. Thus, motive went to issues such as to whether the act was inspired by natural affection, was immoral *etc*. In the case of (b), this reflected the basic form of contract in ages past being barter (including sale, being barter for money) in which there was immediate delivery (*quid pro quo*, '*this for that*'). In the case of (c), this reflected the need for an agreed price (or means of determining it) - a pre-requisite for a valid sale.

As for his definitions of '*sufficient*', '*good*' and '*valuable*' consideration, these comprised, in effect, contracts which a court would uphold as a matter of law.

- Thus, they would not uphold - as sufficient consideration, agreements which were: (a) usurious; or (b) motivated by fraud or deception; (c) which had no consideration (even if in a deed);
- They would uphold as good consideration, those deriving from blood or natural love and affection. However, Blackstone did not analyse the extent such might be categorised by a court as a gift and not a contract;
- In the case of valuable consideration,<sup>269</sup> Blackstone treated this as '*money, marriage, or the like, which the law esteems an equivalent*' (i.e. money or money equivalent). By marriage, he was considering, in part, the dowry element of it, when a relative (usually the father) '*paid*' for (or towards) the marriage.

As to these, '*sufficient*' was (it seems) Blackstone's own categorisation and would have been, better, conflated with '*good*' (as it, often, later was). Indeed, it becomes apparent (from hindsight) that it would have been better if Blackstone had conflated all three of these categories (sufficient, good, valuable) into just one - which stipulated the pre-requisites of consideration.<sup>270</sup> That it is, it had to be *bona fide* (if it was illegal, usurious *etc* it was not) and valuable. And, that it was a pre-requisite for a valid sale that there be a price. And, that - in the case of marriage agreements - the court would determine whether it was a gift or a contract<sup>271</sup> - all of which things eventuated. However, the common law proceeds at a '*crab like*' pace and this would have been a step too far - even for Blackstone. Further, Blackstone had stated:

A deed also, or other grant, made without any consideration, is, as it were, of no effect...

However, this was open to confusion since *Sharington v Strotton* (1565)(see **20(c)**) had made it clear that a deed '*imported*' (presumed) consideration and that a person was estopped from asserting otherwise due to the formal nature of the deed. Indeed, Blackstone himself had previously asserted in this work that a deed:

because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property... a man shall always be estopped by his own deed, or not permitted to aver or prove any thing in contradiction to what he once solemnly and deliberately avowed...<sup>272</sup>

Further, an *arra* (even of no value) comprised consideration and the seal on a deed was an *arra*. Thus, in reality, a deed occurring without consideration was not (in practice) possible since to hold otherwise would be contradict this case as well as to controvert the nature of an *arra* - which still existed, of which Blackstone was well aware (see **(f)**).<sup>273</sup>

#### **(d) Blackstone - 4 Species of Consideration**

Blackstone stated that the civilians categorised '*valuable*' consideration into 4 species. Thus:

These valuable considerations are divided by the civilians into four species.

<sup>269</sup> The concept of '*valuable*' consideration (likely) derived from sales requiring it, *viz* a price. For the purposes of the Fraudulent Conveyances Acts 1571 and 1584 (see **22**), '*good*' consideration was construed as if it, actually, referred to '*valuable*' consideration. *Twyne's Case* (1601) 3 Rep 80(76 ER 809) at 82b 'these words '*good consideration*' are to be intended only of valuable consideration.'

<sup>270</sup> As it is '*sufficient*' soon dropped away and '*good*' and '*valuable*' were often conflated. See e.g. Jenks (writing in 1891), n 91, p 58 'Modern authorities practically use the terms '*good*' and '*valuable*' indiscriminately, as for example Cotton LJ in *Miles v New Zealand Estate Co* (32 ChD at p 238).' The reference was to *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, at pp 285,288.

<sup>271</sup> Because of uncertainty when relatives provided marriage sums or annuities *etc* to relatives, conveyancers drafted the deed both to refer to natural love and affection as well as to '*other good and valuable consideration*' *etc* so that, if not enforceable as a gift, it would be so as a contract. See *McBain Gift*, n 209, p 195 referring to W Newman, *Conveyancer* (1788 ed).

<sup>272</sup> Blackstone, n 49, vol 2, p 295.

<sup>273</sup> Thus, to find cases in which deeds and writings were specifically held void on the basis of no consideration, is very difficult.

1. *Do ut des*: [I give that you may give - *quid pro quo*] as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth.

2 The second species is, *facio, ut facias*: [I do that you may do] as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side in consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other.

3. The third species of consideration is, *facio, ut des*: [I do that you may give] when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value on it. As when a servant hires himself to his master, for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth.

4. The fourth species is, *do, ut facias*: [I give that you may do] which is the direct counterpart of the other. As when I agree with a servant to give him such wages upon his performing such work: which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det*, and *herus dat, ut servus faciat*. [the servant performs that the heir [master] may give. The heir [master] gives so that the servant may perform].

Blackstone did not consider whether such a civilian categorisation (looking back to Roman law) was useful in the common law sphere. Certainly, it was not exhaustive - these are simply some examples of *consensus* (and, indeed, Blackstone uses the word '*agree*'). Likely, due to this, this civilian categorisation was dropped by later legal writers.

#### (e) **Blackstone - Nudum Pactum**

Blackstone stated:

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum* or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. As if one man promises to give another £100 here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*.

But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation, (as a promise to pay a just debt, though barred by the statute of limitations) it is no longer *nudum pactum*. And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned,<sup>274</sup> it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument,<sup>275</sup> and every note from the subscription of the drawer,<sup>276</sup> carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.<sup>277</sup> (underlining supplied)

Blackstone had previously noted that a man was estopped from asserting contrary to his deed.<sup>278</sup> Here, he noted the same applied *re* consideration in respect of bonds and promissory notes (also, BOE). Blackstone also noted that the principle of *nudum pactum* was to deal with the problem of mere '*verbal*' (oral) promises. However,

<sup>274</sup> Blackstone quoted Plowden 308, 309 (*viz. Sharington v Strotton, see 20*).

<sup>275</sup> Blackstone quoted *Turner v Binion* (1661) Hardr 200 (145 ER 452) (the court held that a man was not bound to discover [disclose] the consideration of a bond, which implies in itself a consideration). Blackstone also quoted *Wright v Moor* (1645-6) 1 Ch Rep 157 (21 ER 536). Cf. Bellewe, n 68, p 37 'the acceptor and indorsor of a [BOE] are bound to pay without a consideration; because in commerce we are govern'd by the law of nations, as they are in other countries, and that law is so for the encouragement of trade.'

<sup>276</sup> Blackstone quoted *Meredith v Chute* (1702) 2 Lord Raymond 760 (92 ER 7) (the delivery of a note in which a third party promises to pay the deliverer money, is good consideration for the promise. In an action, the P need not prove on what consideration the note was made). See also Jenks, n 91, p 145.

<sup>277</sup> Blackstone, n 49, vol 2, pp 445-6.

<sup>278</sup> See n 1031.



unlike the prior case of *Pillans v Van Mierop* (1765), Blackstone did not indicate that consideration was not required when the agreement was in writing, *per se*. That said, he indicated that 'any' degree of reciprocity, was sufficient consideration. Given this, is it a pity that Blackstone did not consider whether consideration was a useful pre-requisite. However, in his time, a legal writer stated the law rather than considered its merits.

#### (f) Blackstone - Sale

Blackstone stated:

Sale or *exchange* is a transmutation of property from one man to another, in consideration of some recompense in value: for there is no sale without a recompense; there must be *quid pro quo*. If it be a commutation of goods for goods, it is more properly an exchange; but, if it be a transferring of goods for money, it is called a sale...<sup>279</sup> If a man agrees with another for goods at a *certain price*, he may not carry them away before he has paid for them; for it is no sale without payment, unless the contrary be expressly agreed.<sup>280</sup> ..But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases.<sup>281</sup> (*italics supplied*)

Like Bracton, writing some 500 years earlier (see **12**), Blackstone accepted that a pre-requisite for a valid sale was a '*certain*' (that is, a fixed or agreed) price. Thus, the absence of such was evidence that no contract of sale had been concluded. Blackstone also stated:

if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest (which the civil law calls *arrha*, and interprets to be '*emptiois-venditionis contractae argumentum*',<sup>282</sup> [proof that a contract has been made] the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them.<sup>283</sup>...

This, again, reflected Bracton - the *arra* bound the parties. Blackstone continued:

Anciently, among all northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale*, '*venditio per mutuum manum complexionem*',<sup>284</sup> till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof. As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he renders the price agreed on.<sup>285</sup> ...And by a regular sale, without delivery, the property is so absolutely vested in the vendee; that if A sells a horse to B for £10, and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the contract, the property was in the vendee.<sup>286</sup>

<sup>279</sup> Ibid, p 446.

<sup>280</sup> He continued 'And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side.'

<sup>281</sup> Blackstone referred to *Cowper v Andrews* Hob 41 (80 ER 193) 39 at 41' In another case it works by condition precedent, as in all personal contracts, as I sell you my horse for ten pounds, you shall not take my horse except you pay me ten pounds...except I do expressly give you day, and yet in this case you may let your horse go, and have an action for debt for your money...' Blackstone also referred to Noy, c.42 (see n 923, which statement was repeated in the 5th ed (1757), ch 42).

<sup>282</sup> Blackstone cited the Institutes of Justinian, book 3, title 24 (he, likely, meant to refer to title 23 (*De Emptione et Venditione*)), see Sandars, n 252, p 362 who noted 'The *arrae* were either signs of a bargain having been struck, as for instance, when the buyer deposited his ring with the seller (D[igest] xix.1.11.6), or consisted of an advance of a portion of the purchase-money. They were intended as proof that the purchase had been made.' For the Digest, see Watson, n 252, vol 2, bk 19 (*Actions for Sale*), title 1.11.6 (Ulpian).

<sup>283</sup> Blackstone cited Noy, c 42 (see n 923). Blackstone continued ' And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute 29 Car II c 3 [i.e. Statute of Frauds 1677, s 4] no contract for the sale of goods, to the value of £10 or more, shall be valid, unless the buyer actually receives part of the goods sold, *by way of earnest on his part*; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party or his agent, who is to be charged with the contract. And with regard to goods under the value of £10, no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party who is to be charged therewith.' (*italics supplied*).

<sup>284</sup> Blackstone cited JO Stiernhook, *De Jure Sveonum et Gothorum Vetusto* (1672), bk 2, ch 5 (*Contracts*), see reproduction of A-B Nordiska Bokhandeln, Stockholm (1962), p 231.

<sup>285</sup> See *Cowper v Andrews*, n 1040. As McGovern *Informal Contracts*, n 592, p 1182 noted, this was a change 'Bracton, following Roman law, stated that ownership is not transferred to the buyer until the property is delivered. In the later middle ages, however, the law shifted to the modern notion that in sales of personal property [quoting Blackstone] 'as soon as the bargain is struck, the property in the goods is transferred to the vendee.'

<sup>286</sup> Blackstone cited Noy, c 42 (see n 923).

As to the handshake/clasp (handsale), it is asserted that Blackstone was correct in identifying it with the earnest.<sup>287</sup> However, he did not consider Biblical law and, thus, failed to note that the handshake was much older than Scandinavian practice. Further, he failed to note that the handshake, *per se*, was an *arra*. It took the place of any coin or other token.

#### (g) Blackstone - Debt

Blackstone also considered debt and stated:

A debt of *record* is a sum of money, which appears to be due by the evidence of a court of record...Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation...These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal. Debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise<sup>288</sup>...

Blackstone's definition of a '*simple contract*' was confusing since (like Sheppard in 1675, see **28(d)**) he conflated a written contract (i.e. not one of record or by deed or specialty and - thus - including commercial paper) with an oral contract. However, in evidential terms, they were not the same. Not least, since BOE and promissory notes imported consideration. This conflating of the two (which seems to have derived from legal writers and not the courts) may have affected the decision in *Rann v Hughes* (1778) which is considered next. Further, Blackstone failed to deal with tallies (whether sealed or unsealed). However, likely he would have treated the former as a specialty.

#### (h) Conclusion

It is asserted that Blackstone '*fudged*' the issue on consideration and one can see why. Bracton had laid down four pre-requisites for a valid contract: (a) capacity; (b) subject matter; (c) *consensus*; and (d) delivery. Subsequent to his time, there had been added (e) consideration - something civil legal systems did not have, although Grotius and others had referred to exchange (*quid pro quo*) as being the basis of a contract and did not, additionally, require delivery. As to how Blackstone sought to reconcile various issues:

- **Writings**. Blackstone asserted that consideration was imposed as a legal requirement '*to avoid the inconvenience that would arise from setting up mere verbal promises*.' He was also prepared to accept that it was not required '*in some cases, where such promise is authentically proved by written documents*.'. However, he was not prepared to hold that all writing excluded the need for consideration. Thus, he did not follow Mansfield CJ;
- **Nudum Pactum**. Blackstone sought to limit this as much as possible stating that '*any degree of reciprocity will prevent the pact from being nude*.' He accepted that this included an *arra*. Also, it seems, a handshake. And, that moral consideration was sufficient; '*moral obligation...as a promise to pay a just debt*.';
- **Consideration**. Blackstone did not discuss its origin in English caselaw. Instead, he referred to civil law. He also '*fudged*' the issue as to what it meant, variously referring to: (a) reason (cause); (b) exchange; (c) price; (d) motive; and (e) compensation (recompense). However, he would have known that it could not be (a) or (d) alone, since the word was also being used in the context of: (i) a sale requiring an agreed '*price*'; (ii) the Fraudulent Conveyances Acts 1571 and 1584 (**23(f)**) requiring '*good*' (meaning '*valuable*') consideration; (iii) the caselaw referring to a loss to P (promisee) or profit to D (promisor). These were not referring to exchange but to money (or money equivalent). However, the delivery of '*price*' and '*valuable*' consideration, could be categorised as exchange (*quid pro quo*). This, surely, should have led him to conjecture that exchange (*quid pro quo*) went to the pre-requisite of '*delivery*' - and might, thus, simply be evidence of the same, as opposed to a distinct requirement. And, that price or other recompense, profit and loss (as well as forbearance *etc*) - connoting money or money equivalent - went to '*consensus*' and comprised evidence of a person acting in the belief that he had entered into a contract, as opposed to a distinct requirement. However, Blackstone never pursued this.

In conclusion, Blackstone left a '*half-way*' house. He indicated that consideration was, really, to deal with oral contracts. However, he did not wholly endorse the position that it should be imported into (presumed in) all written contracts. Also, he did not analyse the worth of consideration in any depth. Finally, he gave the

<sup>287</sup> See also **5** and **6(d)**.

<sup>288</sup> Blackstone, n 49, vol 2, pp 464-5 referred to the Statute of Frauds 1677 s 4, see **28(c)**.

impression that contracts were categorised, in terms of form, into: (a) contracts of record; (b) contracts by way of specialty (including deed); (c) simple contracts (the remainder).

### 32. ***RANN v HUGHES (1778)***

This case<sup>289</sup> concerned the administration of an estate and an executor's promise to pay out of her own estate (she had promised to pay a debt of £900 incurred by the intestate). The issue was whether a suit in respect of this required a memo in writing pursuant to the Statute of Frauds 1677, s 4 (see **28(c)**). Skynner LCB delivered the opinion of the judges. He stated:

It is undoubtedly true that every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of his country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*, and whatsoever may be the sense of this maxim in the civil law, it is in the last mentioned sense only that it is to be understood in our law.<sup>290</sup>

Skynner LCB held that '*no sufficient consideration occurs to support this demand against her in her personal capacity*'. As to whether writing took away the '*necessity of a consideration*', the judge considered that Wilmot J in *Pillans v Van Mierop* (1765) (see **30**) had contradicted himself.<sup>291</sup> Skynner LCB continued:

All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved.<sup>292</sup>

This statement of Skynner LCB was incorrect. He forgot about contracts of record.<sup>293</sup> Also, he failed to distinguish deeds from other specialties (otherwise, for example, a sealed tally would have been the same as a deed).<sup>294</sup> Further, up to the time that Skynner LCB made his observation, contracts in writing (but not by way of deed or specialty) and oral contracts *were* treated as different. Not least, since BOE and promissory notes (as well as insurance policies) were held not to require consideration.<sup>295</sup> Further, his statement was *obiter* since the case was decided on the ground of a failure to comply with the Statute of Frauds 1677.<sup>296</sup>

***In conclusion, Rann v Hughes (1778) was not a satisfactory case. It did not look at issues such as why a deed did not require consideration (because the seal was an arra) or whether a signature was also an arra. Also, whether a writing could, properly, be categorised as 'parol' (oral). Also, whether delivery of the writing was sufficient consideration per se.***<sup>297</sup>

<sup>289</sup> 7 TR 350n (101 ER 1014n). Comyn, n 70, p 10 set out the position 'in the case of Rann and another, executors of *Mary Hughes v Isabella Hughes*, administratrix of *J Hughes*, in error, the declaration stated, that on 11 June 1764, divers disputes had arisen between the [P's] testator and the [D's] intestate, which they referred to arbitration; that the arbitrator awarded that the [D's] intestate should pay to the [P's] testator £983. That the [D's] intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the [D], that *Mary Hughes* died, having appointed the [P's] her executors; that at the time of her death the said sum of £983 was unpaid, 'by reason of which premises the [D] as administratrix became liable to pay to the [P's] as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay *etc*. The [D] pleaded *non assumpsit, plene administravit, and plene administravit*, except as to certain goods *etc*' which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth *etc*. The replication took issue on all these pleas. Verdict for the [P] on the first issue, and for the [D] on the two last; and on the first, a general judgment was entered into in the Court of King's Bench against the [D] *de bonis propriis*. This judgment was reversed in the Exchequer chamber; and a writ of error was afterwards brought in the House of Lords, where, after argument, the following question was proposed to the judges by the Lord Chancellor, 'Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the [D] in error in her personal capacity?' See also McMeel, n 821, pp 38-40.

<sup>290</sup> *Ibid*. See also Swain, n 102, p 93.

<sup>291</sup> 7 TR 350n (101 ER 1014n) *per* Skynner LCB 'that he contradicted himself, and was also contradicted by Vinnius in his commentaries on Justinian.'

<sup>292</sup> *Ibid*. One wonders whether Skynner LCB took this from writers such as Sheppard (1675), see n 940.

<sup>293</sup> Cf. Jenks, n 91, p 36.

<sup>294</sup> See n 594 (Bereford CJ in 1313, tally not the same as a deed). See also Hale, n 48 (1713 ed) who referred, p 121 '*deed or specialty*' not to a '*specialty including a deed*'. See also p 100 (nature of deeds).

<sup>295</sup> For criticism see Langdell, n 77, p 64. Also, p 63 (as to BOE, promissory notes and insurance policies, 'these contracts are binding by their own force, and therefore do not require any consideration.'). See also *Josceline v Lassere* (1715) Fort 281 (92 ER 853). See also Swain, n 102, pp 56-9, 81,91.

<sup>296</sup> Anson (30th ed, 2016), n 76, p 99, n 19 'It should be noted...that the only report of the actual decision of the House of Lords stated that the case was decided on the ground of failure to comply with the Statute of Frauds: (1778) 4 Brown PC 27.'

<sup>297</sup> See *Sturlyn v Albany* (1587), n 812.

### 33. COMMERCIAL LAW: 1790-1820

#### (a) Coinage

England's situation in respect of a lack of sufficient legal tender, widescale counterfeiting and a huge volume of private currency continued into the 19th century. This was not helped by the Bank of England issuing (overstamped) Spanish Dollars in 1804 with the consent of the Government. They were not legal tender, as the Earl of Liverpool pointed out.<sup>298</sup> Indeed, an Order in Council in 1798 had confirmed that no coinage was legal (lawful) unless issued under Proclamation.<sup>299</sup> However, with the Industrial Revolution - and more and more workers to be paid - the problem of adequate coinage to pay them, was acute. Individual industrialists took matters in their hands. In 1787, the owner of a copper mine in Wales (Thomas Williams) made copper coins exactly one ounce of weight - the value of one penny's worth of copper at that time. To prevent the risk of being held a counterfeiter, he put the figure of a druid on the coin as well as the initials of his business (Parys Mine Co) with the words '*We promise to pay the bearer one penny.*' He went on to produce 250 tons of pennies and 50 tons of half-pennies in subsequent years and they were snapped up by Birmingham shopkeepers where he later moved his mint.<sup>300</sup> Other industrialists followed.<sup>301</sup> Often, these coins were used by them to pay their workmen who then used (or had to use) the money at a shop or store provided by the industrialist (so called '*truck money*').<sup>302</sup> Although a lot of these tokens were not tokens as such (the copper being of full weight)<sup>303</sup> they were still dis-advantageous to poorer people and in general<sup>304</sup> and there was public opposition to them in some quarters.<sup>305</sup> Such large-scale private production of coinage not only undermined the right of the Crown to produce coins - although it may be said that the Crown '*winked*' at it -<sup>306</sup> these tokens were also, often, counterfeited.<sup>307</sup>

- In an attempt to suppress private coinage, in 1797, the Government issued more copper coins - being pennies and twopennies and, then (in 1799), half pennies and farthings. The latter had milled edges to reduce fraud. It may also

<sup>298</sup> Earl of Liverpool, n 132, p 193 'In the course of last year [1804], Spanish Dollars to a considerable amount were sent into circulation, with new impressions struck upon the face and reverse of them. They were issued, with the consent of the Government, by the Bank of England, who engaged to receive them back at the rate or value at which they were sent into circulation...[these] are certainly not coins, though they have the impression of your Majesty; for they are not current under your royal authority, and no one is obliged to take them as legal tender in payment of any debt. They are merely silver tokens.' See also Davies, n 148, p 295 and Phillips, n 187, pp 9-12.

<sup>299</sup> Phillips, n 187, p 13.

<sup>300</sup> Fletcher, n 149, p 53. See also Mathias, n 188, p 17 who quoted Lord Liverpool (1805) 'Many principal manufacturers are obliged to make coins or tokens to enable them to pay their workmen and for the convenience of the poor employed by them; so great is the demand for good copper coins in almost every part of the kingdom.'

<sup>301</sup> Ibid, p 53.

<sup>302</sup> Earl of Liverpool, n 132, pp 69-70 (quoting Lowndes) 'in consequence of the defective state of the silver coin, great contentions daily arose among the king's subjects, in fairs, markets, shops, and other places throughout the kingdom, to the disturbance of the public peace; - that many bargains [contracts] and dealings were totally prevented and laid aside, which lessened trade in general; - that persons, before they concluded any bargain, were necessitated first to settle the price or value of the very money they were to receive for their goods; and that they set a price on their goods accordingly.'

<sup>303</sup> Mathias, n 188, p 20.

<sup>304</sup> Ibid, p 21 'Travellers beyond the natural circulating area of particular tokens would have the inconvenience of exchanging them for coin of the realm, or the risk that they might only be accepted at a discount, or for their intrinsic value as metal rather than their face value as coins. Shopkeepers had to keep complicated sorting boxes in which tokens could be classified according to their issuers in neighbouring towns and they could be a nuisance for bankers transferring them back to their places of origin for redemption. The workmen paid in such tokens might find themselves at a disadvantage if they were of light weight and redeemable (or acceptable by shopkeepers) only at something less than their face value. His security, and that of all who accepted them, might lie in the intrinsic weight and fineness of the coin, or might rest in the promise of convertibility made by the issuer (and usually announced, with his name, on the coin). If this was upheld, then the probity of the issue could survive a weight lighter than its intrinsic value. But it needed a bold workman to present tokens to his master and demand their face value in coin of the realm.' Ibid, p 22 'If they [the tokens] were much lighter than their intrinsic value, or if the price of copper subsequently dropped, such tokens would be a liability to their possessors, should a day of retribution come when they were prohibited by law or lost their currency.'

<sup>305</sup> Phillips, n 187, pp 26, 30.

<sup>306</sup> Mathias, n 188, p 14 quoting Snelling (in 1760). Mathias also noted 'Even towns began to issue them under acts of Common Council with the authority of the mayor. In any case, legal penalties for forging copper were slight compared with the forgers of gold and silver money, who could face death at Newgate goal [i.e. punished for high treason]. Up to 1744 [actually, 1742, see n 1008] the offence was merely a misdemeanour. Following a new statute of that year, it became punishable with only two years' imprisonment. Even though penalties were increased in later years, the authorities never possessed adequate power to search premises for the illegal moulds and dies, nor did the possession of counterfeit copper become an offence. In all, few prosecutions were initiated by the public authorities (despite the Mint's demand in 1742 that forging copper be made a felony). Striking coins which did not *exactly* resemble the regal issues remained unpunishable. Thereby the way was open for coining '*evasive*' half pence, as they were called, which were not exact copies of the Mint coins, and thus not legally forgeries.'

<sup>307</sup> So, too, were Bank of England notes, the penalty for which was death. See also Phillips, n 187, p 19.

be noted that silver coins issued by the Mint were now, often, of nominal - and not actual value - since they were deficient in weight.<sup>308</sup> In 1812, Parliament passed an Act to '*prevent the issuing and circulating of pieces of gold and silver, or other metal, usually called tokens, except such as are issued by the Banks of England and Ireland*' (the Local Token Bill).<sup>309</sup> This was delayed in its implementation and it was not fully effective until 1817 when an Act '*to prevent the issuing and circulating of pieces of copper and other metal usually called tokens*' was passed.<sup>310</sup>

- In respect of this Act of 1817, Whiting observed 'This Act of Suppression was effective, because the demand for copper trade tokens fell off with the issue of regal shillings and sixpences, the lack of confidence in some copper coins, and finally the appearance of regal coins from 1821 onwards. The sad aftermath was the loss incurred by many who held unredeemable copper tokens; too often these people were the poorest in the land.<sup>311</sup> That said, many of the coins issued by the Government in 1816 were, in fact, nominal;<sup>312</sup>
- Thus, it was not, really, until 1821 that England (finally) had a currency in which all its legal tender (including copper coins) had an actual value - as opposed to a nominal value, since the silver coins throughout its prior history were frequently debased, being clipped or shaved or the actual silver content did not reflect the declared value. And, in the case of copper legal tender, there being insufficient so that the population, to a great extent, had to rely on a private currencies which (technically) were worthless since they were not legal tender.

This, rather shameful, history of English coinage impacted on the doctrine of consideration since it is hardly surprising that the courts held that consideration could be nominal when the judges would have been well aware that the coins in their pockets were exactly that. Indeed, of no value at all in many cases. As it was, English coinage retained actual value until 1919. Then, the silver content in the case of coins of higher value (again) no longer reflected the declared value. Today, all our currency (coins and notes) is of nominal value only.

#### **(b) Powell (1790)**

Powell, *Essay upon the Law of Contracts and Agreements* (1790) is (usually) taken to be the first legal work dedicated to contract. In respect of a definition, it stated:

A contract, according to the common law definition of it, is an agreement between two or more concerning something to be done, whereby both parties are bound to each other, or one is bound to the other.<sup>313</sup> The ingredients requisite to form a contract are, first, parties. Secondly, consent. Thirdly, an obligation to be constituted or dissolved. That these things must coincide, is evident from the very nature and essence of a contract...it is necessary that the party to be bound, shall have given his free assent to what is imposed upon him...These observations lead us, first, to the consideration of what persons have a capacity to assent, so as to oblige themselves, or others, by agreement. And, secondly, what circumstances are necessary to conclude that the parties to a contract have assented, and thereby constituted a perfect obligation.<sup>314</sup>

<sup>308</sup> Mathias, n 188, p 26 'By the 1790's the silver coin was '*notoriously defective*', according to the Committee on Coin, with an average deficiency in weight of 45% in the smaller denominations. It was a moot point whether the silver or the copper coins of the realm were in a worse mess.' See also Earl of Liverpool, n 132, p 185

<sup>309</sup> 52 Geo 3 c 157 (rep 1870). See also 53 Geo 3 c 114 (rep 1861). See Davies, n 148, p 297 and Phillips, n 187, p 30

<sup>310</sup> 57 Geo 3, c 46 (rep 1870). See also Whiting, n 184, p 31. Also, Mathias, n 188, p 12. Ibid, p 28 'A bill was passed in July 1817 forbidding private manufacture of copper coins and ordering that all in circulation be presented to their issuers for redemption by January 1818 - with a few exceptions granted to '*poor relief*' tokens which were extended in the 1820's. As with silver tokens, however, legal prohibitions were not very effective until massive issues of regal coinage took place, and these did not begin until 1821.' See also Phillips, n 187, pp 40-1.

<sup>311</sup> Whiting, n 184, p 31. Fletcher, n 149, ch 9-11 indicated that private tokens were not wholly superseded in that they were still issued for advertising purposes, gambling or pub checks.

<sup>312</sup> Fletcher, n 149, p 67 'By 1816 the Royal Mint had moved from the Tower of London to a new site on Tower Hill where modern steam powered minting machinery at last made possible the minting of all coins the nation required. Ironically, the silver coins of 1816 - crowns, half crowns, shillings and sixpences - were all tokens, having an intrinsic content substantially below their face value. It took until 1821 for the new Mint to perform a similar job in supplying enough new pennies, halfpennies and farthings to end the need for copper tokens, which had been declared illegal by an act of Parliament on 1817 and which gradually withered away as the public lost faith and interest in them, preferring to rely instead on the Government's declared but rarely tested promise to pay bearers on demand the face value of its now plentiful regal coppers.'

<sup>313</sup> Powell, n 65, p vi. Powell continued 'But, by the writers upon general law, it is defined to be '*Duorum pluriumve in idem placitum consensus, obligationis licite constituendae vel tollendae causa datus*', that is, the consent of two or more persons in the same thing, given with the intention of constituting, or dissolving lawfully some obligation. Perhaps the following description will be deemed more simple than either. 'A contract is a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other.'

<sup>314</sup> Ibid, pp vi-viii. Powell also noted that (in Roman law), p 334, a promise did not bind until it was accepted. See also Swain, n 102, p 147, 182 (though Swain did not note the reference to Roman law).

Powell used '*assent*' as a synonym for '*consent*'<sup>315</sup> and '*ingredients*' to refer to '*pre-requisites*'. Thus, Powell (like Bracton) treated a contract as requiring:

- (a) the capacity of the contracting parties ('*what persons have a capacity to assent*');
- (b) a subject matter ('*something to be done*', '*an obligation to be constituted or dissolved*');
- (c) *consensus* ('*assent*', '*consent*').

As for Bracton's '*delivery*', Powell dealt with this in the context of consideration. He also noted that contracts had to be lawful or else they were void.<sup>316</sup> As for consideration, while not mentioning this in his definition of a contract, he stated:

A consideration is the material cause of a contract or agreement; or that, in expectation of which, each party is induced to give his assent to what is stipulated reciprocally between both parties<sup>317</sup>...since words are frequently spoken by men unadvisedly and without due deliberation, the law will not bind a man to an executory contract entered into by words only, if it be not founded on a good and valuable consideration<sup>318</sup>.. And it is to be observed, that such a cause or consideration may arise and be created in two ways. First, by some act to be done by the one party, for the benefit of the other party. And any thing, however trifling, to be done by the [P], will be a consideration sufficient whereon to ground an action...Secondly, a consideration may arise or be created, by doing or permitting somewhat to be done to the prejudice or loss of one of the parties. So that it is not absolutely necessary that the consideration for a contract imports some gain to him that makes the contract; but that it is sufficient that the party, in whose favour the contract is made [i.e. the promisee], forgoes some advantage or benefit which otherwise he might have taken or had, or suffers some loss in consequence of his placing his confidence in another's undertaking...<sup>319</sup>

Powell also noted that:

Mutual promises must be both binding, as well on the one side as the other, and must be both made at the same time, or else they will be both *nuda pacta*. A contract or agreement may be supported either by a valuable consideration: as marriage, work done *etc* or by a consideration: as that of blood or natural affection between near relations, the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one near relation to another.<sup>320</sup>

It may be noted that Powell, generally, followed Blackstone.<sup>321</sup>

### (c) Comyn (1807)

Comyn, in a *Treatise of the Law relative to Contracts and Agreements not under Seal* (1807),<sup>322</sup> noted that all contracts were categorised as agreements by: (i) specialty; or (ii) parol.<sup>323</sup> He stated:

<sup>315</sup> Ibid, p 9 'it is of the essence of every contract or agreement, that the parties to be bound thereby should consent to whatever is stipulated, for, otherwise, no obligation can be contracted.' Ibid, p 10 'the term '*assent*' signifies the acquiescence of the mind to something proposed or affirmed; and involves, in consideration of law, first, a physical power of assenting, secondly, a moral power; and, thirdly, a deliberate and free use of those powers.' Ibid, p 131 'We are to consider in how many ways an assent may be given to a contract or agreement.'

<sup>316</sup> Ibid, p 164 'the subject of it [the contract] ought to be such a thing, as men have a lawful right and power of stipulating about at their pleasure. It follows, that an engagement to do a thing in itself unlawful must be void...'

<sup>317</sup> Ibid, p 330. '*Material cause*' in terms of legal writers goes back to the civilians Fulbecke (1601) and Cowell (1607), see **27(b)** and **(c)**.

<sup>318</sup> Ibid. Powell continued 'So if one buy me an house, or other thing for money, and no money be paid, nor earnest given, nor day set for payment, nor the thing delivered, here no action lies for the money, or the thing sold, but the owner may sell it to another if he will, for such promises or contracts are deemed *nuda pacta*, there being no consideration or cause for them, but the covenants [promises] themselves, which will not yield an action; and this agrees with the definition of *nudum pactum*, as given by the civilians, namely, *nudum pactum est ubi nulla subest causa praeter conventionem*.' The quotation is from *Sharington v Strotton* (1565), see n 763. Cf. As for BOE or promissory note not requiring consideration, Powell, p 341, stated the reason was that the law merchant did not require it.

<sup>319</sup> Ibid, p 344. Powell also noted, p 348, that past consideration was insufficient.

<sup>320</sup> Ibid, p 361. In the case of the Fraudulent Conveyances Acts 1571 and 1584, it is to be remembered that there had to be valuable consideration and that this did not include blood and natural affection.

<sup>321</sup> Powell also referred to '*sufficient*' consideration (mentioned by Blackstone), see e.g. p 168, however, more in passing.

<sup>322</sup> Comyn, n 70. See also Swain, n 102, p 148. Cf. Montefiore, *Commercial Dictionary* (1803) 'Consideration, is the money or other beneficial act done towards or paid to another, for which a certain equivalent beneficial advantage is to be communicated. Every consideration must be legal, and every act importing a consideration must be practicable, otherwise it will be void.' This, rather quixotic, definition adds nothing.

<sup>323</sup> Ibid, p 1 'All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol. If they be merely written, and not under seal, they are denominated contracts by *parol*.' He continued 'As contracts and agreements between merchants and others are most commonly entered into either verbally, or in writing without seal, the present work is wholly confined to contracts and agreements usually denominated parol, and these alone, it may be observed, are the subject matter of the action of *assumpsit*.'

Now a contract by *parol* is defined to be a bargain or agreement voluntarily made, either verbally, or in writing not under seal, upon a good consideration, between two or more persons capable of contracting, to do or forbear to do some lawful act...these are valid contracts, because there is, what lawyers commonly term, *quid pro quo*, or one thing for another.<sup>324</sup>

But, if a man, without any consideration than mere good will, or natural affection, make a voluntary promise to give to another a sum of money, as for instance, £20 and that he will be his debtor for that sum, this is no contract, but a mere naked promise or *nudum pactum*: for, however a man may or may not be bound to perform such a promise, in honour or conference, which the municipal laws of this country do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact or promise from being *nude*, and therefore, in the instance put, if any thing, however trifling were done, or to be done or given for the £20, it would be a valid contract, and binding upon the parties.<sup>325</sup>

In this, Comyn followed Blackstone (see 31). To render a contract '*certain*' or '*complete*', Comyn noted that 6 things appeared '*necessary to concur*' viz.

- (a) a person able to contract; [i.e. capacity]
- (b) a person capable to be contracted with; [i.e. capacity]
- (c) a thing to be contracted for; [i.e. subject matter]
- (d) a good and sufficient consideration or *quid pro quo*; [i.e. consideration]<sup>326</sup>
- (e) clear and explicit words to express the contract or agreement;
- (f) the assent of both the contracting parties. [i.e. *consensus*]<sup>327</sup>

These reflected Bracton's capacity, subject matter and *consensus* - with (e), actually, being part of (f) (and, thus, unnecessary) and with (a) and (b) being able to be merged - something which a later writer, Colebrooke (in 1818) did, since he only referred to four, viz.

- (a) capacity of the parties;
- (b) subject matter ('*an object certain*');
- (c) consideration ('*good and sufficient consideration*');
- (d) *consensus* ('*consent of the parties*').<sup>328</sup>

As for (d), Comyn treated consideration and *quid pro quo* as one and the same, with his also describing *quid pro quo* as '*one thing for another*.' (see above quotation).<sup>329</sup> Later, he re-iterated it was essential to every contract that '*it be founded upon a good consideration*'.<sup>330</sup> He stated:

The civilians hold, that in all contracts...there must be something given in exchange, something that is mutual or reciprocal. The thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void.<sup>331</sup>

<sup>324</sup> Cf. Newland, n 73 (1806), p 1 quoted Blackstone, 'A contract is an agreement, upon a sufficient consideration to do or not to do, a particular thing.'

<sup>325</sup> Ibid, p 2. Comyn cited Comyns, *Digest*, n 59, title *Agreement A1* 'An agreement is, *aggregatio mentium*, viz. when two or more minds are united in a thing done or to be done, or where a mutual assent is given to do or not to do a particular act.' The reference came from *Renniger v Fogossa* (1551), see n 751. The wording in the 1st ed of Comyns *Digest* (1762, vol 1) was similar, save that it did not contain the words in italics.

<sup>326</sup> Cf. Newland, n 73 (1806), p 65 'valuable, or a meritorious consideration.'

<sup>327</sup> Ibid, pp 2-3. Comyn also noted 'But to an agreement or contract, there is not any prescribed form of words, but any words which show the assent of the parties are sufficient.'

<sup>328</sup> Colebrooke (in 1818), n 73, p 14. He also expressly noted that delivery was no longer required 'A contract, formed by the sole consent of the parties, is termed consensual...[it] binds the parties from the moment they have signified their consent, without the intervention of anything else to perfect the engagement. In sale and purchase, the article, which is the subject, is sold as soon as the parties have consented. In lease and hire, the subject is let when they are agreed. The engagement is complete, and the obligation created, previous to delivery of the thing.'

<sup>329</sup> Cf. Colebrooke (in 1818), n 73, p 3 'The mutual or reciprocal thing, which is the cause or motive of the engagement, is called the consideration.'

<sup>330</sup> Ibid, p 8.

<sup>331</sup> Ibid. Following Blackstone, Comyn also stated, p 9 'A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law, and a man cannot be compelled to perform it. But it is observed, as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases, where such a promise is authentically proved by written instruments. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the

Also,

It is a known rule of law, that to make a contract or agreement obligatory the consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made; otherwise the contract or agreement is considered as *nudum pactum*, and cannot be enforced.<sup>332</sup>

That said, Comyn noted that '*A promise for promise is a good consideration, as in consideration of a reciprocal promise of marriage.*'<sup>333</sup> And that, '*if there be any benefit, labour, or prejudice, however trifling, it is deemed a sufficient consideration.*'<sup>334</sup> What is interesting in Comyn is that - in his definition of consideration - he merged two different things viz: (a) *quid pro quo* (exchange); and (b) '*benefit to the [promisor, i.e. the D], or some trouble or prejudice to the [promisee, i.e. the P]*', without noting that (a) and (b) were not the same (the latter reflecting value, profit or loss).

#### (d) Chitty (1826)

Other texts in this period, such as Williams (1812)<sup>335</sup> and Woolrych (1829),<sup>336</sup> added little. Chitty, in 1826, in the first edition of his long lasting text, *The Law of Contracts not under Seal*, stated:

The term '*contract*', in its more extensive sense, includes every description of agreement, or obligation, whereby one party becomes bound to another, to pay a sum of money, or perform, or omit to do, a certain act... A contract or agreement, not under seal, may be thus defined or described: a mutual assent of two or more persons, competent to contract, founded on a sufficient and legal motive, inducement, or consideration, to perform some legal act, or omit to do any thing, the performance whereof is not enjoined by law.<sup>337</sup>

From which definition it appears that to constitute a sufficient agreement, there must be: 1st the reciprocal or mutual assent of two or more persons competent to contract. 2ndly A good and valid consideration. 3rdly. A thing to be done which is not forbidden, or a matter to be omitted, the performance of which is not enjoined, by law.<sup>338</sup>

Thus, in essence, Chitty treated the pre-requisites of a contract as:

- (a) the parties have capacity ('*competent to contract*');
- (b) a subject matter ('*pay a sum of money, or perform, or omit to do, a certain act*');<sup>339</sup>
- (c) *consensus* ('*mutual assent*');
- (d) consideration ('*good and valid consideration*');
- (e) the agreement is not unlawful ('*not forbidden*', '*not enjoined by law*').

As to consideration, Chitty stated:

A valid and sufficient consideration, motive, or inducement to make a promise, upon which a party is charged, is of the very essence of a contract not under seal, and must exist, although the contract be reduced into writing... This consideration may arise either by reason of a benefit resulting to the party promising [the promisor], or to a third person, at the request of the former, by the act of the promisee; or on occasion of the latter sustaining any loss or

instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration.' Also, p 13 'a bargain without a consideration is said to be a contradiction in terms, and cannot exist.' Comyn cited *Middleton v Lord Kenyon* (1794) 2 Ves Jun 391 (30 ER 391), at p 408, *per* Lord Loughborough 'a bargain without consideration is a contradiction in terms, and cannot exist.' See also Swain, n 102, p 186.

<sup>332</sup> Comyn, n 70, p 13. Also, p 16 'a *nudum pactum*, or agreement to pay any thing on one side, without any compensation on the other, is actually void in law and a man cannot legally be compelled to perform it.' Also, 'So, if one buy goods for money, and no money be paid, nor earnest given, nor day set for payment, nor the goods, or any part of them, delivered, here no action lies for the money, or the goods sold, but the owner may sell them to another if he will; there being no consideration, but a mere agreement to buy.'

<sup>333</sup> *Ibid*, p 15. He also stated 'mutual promises must be made at the same time, otherwise they will be *nuda pacta*.'

<sup>334</sup> *Ibid*, p 17.

<sup>335</sup> Williams, n 61, p 178 followed Blackstone.

<sup>336</sup> Woolrych, n 62, ch 2 'In all contracts there must be a valid consideration...'. However, he did not analyse what that was. He also stated, *Ibid* 'in the case of a [BOE] or note, which an indorsee or payee receives *bona fide*, and without knowledge of a want of consideration, a defence to that effect cannot be set up, for it would enable parties to concoct an unavailable instrument, and defraud the public through it.'

<sup>337</sup> See also Swain, n 102, pp 177-8.

<sup>338</sup> Chitty, n 71, p 3. As to mutual agreement, Chitty also noted, p 4 'No contract is raised by a mere affirmation in discourse; a mere overture, or offer to enter into an agreement, not definitively and expressly assented to by both parties.'

<sup>339</sup> Chitty also noted, p 92 'Parties are allowed the fullest latitude with regard to the subject matter of their agreements. The law requires, that no legal object be embodied in the consideration, or the matter stipulated to be performed, or omitted. Subject to this exception, and the rule that the act to be fulfilled must not be utterly impossible, there is no encroachment on the liberty of contracting. The agreement may relate to a past, a present, or a future transaction. And it is, in general, no legal objection to a contract, that the subject matter is of a trifling, unimportant, or ridiculous nature.'



inconvenience, or suspending or forbearing any right or remedy at law, or in equity, at the instance of the person making the promise.<sup>340</sup>

Chitty indicated that consideration did not need to be '*adequate in point of actual value*' and that a '*slight benefit*' be conferred on the D or if the P sustain the '*least, injury, inconvenience or detriment*'.<sup>341</sup> In the case of sale, he followed Noy, see **28(a)**, in providing that it was a transfer of property for a price.<sup>342</sup>

#### (e) **Fox (1842)**

Fox was a special pleader and barrister of the Inner Temple. His text, *A Treatise on Simple Contracts* (1842), indicates the extent to which there was no standard, modern, definition of a contract. Thus, Blackstone was oft cited,<sup>343</sup> despite some 70 years having passed. As for consideration, Fox treated it the same as *quid pro quo*.<sup>344</sup> He indicated that consideration was of two sorts, (i) good;<sup>345</sup> and (ii) valuable.<sup>346</sup> In the case of the latter, he frankly accepted that all the examples could not be enumerated (indicative, it is asserted, that they were, at base, evidential). Fox also accepted the minimal nature of consideration required:

The smallest possible advantage or detriment will sustain a promise of any amount. Thus, the mere act of showing a deed...[or] proving a debt to be due to the [P, the promisee] from a third person...[or] mere permission to weigh certain boilers...<sup>347</sup>

As for the pre-requisites for a contract, Fox took these to be - in effect - the same as Chitty, although he did not set this out clearly.<sup>348</sup> These included a mutual intention to contract (*consensus*).<sup>349</sup>

#### (f) **Conclusion**

Up to the mid-19th century, there were competing views of consideration, with matters still left very opaque. To some, it was *quid pro quo* (reflecting Dyer CJ) (see **23(a)**) - although they failed to link this to delivery.<sup>350</sup> To others, it was loss to P or profit to D (reflecting Coke)(see **23(f)**). Often, like Comyns, legal writers combined the two - without noting any discrepancy. Further, there was no analysis as to the origin, or nature, of consideration. Indeed, it seems clear that - for all legal writers up to this date - consideration was not the '*big*' issue that academics were to later make of it. It was also easily satisfied.

<sup>340</sup> Ibid, p 7.

<sup>341</sup> Ibid 'It is not essential that the consideration should be adequate in point of actual value, the law having no means of deciding upon this matter and it would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties, by not allowing them to be sole judges of the be derived from their bargains; provided there be no incompetency to contract, and the agreement violate no rule of law. It is sufficient that a slight benefit be conferred by the [P] on the [D], or a third person; or even if the [P] sustain the least injury, inconvenience, or detriment; or subject himself to any obligation, with benefitting the [D], or any other person.'

<sup>342</sup> Ibid, p 108 'A sale, or exchange, is a transmutation of property from one man to another, in consideration of some price or recompense in value.'

<sup>343</sup> Fox, n 73, p 1 'A contract in law is an agreement between parties for a sufficient consideration to do, or abstain from doing, a particular thing.' For Blackstone, see **31**.

<sup>344</sup> Ibid, p 50 'Every promise must be paid for. The party promising must have a *quid pro quo*. The equivalent for his promise is called a consideration: a contract, without a consideration, is one-sided, and does not bind. It is termed in law '*nudum pactum*'.

<sup>345</sup> Ibid, pp 50-1 'Good considerations are, consanguinity and the natural affection of near relations. They are sufficient for some purposes, as to raise a use of lands, but in such cases there must be a deed.'

<sup>346</sup> Ibid, p 51 'Valuable considerations are as various as the circumstances by which mankind may confer or receive advantage. To give an exact definition of them, or to enumerate them all, would be impossible.'

<sup>347</sup> Ibid, p 51. He referred to *Sturlyn v Albany* (1587)( see n 813) and to *Bainbridge v Firmstone* (1838) 8 A & E 743(112 ER 1019). Fox also indicated that the act must be physically possible or else there was no consideration.

<sup>348</sup> Ibid, p 2 '1st, parties competent to contract. 2ndly, a sufficient consideration; and 3rdly, a sufficient promise. However, elsewhere, Fox treated capacity under the third head (p 3). He also indicated that the consideration must not be contrary to the common law, legislation or public policy. Nor must it be immoral or fraudulent (p 54).

<sup>349</sup> Ibid, pp 62-3 'it must clearly appear that there was an intention to contract. Mere loose talk will not bind...even an offer, however, formal and well considered, is not a promise till it has been accepted. The assent of both parties is necessary.'

<sup>350</sup> The connection may be seen, for example, in Sheppard Touchstone, n 576 (1826 ed), vol 1, pp 223-4 with regard to goods 'A bargain and sale may be made of goods and chattels...by word as well as by writing...without any delivery of any part of the things sold, or of any piece of money, (as the manner is) in the name of seisin. But in this case...respect is to be had unto the cause and consideration of the bargain...if there be no consideration or no good consideration of it, it is of no effect at all...therefore if a man by word of mouth sell to me his horse, or any other thing, and I give him or promise him nothing for it; this is void and will not alter the property of the thing sold.' (*underlining supplied*). The '*give*' element in consideration related to *quid pro quo* and delivery. The '*promise*' element related to *consensus*.

### 34. THE YEAR 1845 - MODERN DOCTRINE OF CONSIDERATION

This year was important in relation to the pre-requisites for a contract since livery (delivery) of seisin for land ended. The Real Property Act 1845 enacted that - in future - corporeal hereditaments were to lie in grant and not in livery. Alexander noted:

The importance of this Act in the history of conveyancing it would be difficult to overestimate. Henceforth all land of freehold tenure could be conveyed by deed, one deed, and that deed usually a simple grant. This Act of 1845 marks definitely the break of our law with the old feudal system....<sup>351</sup>

This event was a decisive break with the Anglo-Saxon and medieval past in respect of land. Land (whether corporeal or incorporeal) was now transferred by document. It could no longer be transferred by word and the symbolic delivery of a sod of earth or a twig<sup>352</sup> (in the case of chattels, since the 14th century they did not need livery of seisin, but could be transferred by way of deed).<sup>353</sup>

- *Why* this was so important with respect to the law of contract and the doctrine of consideration was that Bracton's pre-requisite of 'delivery' for a valid contract now disappeared as it had done (in practice) for deeds.<sup>354</sup> Thus, delivery could be a term of the contract, but was no longer treated as a pre-requisite.
- This 'dropping' of delivery as a pre-requisite had begun as long ago as Blackstone who did not refer to it as such (see 31). However, it was still preserved in the concept of consideration being a '*quid pro quo*' (giving this for that). By Victorian times, this expression had died away and the modern evolution of the doctrine developed - loss to the P or profit to the D (including forbearance).

Three other important developments also affected the doctrine of consideration by 1845.

- **Local Courts.** By Victorian times, local courts such as courts baron, piepowder courts, local admiralty courts *etc* had all, in practice, died away and the county court (a statutory creation in 1846) and king's court had wholly taken over.<sup>355</sup> The effect was that the law merchant (always part of the common law but a separate area of law applying to merchants with its expedited procedures and various evidential benefits) had died away by early Victorian times. Not least, since '*merchants*' as a distinct class no longer existed. So too, had local (commercial) customs. Thus, the medieval benefits mentioned in 14 had all gone and the king's court (including, now, the county court) was the primary source of law and evidential procedures;
- **Tallies.** A tally was not treated in law the same as a deed (see 15(d)) since it could be more easily erased than writing on parchment. However, by 1834, tallies were obsolete. Thus, this category of evidence died away. Those in writing in writing that remained (I leave aside instruments of record which had a higher nature than deeds)<sup>356</sup> comprised: (a) deeds; (b) specialties (i.e. bonds and other writings which were sealed); (c) BOE and promissory notes; (d) other unsealed writings (excluding (c)). Since (a)-(c) did not require consideration, the effect was that

<sup>351</sup> Real Property Act 1845 (8 & 9 Vict c 106). See also GG Alexander, *Recent Developments in Conveyancing Law* in Cambridge Legal Essays (Heffer & Sons, 1926), p 24. Also, McBain Gift, n 209, p 196. A Underhill, *Changes in the English Law of Real Property during the Nineteenth Century* in AALH, n 872, vol 3, p 706 'the old common law theory that actual delivery of possession, or the newer theory that a notional delivery by the aid of the Statute of Uses [1536] was necessary to a transfer of land, was swept into the limbo of pedantic rubbish, and a simple deed of grant was made sufficient. This deed of grant is still the common form of conveyance.'

<sup>352</sup> In the case of land, livery of seisin had been avoided by using other forms to feoffment such as grants, releases and confirmations. Also by bargain and sale under the Statute of Enrolments 1536. See also Hale, n 48 (1713 ed), pp 101, 106. Also, Sheppard Touchstone (1826 ed), n 576, vol 1 & 2.

<sup>353</sup> Baker Introduction, n 315, p 384 'by the end of the fourteenth century a gift of chattels could be effected by deed.' Baker cited *Pynchoun v Geldeford* (1385) YB Hil 8 Ric II (Ames Foundation, 1987), p 215, p 17. A man, by deed, transferred all his chattels to others, reserving a right of use during his life. See also McBain Gift, n 209, p 188. Cf. Jenks, n 91, p 158 'It is extremely probable, though difficult to prove, that the operation of the Statute of Uses [1536], in executing conveyances made for money considerations without livery of seisin, was extended by analogy to the case of sales of chattels, and thus give rise to the modern doctrine that delivery is not necessary in order to pass the property on the sale of a specific chattel.'

<sup>354</sup> Deeds still, technically, required delivery as a pre-requisite. However, even in Coke's day (see n 825), actual delivery was not required. Further, delivery of the deed was held to be only a matter of intention, see *Doe d Garmons v Knight* (1826) 5 B & C 671 (108 ER 250) *per* Bayley J at p 692 and *Xenos v Wickham* (1867) LR 2HL 296 at p 312 *per* Blackburn J. Also, *Macedo v Stroud* [1922] 2 AC 330 *per* Viscount Haldane at p 337 'as soon as there are acts or words showing that it is intended to be executed as his deed that is sufficient.' See also Cheshire & Fifoot, n 79, p 19.

<sup>355</sup> See also McBain Law Merchant, n 134, p 136. In particular, the Municipal Corporations Act 1835 abolished all remaining restrictions on trading by retail or wholesale. This, effectively, ended the concept of '*merchant*' as a distinct category of person or of trade. McKendrick, n 64, p 7 noted: 'By the time of his retirement [that of Mansfield CJ in 1788], the law merchant had become fully absorbed into the common law.'

<sup>356</sup> See ns 35 & 575. It may be noted that the Statute of Acton Burnell 1283, the Statute of Merchants 1285 and the Statute of the Staple 1353 were repealed in 1863.

the doctrine of consideration applied to few written documents in any case and - since illiteracy rates were improving - there were less oral agreements made;

- ***Forms of Action.*** As previously noted, the term '*consideration*' was used in pleadings in the king's court. In particular in the action of *assumpsit*. It was also connected with the actions of covenant, debt and case. However, in Victorian times, steps were taken (legislatively) to abolish this formulary system since it had run its course.<sup>357</sup>

The result of the above was that the modern doctrine of consideration came to the fore. Thus, unlike Blackstone who defined '*consideration*'; in terms of: (a) reason (cause); (b) exchange (with the idea of *quid pro quo*); (c) price (value, including profit and loss); (d) motive; (e) compensation, all these former definitions tended to drop away save for (c). This is unsurprising since:

- Bracton had indicated that it was a pre-requisite of a valid sale that there be a '*fixed price*'. Further, *Stone v Withipole* (1589) had referred, as a matter of pleading in *assumpsit*, to the need to show a loss to P or a profit (benefit) to D. However, by 1845, the need for '*fixed*' had dropped away. All that was needed was a '*price*'. How it was determined could be left to the terms of the agreement; it was not a pre-requisite as such. The need for a price was, later, to be reflected in the Sale of Goods Act 1893 (see 37(b)).

***In conclusion, from mid-Victorian times, the modern formulation of consideration developed and 'quid pro quo' (which was connected to the pre-requisite of delivery) dropped away.***

### 35. THE PERIOD 1845 - 76

#### (a) Blackburn (1845)

Blackburn - in the first edition of his *A Treatise on the Effect of the Contract of Sale* (1845)<sup>358</sup> - said little on contract or consideration as such, merely noting in his *Introduction*:

By the common law of England, no peculiar form is required to give validity to a contract or agreement. It is essential there be a mutual assent of both parties as to what is agreed upon, and also (unless the agreement be by deed) that there be a consideration for the engagement of the parties, for if not, the agreement is merely honorary and not enforced by the law.<sup>359</sup> The agreement might, at common law, be enforced if the mutual assent of the parties and the consideration could be proved by any evidence.<sup>360</sup>

It is also of interest that the nature of earnest seems to have so died out by this time, such that Blackburn - despite being a considerable commercial lawyer - seems to have been uncertain as to its purport.<sup>361</sup> Blackburn also noted that the English law of sale did not require a fixed price or delivery.<sup>362</sup>

<sup>357</sup> Maitland, n 632, p 8 'in 1832 a partial assault had been made on the personal forms. The principal personal forms were these - debt, detinue, covenant, account, trespass, case, trover, assumpsit, replevin. By 2 Will IV, c 39 (1832) 'Uniformity of Process Act' - the process in these personal actions was reduced to uniformity. The old original writs were abolished and a new form of writ provided. In this writ, however, the [P] had to insert a mention of one of the known forms of action. Another heavy blow was struck in 1852 by the Common Law Procedure Act, 15 and 16 Vic, c. 76. It was expressly provided (sec 3) that it should not be necessary to mention any form or cause of action in any writ of summons. But still this blow was not heavy enough - the several personal forms were still considered as distinct. The final blow were struck by the Judicature Act of 1873 and the rules made thereunder, which came into force in 1875. This did much more than finally abolish the forms of actions known to the common law for it provided that equity and law should be administered concurrently.' Ibid, p 9 'It can no longer be said [in 1909], as it might have been said in 1830 that we have about 72 forms of action, or as it might have been said in 1874 that we have about 12 forms of action.' Maitland also noted, p 17, that trial by battle had been abolished in 1819 and wager of law in 1833, although 'For a very long time before this any practical talk of these barbarisms had been very rare, and for a still longer time pent within ever narrowing limits...'. See also pp 80-1. Thus, the evidential matrix that was the background to the development of the doctrine had all gone.

<sup>358</sup> C Blackburn, *A Treatise on the Effect of the Contract of Sale* (1845). The last edition (3rd ed) was in 1910.

<sup>359</sup> Ibid, pp 2-3. As to a sale, he stated 'A contract concerning the sale of goods may be defined to be a mutual agreement between the owner of goods and another, that the property in the goods shall or some price or consideration be transferred to the other, at such a time and in such a manner as is then agreed.'

<sup>360</sup> Ibid, p 3. He continued, referring to the Statute of Frauds 1677, s 17 (see 28(c)) 'But by statute law, no contract from the sale of any goods, wares, or merchandize for the price of £10 or upwards shall be allowed to be good except there be evidence of a particular character. When this evidence exists the effect of the agreement is the same as it would have been at common law.'

<sup>361</sup> Ibid, p 42. Discussing the Statute of Frauds (1677), s 17 (see 28(c)) Blackburn stated 'The words [referring to the earnest] have in practice been found so intelligible that there is only one case in which any decision on the meaning of this clause is reported, and that decision seems almost self-evident.' In *Blenkinsop v Clayton* (1817) 7 Taunt 597 (129 ER 238) the buyer drew a shilling across the purchaser's hand, and then put it in his own pocket to strike the bargain. The Court of Common Pleas held 'he had not given anything in earnest, for the purpose of satisfying the requirement of part payment under the Statute of Frauds 1677, s 17. Blackburn continued 'It need only be observed, that there cannot be any payment unless it is accepted as well given as payment.' This case appears correct - the earnest should have been delivered to the seller. Counsel in the case noted that the practice was called in the North of England '*striking off a bargain*'.

**(b) Smith (1847)**

Smith - in the first edition of his *Law of Contracts* (1847)<sup>363</sup> - deriving from a series of lectures he delivered in 1846 - was an influential text in its time. Dividing contracts into those under seal and simple contracts,<sup>364</sup> - which categorisation he recognised was not of the best<sup>365</sup> - he noted that the latter required consideration<sup>366</sup> and that it comprised:

Any benefit to the person making the promise [the promisor, D], or any loss, trouble, or inconvenience to, or charge upon, the person to whom it is made [the promisee, P].<sup>367</sup>

This formulation (although Smith did not mention the case) went back to that of Coke in *Stone v Withipole* (1589)(see **22(f)**), that is '*the charge of the [P], or the benefit of the [D]*'. As authority for his statement, Smith cited Patteson J in *Thomas v Thomas* (1842) in which the latter stated:

Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the [P]; it may be some benefit to the [P], or some detriment to the [D]; but at all events, it must be moving from the [P].<sup>368</sup>

However, as Jenks pointed out, this formulation was incorrect, since the words should have been transposed.<sup>369</sup> Smith also accepted that consideration was related to *consensus*, since the parties had to consent to it<sup>370</sup> and that

<sup>362</sup> Ibid, p 170 'The civil law is founded, amongst others, upon two assumed principles, which are not recognised by the English law; one is, that a sale must be for a fixed price in money, and that a contract to part with property for a valuable recompense, not consisting of moneys numbered, cannot be a sale, but must be of a different nature. The other is, that property cannot be transferred by any agreement, unless there be an overt act of delivery of possession. Neither of these principles are recognised by the English law, and such of the rules of the civil law as are founded exclusively upon them, ought not to prevail in a system in which the principles themselves do not exist.' In the case of a fixed price, this was incorrect. It was Bracton who stipulated it (see **12**).

<sup>363</sup> Smith, n 73. This edition ended in 1885 (8th ed). Smith had also published a *Compendium of Mercantile Law* (1st ed, 1834, the 13th in 1931).

<sup>364</sup> Smith also mentioned contracts of record. However, he stated, n 959, pp 3-4 'they are so little used in the ordinary affairs of private individuals, that I may dismiss them in a very few words. At an early period of our law, statutes merchant and statutes staple, which are both contracts of record for the payment of debts, were ordinarily in use. They are, however, now almost unheard of. The only contract of record with which we now occasionally meet is a recognizance, and that oftener in matters in which the Crown is concerned than between subject and subject....The peculiar incidents of a contract of record are, first, that, like all records, they prove themselves, their bare production without any further proof being sufficient evidence of their existence, should it be controverted.' Smith, p 5, also noted that deeds did not have to be signed (as opposed to Blackstone, see n 1020).

<sup>365</sup> Ibid, p 24 'though...there is, in practice, a very wide distinction between written and verbal contracts, yet, in theory, the law of England acknowledges no difference between them at all, but denominates them all by the same term, *simple contracts*.' This was a consequence of the judgment of Skynner CJ in *Rann v Hughes* (1778), see **32**.

<sup>366</sup> Ibid, p 81 'a consideration to support it.' See also pp 86-7 (referring to the need for consideration to prevent persons entering into hasty bargains and citing *Eastwood v Kenyon* (1840) *per* Denman CJ, see text to n 1007).

<sup>367</sup> Ibid, p 87. Smith cited Plowden '*Nudum pactum est ubi nulla subest causa praeter conventionem; sed ubi subest causa sit obligatio et parit actionem*', see n 763. Smith also cited *Lilly v Hayes* (1836) 5 Ad & Ell 548 (111 ER 1272)( P's debtor sent money to D who admitted receipt and acknowledged it was to be paid to P. Held P might sue him for the money had and received and that D could not allege a want of consideration moving from P to him). Smith also cited W Selwyn, *Abridgment of the Law of Nisi Prius*, vol 1, *Assumpsit*, p 43 which stated 'any act of the [P] from which the [D] or a stranger derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the [P], however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the [P], with the consent, express or implied, of the [D], or, in the language of the pleading, *at the special instance and request of the [D]*'. The first edition of this work was in 1806-8, the last (13th ed) in 1869. In the latter, p 55, Selwyn stated 'This consideration is either of benefit to the [D] or of benefit to a stranger, or of damage, or of loss sustained by the [P], *at the request* of the [D]; and herein the law of England adopts and recognises the rule of the civil law, *ex nudo pacto non oritur actio*. Any act of the [P], from which the [D] derives, or expects to derive, a benefit or advantage, or any labour, detriment, or inconvenience sustained by the [P], however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the [P], at the request or with the consent, either express or implied, of the [D].'

<sup>368</sup> 2 QB 851 (14 ER 330) at p 859. For his part, Denman CJ interpreted consideration as, p 859 'one which confers what the law considers a benefit on the party.' A widow promised to pay her husband's executors £1 towards ground rent and to keep the dwelling house in good repair was deemed to be consideration for the executor's written promise to transfer to her a right to occupy the house during widowhood..

<sup>369</sup> Jenks, n 91, p 28, fn 2 'Surely these words should be transposed? Cf. opening sentence of judgment of Le Blanc J in *Jones v Ashburnham* (1804) 4 East 455 (102 ER 905) 'The definition by Mr Justice Yates [in *Pillans v Van Mierop*, see **30**] of a consideration sufficient to maintain a promise is, that it be either of some benefit to the [D] or some detriment to the [P]. It is sufficient if it be a detriment to the [P], though no actual benefit accrue to the party undertaking.' Cf. *Bunn v Guy* (1803) 4 East 190 (102 ER 803) *per* Lord Ellenborough at p 194 'A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself'. See also Swain, n 102, p 187.

the adequacy of consideration was not to be taken into account.<sup>371</sup> In respect of sales, Smith stated that they included:

all agreements by which property is parted with for a valuable consideration, whether there be a money payment or not, provided that the bargain be made, and the value measured in money terms.<sup>372</sup>

Finally, Smith noted that an earnest bound the parties to the bargain.<sup>373</sup>

**(c) Levi (1854)**

Levi, in his *Manual of the Mercantile Law* (1854),<sup>374</sup> stated:

A contract is an agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages, upon certain considerations to the other, to give some particular things, or to do or abstain from doing some particular act.<sup>375</sup> The essentials of a contract are, the consent, the capacity of the parties, the subject matter, the lawfulness of the contract itself, and the consideration.<sup>376</sup> ...There must be a consideration for a promise: wherever the undertaking is gratuitous, it creates no legal responsibility. A consideration must be of some value, however slight. A difference is made between a good consideration and a valuable consideration. To give a right of action as between the parties, it is enough if there be a good consideration; but to render it good, even against third parties, the consideration must be valuable. A consideration will be sufficient when the party promising obtained some benefit for such a promise, or even when a third person was thereby benefitted; and also when the party to whom the promise is made subjects himself to any charge or obligation, or to some inconvenience.<sup>377</sup>

It may be noted that, since legislation which referred to 'good' consideration (i.e. the Fraudulent Conveyances Acts 1571 and 1584) was repealed in 1863, this expression was progressively replaced by reference to the 'lawfulness of a contract'.<sup>378</sup> Thus, a contract was void if illegal or contrary to public policy.

**(d) R v Morton (1873)**

This case,<sup>379</sup> which is often overlooked, had the effect of creating another type of specialty. Bovill CJ indicated that - while a document might be a deed in form - the courts might not treat it so in practice. He stated:

Many documents under seal are not deeds; for instance, an award, though sealed. Again, a will is often under seal. So is a certificate of magistrates, a certificate of admission to the College of Physicians, or to other learned bodies. So is a share certificate. Yet it can hardly be said that all these are deeds. The probate of a will is very similar; it is

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<sup>370</sup> Ibid, p 89 'Incidental to the relation between the parties to a contract arising from the nature of a consideration is their mutual assent to it.' Smith cited Pothier who stated 'A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise.' Pothier (1699-1772) was a judge of the Presidial Court of Orleans and a professor of law at the University of Orleans, France. His *Traite des Obligacions* (Treatise on Obligations) was published in 1761. See WD Evans (trans), *Law of Obligations or Contracts* (1st ed, 1806; 3rd ed, 1853). See also Swain, n 102, pp 150-1.

<sup>371</sup> Ibid, pp 95-6 'Provided there be some benefit to the contractor, or some loss, trouble, inconvenience, or charge imposed upon the contractor so as to constitute a consideration, the courts are not willing to enter into the question whether that consideration be adequate in value to the thing which is promised in exchange for it.' Smith cited, p 97, *Wilkinson v Oliveira* (1835) 1 Bing NC 490 (131 ER 1206) (the declaration stated that - in consideration that P (at D's request) gave D a letter written by O (since deceased) by means of which D was enabled to (and did) end various disputes and obtain a large portion of O's effect - D promised to give P £1000. Held a sufficient consideration was disclosed to sustain an action on the promise). See also Jenks, n 91, pp 63-4.

<sup>372</sup> Ibid, p 330.

<sup>373</sup> Ibid, p 76 'Earnest or payment of part of the purchase money equally satisfies the [Statute of Frauds 1677, s 17, see **28(c)**], however small the sum paid may be. It is obviously attended by few of the niceties which beset the principle of acceptance, nor does it transfer control over the goods possessed by the seller, whose lien remains unimpaired....Earnest merely binds the bargain, and satisfies the Statute of Frauds [1677]... although it seems an unsettled question how far payment of earnest transfers the right of property.' Smith cited *Bach v Owen* (1793) 5 TR 409 (101 ER 229). Here A and B agreed to exchange horses and A gave B an earnest. Buller J at p 410 'payment of the halfpenny vested the property of the colt in the [D].'

<sup>374</sup> Levi, n 77.

<sup>375</sup> Ibid, p 101. Levi referred to the French jurist Pothier, *Obligations*, s 3, see n 1129.

<sup>376</sup> Ibid, p 101. Levi also stated: 'A contract is called *synallagmatic*, [exchange] when two persons reciprocally bind themselves one towards another; *unilateral*, when one only or more persons bind themselves to another, without any corresponding obligation on the part of the other.'

<sup>377</sup> Ibid, pp 101, 104-5. Levi cited *Morton v Burn* (1837) 7 A & E 19 (112 ER 378).

<sup>378</sup> Levi accepted as much when he stated, p 105 'a consideration, as the contract itself, must be lawful, and not against law [i.e. illegal, unlawful], sound policy, or good morals.'

<sup>379</sup> LR 2 CCR 22.

given under the seal, formerly of the ordinary, now of the Court of Probate. It is a certificate of the will having been proved and administration granted; but I have never heard it suggested that that is a deed.<sup>380</sup>

The statement of Bovill CJ added uncertainty as to what was a deed - since these awards *etc* were on parchment or paper and delivered. It also left uncertain the difference between a deed and a speciality - itself rather confused in light of the statement of Skynner LCB in *Rann v Hughes* (1778) (see 32) that there were only contracts by way of: (a) speciality; and (b) parol. Further, did these awards, certificates *etc*, require consideration? (presumably, being sealed they did not; and the seal, in any case, might be construed as an *arra*). Thus, Bovill CJ created another form of speciality - a document which satisfied all the pre-requisites of a deed but was not a deed.

**(e) Bolton v Madden (1873) & Currie v Misa (1875)**

In *Bolton v Madden* (1873),<sup>381</sup> Lord Blackburn stated:

The general rule is, that an executory agreement, by which the [P] agrees to do something on the terms that the [D] agrees to do something else, may be enforced, if what the [P] has agreed to do is 'either for the benefit of the D or to the trouble or prejudice of the [P]'.<sup>382</sup>

It would seem inevitable the courts would alight on this formulation of consideration - deriving from *Stone v Withipole* (1589)(see 23(f)) ('either the charge [loss] of the [P], or the benefit of the [D]') - since the *quid pro quo* formulation of consideration (deriving from Dyer CJ, see 23(a)) had gone, with delivery no longer being a pre-requisite for a contract. However, this was greatly expanded in *Currie v Misa* (1875)<sup>383</sup> with Lush J (delivering the judgment of the majority) stated what, later, became an oft cited definition of consideration:

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.<sup>384</sup>

Thus, now, consideration - a legal fiction ('in the sense of the law') was satisfied if a court could find 'some' (i.e. any) benefit or loss to *either* party - a considerable extension on what there was before.<sup>385</sup> What is surprising is that, at this juncture, the court did not consider what was the origin of the doctrine. Also, whether this was not a rule of evidence - *viz.* evidence of *consensus*. That is, the fact that a party incurred a loss (or a benefit) was pretty good evidence that they thought that a contract had been made. Also, as a pre-requisite formulated in such wide terms, this *dictum* doomed the caselaw to enumerating an increasing catalogue of examples of such a benefit or loss. This is exactly what has happened. It is the inevitable result of trying to make a rule of evidence a pre-requisite. Thus, the US academic, Corbin (in 1950) who wrote a standard work on Contract, exclaimed:

Who can now read all the reports of cases dealing with the law of consideration...? Certainly not the writer of this volume.<sup>386</sup>

**(f) Conclusion**

<sup>380</sup> At p 27. See also Salmond & Williams, n 78, p 63.

<sup>381</sup> (1873) LR 9 QB 55.

<sup>382</sup> At pp 56-7. Blackburn cited Comyns, n 59, *Action on the Case in Assumpsit* B1. He was probably referring to the 4th ed (1800). In the 5th edition (1882) Comyns's *Digest* stated 'The consideration, upon which an *assumpsit* shall be founded, must be for the benefit of the [D], or to the trouble or prejudice of the [P]. And, therefore, a promise, in consideration of the forbearance of a suit, is good; for that is for the benefit of the [D]...!'

<sup>383</sup> (1875) LR 10 Ex 153 (1875-6), LR 1 App Cas 554.

<sup>384</sup> At p 162. This was founded on Comyns, *Digest* (5th ed (1882), vol 1, p 294). Jenks, n 91, p 27 'This *dictum*...really leaves out of account one of the most vital qualities of a consideration *viz.* its connection with the promise which it is intended to support.'

<sup>385</sup> In reviewing Sutton's work (n 99), IH Williams, *Sutton Reconsidered* (1975) 3 Otago LR 428, 'Who can be much the wiser for reading and reflecting upon his Lordship's definition? The statement is so arid as to border on the meaningless...!'

<sup>386</sup> AL Corbin, *Corbin on Contracts* (One Volume ed, 1952), p 162. Quoted by Gilmore, n 98, p 132, fn 165. Corbin continued 'He has merely read enough of them to feel well assured that the reasons for enforcing informal promises are many, that the doctrine of consideration is many doctrines, and that no definition can rightly be set up as the one and only correct definition, and that the law of contract is an evolutionary product that has changed with time and circumstance and that must ever continue to so change...In each new case, the question for the court is 'should this promise be enforced'. Its problem is not merely to determine mechanically, or logically, whether it falls within Professor Wiseacre's [i.e. any professor's] statement of the doctrine of consideration or complies with some commonly repeated definition...! However, in English law, it is asserted that the doctrine is not many doctrines, rather, it is a number of rules of evidence, no longer required.'

In the period 1845-76, reference to consideration in terms of *quid pro quo* disappeared - unsurprising since delivery as a pre-requisite for a contract had gone. However, the formulation in *Currie v Misa* (1875) expanded the definition of consideration greatly - to such an extent that it should have questioned whether there was any purpose in its being a pre-requisite as opposed to what it had first been *viz.* evidence of *consensus*, as pleaded in an action of *assumpsit*.

### 36. THE PERIOD 1876 - 93

In this period - perhaps, spurred on by continued uncertainty as to how to define consideration (with endless formulations) - academic writers sought to find the source. Pollock (an Oxford professor) initiated this with the first edition of his *Principles of Contract* (1876) written when he was 32 and intended to be a student text.<sup>387</sup> However, he was somewhat prone to adopting a theory and then dropping it.<sup>388</sup> Thus, he was much influenced by the writings of the German jurist Savigny<sup>389</sup> and this was reflected in his formulating contract in terms of (rather overlarge) principles.<sup>390</sup> Such an analysis was not well thought out and, doubtless, it influenced others long after he had accepted that he had accorded Savigny '*overmuch deference*'.<sup>391</sup> Similarly, Pollock (initially) thought that consideration originated from Chancery and, indeed, back to Roman law,<sup>392</sup> but he soon discarded the latter and he seems to have then accepted Holmes' explanation (see **16(a)**). Finally, by the seventh edition of his work (in 1902), Pollock had re-cast a large part of his chapter on consideration and he did so again in 1920.<sup>393</sup>

#### (a) Pollock (1876)

In the first edition of his work, Pollock noted that it was curious that no satisfactory definition of a contract was to be found '*in any of our books*'.<sup>394</sup> He stated that a contract - above all things - arose from the consent of the parties, the parties '*concur in expressing a common intention*'.<sup>395</sup> (i.e. *consensus*). This involved persons having an intention and the same agreeing.<sup>396</sup> The intention, also, had to be directed to legal consequences<sup>397</sup> which conferred rights (or imposed liabilities) on the parties.<sup>398</sup> Such *consensus* arose from a proposal (offer) and acceptance.<sup>399</sup> A contract produced an obligation.<sup>400</sup> Pollock also cited the Indian Contract Act 1872 which

<sup>387</sup> Pollock, n 75. Duxbury, n 75, p 190.

<sup>388</sup> See generally, Duxbury, n 75, ch 5.

<sup>389</sup> Friedrich Carl von Savigny (1799-1861) was a German jurist and historian. In particular, his works, *System des heutigen romischen Rechts* (Berlin, 1840-9) and *Das Obligationenrecht* (Berlin, 1851-3) had considerable influence. As Wright Essays noted, n 106, p 413, Pollock had studied classics and philosophy at university (Cambridge) and had written on Spinoza. Thus, he was, probably, attached to the approach. See also Swain, n 102, p 19. Savigny influenced other English legal writers besides Pollock and Anson, see W Markby, *Elements of Law* (1871), pp 78 *et seq.* Markby was a judge of the High Court of Calcutta. See also Duxbury, n 75, pp 190-1, 194.

<sup>390</sup> Swain, n 102, pp 203-4 'In the first couple of editions of his treatise the influence of...Savigny was very apparent...Pollock would later concede that he was sometimes too slavish in this regard [3rd ed, 1881, p v where Pollock conceded he had shown '*overmuch deference*'.].'

<sup>391</sup> Cf. MR Cohen & FS Cohen, *Readings in Jurisprudence and Legal Philosophy* (1951), p 101 'The spectacle of Pollock describing English common law by quoting whole paragraphs from a German scholar's description of the law ancient Rome raises a real problem for those who think, with Holmes, that the common law is 'not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.' Quoted by Ellinghaus, n 99, p 286. Maitland would not have been so precipitate.

<sup>392</sup> Pollock, n 75, p 152 'both the general conception and the name of consideration may well have had their origin in the Court of Chancery and the law of uses and have been thence imported into the law of contracts rather than developed by the common law courts.' Ibid, p 163 'There is some reason... to believe that the doctrine of consideration owes its origin to the court of Chancery.'

<sup>393</sup> F Pollock, *Afterthoughts on Consideration* (1901) 17 LQR 415 (*re* the 7th ed of his work) 'recent investigation and discussion having led me to recast a large part of the chapter on consideration.' Duxbury, n 75, p 199 (*re* 1920 'some of it seems to me but callow stuff now'). See also, Swain, n 102, p 220.

<sup>394</sup> Pollock, n 75, p 1 'It is somewhat curious that no such thing as a satisfactory definition of contract is to be found in any of our books. The truth is that not one definition but a series of definitions is required...'. Pollock took an '*agreement*' to be wider than a contract. Following Savigny, he stated, p 2 'When two or more persons concur in expressing a common intention so that the rights or duties of those persons are thereby determined, this is an agreement.'

<sup>395</sup> Ibid, p 3.

<sup>396</sup> Ibid, p 2 'they must communicate them [their intentions] to one another, for...uncommunicated intentions, however exactly they correspond, do not make an agreement.'

<sup>397</sup> Ibid. The intention of the parties must...be an intention directed to legal consequences.'

<sup>398</sup> Ibid. 'those consequences must be such as to confer rights or impose duties on the parties themselves.'

<sup>399</sup> Ibid, p 4 'The mutual communication which makes up an expression of common intention for the purposes of legal agreement consists of proposal and acceptance.'

<sup>400</sup> Ibid, p 5 'A contract accordingly is an agreement which produces an obligation.' This was no different to Bracton, see **12**.

described a contract as an agreement enforceable in law.<sup>401</sup> In the 4th edition of his work (1885), Pollock stated that '*every agreement...enforceable by law is a contract*' and he enumerated the pre-requisites for the same:

The first and most essential element of an agreement is the consent of the parties. There must be the meeting of two minds in one and the same intention...other conditions must be fulfilled. The agreement must be...an act in law; that is, it must be on the face of the matter capable of having legal effects. It must be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have a contrary intention...It is possible...to analyse and define agreement as constituted in every case by the acceptance of a proposal [offer]...' <sup>402</sup>

Pollock, therefore, viewed the pre-requisites for a contract as: (a) *consensus* ('*meeting of two minds in one and the same intention*'); (b) the parties intended a legal act. Elsewhere, he referred to: (c) subject matter; (d) capacity; (e) the contract not being unlawful and; (f) the need for consideration.<sup>403</sup> In respect of consideration, (in the 4th edition of his work (1885)) after referring to *Currie v Misa* (1875), Pollock stated:

An act or forbearance of the one party, present or promised, is the *price* for which the promise of the other is bought, and the promise thus given for value is enforceable. In the phrase of our medieval books - a phrase which appears to be peculiar to English usage - there must be *quid pro quo*. But when the *quid* is once established, the *quantum* is for the judgment.<sup>404</sup> (*italics supplied*)

The problem with this formulation is that it was not what the court in *Currie v Misa* (1875) actually said.

- Rather, the court had referred to '*some benefit accruing to the one party...or some loss suffered or undertaken by the other.*' Thus, Pollock's formulation was different. Further, the court did not express consideration in terms of promise. Nor, in terms of sale ('*the price for which the promise of the other is bought*');
- Thus, Pollock's definition was idiosyncratic. Also, it was untrue that *quid pro quo* (exchange) was peculiar to English usage. Although they did not use the precise expression '*quid pro quo*', exchange was central to the definition of a contract by civilian writers (see **27(b),(c)** and **(e)** and **29(a)**). Further, Pollock did not attempt to indicate what connection *quid pro quo* had to his prior statement as to '*buying*' a promise (the price).

Given Pollock's changes of opinion as to the source of consideration and his frequent amendment of statements on consideration, one wonders whether he had a good understanding of it.<sup>405</sup> Certainly, he was not disposed to track down the caselaw. As it was, Pollock accepted that the legal principles in respect of consideration had been '*extended with not happy results beyond its proper scope*'<sup>406</sup> and his later work reflected his ambivalence to the doctrine.<sup>407</sup> It seems that, by the end of his life, he was prepared to accept the contention of Lord Wright (see **39**) that consideration should be abolished.<sup>408</sup>

### **(b) Anson (1879)**

Anson, in the first edition of his *Principles of the Law of Contracts* (1879) which was to go through many editions thereafter, considered contract and consideration. He stated (influenced by Savigny and by Pollock):

<sup>401</sup> Ibid, p 6 referring to the Indian Contract Act 1872, s 2(h) 'An agreement enforceable by law is a contract.' Ibid, s10 'All agreements are contracts if they are made by the free consent of parties competent to contract, for lawful consideration and with a lawful object, and are not hereby expressly declared to be void.' See also Swain, n 102, p 265.

<sup>402</sup> Pollock, n 75 (1885 ed. I quote from the 2nd American ed of the 4th English ed), pp 2-4

<sup>403</sup> Cf. Duxbury, n 75, pp 191-2. Cf. *Haynes v Haynes* (1861) 1 Drewry & Smale 426, 433 *per* Kindersley VC.

<sup>404</sup> Pollock, n 75, p 167. Cf. 1st edition, (1876), p 147 where he quoted the *dictum* of Lush J.

<sup>405</sup> Duxbury, n 75, p 206 'Consideration itself remained as a black hole.'

<sup>406</sup> Ibid (1876 ed), p 160. In the 4th edition (1885, I quote from the 2nd American ed from the 4th English ed) he noted, p 167 'In some cases, no doubt, the rule is strained either way...' Ibid, p 172, 'Historically, the truth of the matter seems to be that suitors and judges have made attempts in various directions to strain legal principles for the purpose of making people fulfil legal promises or pay for services which could not easily be said to have been really contracted for, but which also represented benefits they were never intended to have for nothing. These attempts were in part favoured by the confused and fictitious manner in which all quasi-contractual transactions were treated; request, consideration, and promise having become, instead of the names of real facts, counters for pleaders to play with. In many cases the enterprise failed, in some it succeeded. The residue of successes appears in a few anomalous rules still laid down by the text-writers.' Ibid, p 180 'The doctrine of consideration has been extended with not very happy results beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts.'

<sup>407</sup> Also, Swain, n 102, p 220. In respect of sealing Pollock came to a view as to its inadequacy. FE Pollock, *Essays in the Law* (1922), ch 8, essay on *Archaism in Modern Law*, p 209 'In modern times the seal has become an empty formalism, and its use has been generally dispensed with by statute in the American common-law states and in our English-speaking colonies.'

<sup>408</sup> Duxbury, n 75, p 206 (Pollock writing to Goodhart, a member of the Law Revision Committee 1937, see **40**, in 1936).



We may regard contract as a combination of the two ideas of agreement and obligation.<sup>409</sup> It is that form of agreement which directly contemplates and results in an obligation.<sup>410</sup> ...Agreement requires for its creation at least two parties. There may be more than two, but inasmuch as agreement is necessarily the outcome of consenting minds, the idea of plurality is essential to it...The parties must have a distinct intention and that intention must be common to both. Where there is doubt, or difference, there cannot be agreement...There must be a communication by the parties to one another of their common intention... The intention of the parties must refer to legal relations. The assumption of legal rights and duties must be the object of agreement, as distinguished from a dinner engagement or a promise to take a walk. For the purposes of English law we may take it, as a test of this reference to legal relations, that the intention of the parties must have '*something which is of some value in the eyes of the law*', something which can be assessed at a monetary value....Agreement then is the expression by two or more persons of a common intention to affect the legal relations of those persons...<sup>411</sup>

Anson also stated:

Contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other.<sup>412</sup>

His definition of a contract only being a legally enforceable agreement '*by which rights are acquired...to acts of forbearances*' is too narrow a formulation today since contracts are multitudinous in their nature. In respect of the pre-requisites of a contract, Anson stated that these comprised:

1. In a distinct communication by the parties to one another of their intention; in other words, in proposal and acceptance.<sup>413</sup> 2. In the possession of one or other of those marks which the law requires in order that an agreement may affect the legal relations of the parties. These marks are form, and consideration. 3. In the capacity of the parties to make a valid contract. 4. In the genuineness of the consent expressed in proposal and acceptance. 5. In the legality of the objects which the contract proposes to effect. Where all these elements co-exist, a valid contract is the result...<sup>414</sup>

Although the formulation was somewhat obscure, in effect, Anson indicated that a '*valid contract is the result*' if:

- (a) the parties have capacity;
- (b) there is a subject matter;<sup>415</sup>
- (c) the parties intend a legal act;<sup>416</sup>
- (d) there is *consensus* ('*mutual consent*', '*common intention*');<sup>417</sup>
- (e) there is valuable consideration ('*something...of value in the eyes of the law*');
- (f) it is not unlawful.

Shorn of the rather obscure wording of Anson, this is the basis for a serviceable definition of a contract today (see **50(a)**). It also reflects the pre-requisites of Bracton (c. 1250) and of Blackstone (1766), as updated.<sup>418</sup> In respect of consideration, Anson had indicated that:

<sup>409</sup> Anson defined '*obligation*' as, n 76, p 4 'a power of control, exerciseable by one person over another, with reference to future and specified acts or forbearances.' Anson also stated (without citing any authority), p 5 'The thing to be done must be such as possesses, or is reducible to a pecuniary value. This is needed in order to distinguish legal from moral and social relations. If a man saves me from drowning I am under a moral obligation to him, but neither my life nor my gratitude can be estimated at a money value.'

<sup>410</sup> Anson, n 76, p 1. Anson continued 'We should therefore try to get at the meaning of agreement and obligation; and Savigny's analysis of these two legal conceptions may with advantage be considered here with reference to the rules of English law.'

<sup>411</sup> Ibid, pp 1-3. Anson also noted, p 4 'Agreement being a term of wider meaning than contract, we have to ascertain the characteristic of contract as distinguished from other forms of agreement.'

<sup>412</sup> Ibid, p 8.

<sup>413</sup> Without citing any authority, Anson, n 76, p 11 made the (breath taking) statement: 'Every expression of a common intention arrived at by two or more parties is ultimately reducible to question and answer.' He added a side note 'Agreement must originate in proposal and acceptance.' Again, he cited no authority.

<sup>414</sup> Anson, n 76, p 10.

<sup>415</sup> Oddly enough, Anson does not appear to have stated this directly. However, it is implicit from his examples.

<sup>416</sup> viz. Ibid, p 2 'The intention of the parties must refer to legal relations. The assumption of legal rights and duties must be the object of agreement, as distinguished from a dinner engagement or a promise to take a walk.' Ibid, p 14 'A proposal to be made binding by acceptance, must be made in contemplation of legal consequences; a mere statement of intention made in the course of conversation will not constitute a binding promise, though it be acted upon by the party to whom it was made.'

<sup>417</sup> Ibid, p 11 'There must be an acceptance of the promise by the person to whom it is made, so that by their mutual consent the one is bound to the other. A contract then springs from the offer of a promise and its acceptance.' Ibid, p 2 'There must be a communication by the parties to one another of their common intention.'

<sup>418</sup> In the case of Bracton, by excluding reference to delivery. In the case of Blackstone, transposing '*good*' consideration to reference to the contract being lawful (not illegal, immoral *etc*) and indicating that moral intentions are insufficient.

the intention of the parties must have '*something which is of some value in the eyes of the law*', something which can be assessed at a money value.<sup>419</sup>

As to what this value was in the '*eyes of the law*', Anson stated:

no promise, which is not under seal, is binding *unless the promisor obtains some benefit in return for his promise*, and this benefit is called '*consideration*'. Bearing this necessity in mind, we may say that proposal may assume two forms, the offer of a promise, and the offer of an act. Acceptance may assume three forms, simple assent, the giving of a promise, or the doing of an act. And thus a contract may originate in one of four ways. 1. In the offer of a promise and its acceptance by simple assent: which in English law applies only to contracts under seal. 2. In the offer of an act for a promise, as if a man offers services which when accepted bind the acceptor to reward him for them. 3. In the offer of a promise for an act, as when a man offers a reward for the doing of a certain thing, which being done he is bound to make good his promise to the doer. 4. In the offer of a promise for a promise, in which case when the offer is accepted by the giving of the promise, a contract arises consisting in outstanding obligations on both sides.<sup>420</sup> (*italics supplied*)

This analysis was very much that of Anson - not helped by the fact that - having promoted the concepts of '*offer*' and '*acceptance*' - he switched back to '*promise*'. Further, to say that consideration was the receipt of a '*benefit*' for a promise, contradicted the general caselaw view of a detriment to P or benefit to D. However, Anson also later stated:

When a contract comes before the courts, evidence is required that it expresses the genuine intention of the parties; and this evidence is found either in the solemnities of the contract under seal, or in the presence of consideration, that is to say, in *some benefit to the promisor [i.e. D] or loss to the promisee [i.e. P], granted or incurred by the latter in return for the promise of the former*. Gradually consideration comes to be regarded as the important ingredient in the contract, and then the solemnity of the deed is said to make a contract binding because it '*imports consideration*', though in truth it is the form which, apart from any question of consideration, carries with it legal consequences.<sup>421</sup> (*italics supplied*)

Anson also referred to *Currie v Misa* (1875) as the '*fullest definition of consideration*'.<sup>422</sup> Thus, it seems clear that he accepted it as an adequate definition of consideration. Further, it is asserted that Anson was correct in asserting (see above) that - when an agreement came before a court - '*evidence*' was required that it expressed the genuine intention of the parties and that this was found in '*the presence of consideration*'. Thus, he viewed consideration as being, at base, evidential. Finally, Anson equated consideration with *quid pro quo* and thought that it owed its origin to Chancery - both of which propositions are no longer sustainable.<sup>423</sup> Consideration was not just a reference to *quid pro quo* and it originated in *assumpsit*.

### (c) Conclusion

Pollock and Anson are useful in that they show that little had changed from Bracton c. 1250. Thus, Bracton has perceived a contract as an agreement which, when vested, produced a contract, which contract gave rise to (i.e. produced) obligations. Pollock also noted that a contract was an '*agreement...enforceable by law*' without trying to specify this in greater detail. This was wise since, by his time, it was impossible to say that - the nature of contracts being so varied - all of them could be treated as encompassing an exchange, like the old contracts of barter or sale. Further, both Pollock and Anson accepted a number of Bracton's pre-requisites for a contract (*viz.* capacity, subject matter, *consensus*). As for consideration, however, their formulations added little to *Currie v Misa* (1875) - unsurprising since they did not investigate the Elizabethan period.

## 37. BILLS OF EXCHANGE ACT 1882 & SALE OF GOODS ACT 1893

### (a) Bills of Exchange Act 1882

<sup>419</sup> See n 1170.

<sup>420</sup> *Ibid*, p 12.

<sup>421</sup> *Ibid*, p 31. Anson did not mention an *arra*. However, his reference to the *form* of the deed (i.e. the seal) as being the important thing is correct. Since a seal is an *arra*, it is evidence of a party being bound. *Ibid*, p 39 'that which identifies a party to a deed with the execution of it is the presence of his seal...'

<sup>422</sup> *Ibid*, p 61.

<sup>423</sup> *Ibid*, p 34 'It is no easy matter to say how consideration came to form the basis upon which the validity of informal promises might rest. It is sufficient for the purposes of the present work to say that the idea of consideration, or a '*quid pro quo*' as it is styled in some of the earlier reports, was probably borrowed by the common law courts from the Chancery.'

BOE and promissory notes were not treated the same as deeds. Rather, they were categorised as simple contracts (albeit, this categorisation was inadequate, see 32). On the basis of the law merchant, consideration was presumed (imported) and this was applied by the common law even when BOE and promissory notes were no longer effected by merchants but by everyone.<sup>424</sup> This exception was reflected in the Bills of Exchange Act 1882 ('BOE 1882'), s 30 of which provided:

(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.<sup>425</sup> (2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Section 27 also provided that valuable consideration for a BOE might be constituted by:

(1)(a) Any consideration sufficient to support a simple contract; (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.<sup>426</sup>

The BOE 1882 is still extant - albeit *inland* BOE are now obsolete, having been replaced by cheques.<sup>427</sup> As M'Neil pointed out, the law in Scotland was different to English law in respect of BOE since the doctrine of consideration did not apply.<sup>428</sup> Finally, for BOE, past consideration is acceptable.<sup>429</sup>

### **(b) Sale of Goods Act 1893**

The Sale of Goods Act 1893 Act ('SGA 1893') consolidated the law of sale. Section 1(1) provided that:

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money *consideration*, called the price.<sup>430</sup> (*italics supplied*)

Reference to '*consideration*' was not actually necessary since it could have, as easily, said '*for money*.' This definition helped distinguish between a sale and barter (goods for goods) as well as a sale and a gift<sup>431</sup> - although, today, the fact that consideration has been given does not preclude a gift<sup>432</sup> The SGA 1893 was

<sup>424</sup> McBain Law Merchant, n 134, pp 108-11,121.

<sup>425</sup> The BOE Act 1882, s 2 provided that '*value*' means *valuable consideration*' and s 4(b) provided that a BOE was not invalid by reason 'That it does not specify the value given, or that any value has been given therefor.'

<sup>426</sup> Ibid, s 27(2) 'Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time. (3) Where the holder of a bill has a lien on it, arising either from a contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.'

<sup>427</sup> See Davies, n 148, p 343 (decline in the inland BOE began markedly in the 1880s). The difference between inland and foreign BOE related to the fact of the latter being required to be noted and protested for non-payment. It has been asserted that this is no longer required and should be abolished, see GS McBain, *Modernising the Law of Notarisation and Public Notaries* [2016] JBL, Issue 2, pp 91-114. Thus, a distinction between inland and foreign BOE could, then, be removed.

<sup>428</sup> A M'Neil, *Bills of Exchange, Cheques and Promissory Notes* (1920), pp 36-7 'To render a bill valid in Scotland it does not require to have been granted for value adequate or inadequate, nor do the words '*for value received*' require to form part of it, whether value have been received or not...In England...a bill is invalid if granted for no valuable consideration. Hence a voluntary gift of money does not constitute value.'

<sup>429</sup> Salmond & Williams, n 78, pp 128-9 'the rules thus laid down in the Act differ from the ordinary rules in the following respects.(i) Past consideration is a sufficient consideration. (ii) Provided that consideration was given for a bill or note at some stage, a person may be liable on the instrument although not himself a party to that (or any other) consideration. Thus A may draw a cheque in favour of B or order and make a gift of it to B. B may endorse it to C in payment of a debt, and may give it to D. D can sue A. (iii) Consideration is presumed unless the contrary is shown. The ordinary rule is that a party suing on a simple contract must allege and prove consideration.' See also Anson (30th ed), n 76, p 103 '[s 27] is a genuine exception to the rule that past consideration does not count.'

<sup>430</sup> Section 1(3) provided that 'Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called '*an agreement to sell*.'

<sup>431</sup> As Chalmers noted, see e.g. R Sutton & NP Shannon, *Chalmers' Sale of Goods Act 1893* (12th ed, 1945), p 5 'Where goods are transferred by one person to another without any price or other consideration being given in return, the transaction is called a gift. Where a gift of goods is not effected by deed, it is incomplete and ineffectual until delivery to the donee of the thing intended to be given. *Donatio perficitur possessione accipientis*. The intention to transfer the property is of no avail. The distinction between sale and gift in this respect has been elaborately discussed by Lord Bowen [they referred to *Cochrane v Moore* (1890) 25 QBD 57] So, again, a gift must be distinguished from a declaration of trust. In the case of a gift there must be a transfer of possession, in the case of a declaration of trust the trustee must retain, and intend to retain, the control. An inchoate gift falls between the two.'

<sup>432</sup> See n 835.

replaced by the Sale of Goods Act 1979; however, s 1(1) was not affected.<sup>433</sup> The SGA 1893 also contained a section 4 (now repealed, it took over from the Statute of Frauds 1677, s 17, see **28(c)**) which referred to sales of goods above the value of £10.<sup>434</sup>

### (c) **Conclusion**

Both these Acts affected the doctrine of consideration. The BOE 1882 encapsulated in legislation an exception to past consideration not being adequate.<sup>435</sup> The SGA 1893 (now SGA 1979) provided that a sale of goods was a contract in which goods were exchanged for money - no other consideration was required.

## 38. **COMMERCIAL LAW - 1891-1915**

### (a) **Jenks (1891) & Stevens (1903)**

Jenks considered the history of the doctrine of consideration in the Yorke Prize Essay for 1891.<sup>436</sup> His conclusions on its origin have already been considered (see **16(a)**). In respect of the definition of consideration, he stated:

A consideration is a detriment voluntarily incurred by the promisee [or a benefit conferred on the promisor at the instance of the promisee] in exchange for the promise<sup>437</sup> ... Such consideration may be either the performance or the promise of an act or forbearance.<sup>438</sup> ... The existence of a consideration is essential to the validity of every 'simple' or formless contract, i.e., every contract not contained in sealed writing nor apparent on the records of a court of justice<sup>439</sup> ... in the case of negotiable instruments, the existence of consideration is presumed, in the absence of suspicious circumstances.<sup>440</sup> In ordinary cases, it is immaterial whether or not the consideration be economically adequate to the promise....<sup>441</sup> ... the consideration must be genuine.<sup>442</sup>

Jenks noted that the wording in brackets was in deference to the opinion of Pollock, who seemed to doubt its authority.<sup>443</sup> For his part, Stevens, in his *The Elements of Mercantile Law* (1903),<sup>444</sup> followed Pollock in defining a contract as an agreement enforceable by law. He noted that contracts were divisible into specialties and parol contracts.<sup>445</sup> Also, '*There must be consideration to support a simple contract, but otherwise, with certain exceptions...no particular form is necessary; nothing but agreement...is required for the formation of a contract.*'<sup>446</sup> In respect of a definition of consideration, Stevens followed *Currie v Misa* (1875)(see **35(e)**).<sup>447</sup>

<sup>433</sup> SGA 1979, s 2(1) 'A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.'

<sup>434</sup> viz. 'a contract for the sale of any goods of the value of [£10] or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.'

<sup>435</sup> This does not apply to Scotland, which has no doctrine of consideration.

<sup>436</sup> Jenks, n 91.

<sup>437</sup> Ibid, p 3. Jenks continued 'This, is submitted, is the general sense of the text-books on the subject, though some of them express themselves obscurely. It may be taken as the view of Smith and Anson. [Jenks cited Smith, *The Law of Contracts*, 5th ed. p 154 and Anson, *Principles of the English Law of Contracts*, 4th ed, p 68]. Addison does not furnish a definition, and Leake is very vague [Jenks cited SM Leake, *Elements of the Law of Contracts*, 1st ed (1867), p 17' (the reference should be to p 10) Some matter accepted or agreed for, as a return for the promise made.']. Chitty is positively misleading when he speaks of 'a sufficient consideration or recompense for making, or motive or inducement to make, the promise upon which a party is charged.' [Jenks cited Chitty, *Treatise on the Law of Contracts*, 12th ed, p 19]. Jenks discussed the authority for his description of consideration, at pp 26-31, citing various *dicta*, such as that of Lush LJ in *Currie v Misa* (1875), see **35(e)**.

<sup>438</sup> Ibid, p 4.

<sup>439</sup> Ibid, p 5. Jenks noted an exception; a negotiable instrument could be discharged at any time by parol, without consideration. Ibid, p 7.

<sup>440</sup> Ibid, p 11.

<sup>441</sup> Ibid, p 12.

<sup>442</sup> Ibid, p 13.

<sup>443</sup> Ibid, p 2. He cited F Pollock, *Principles of Contract*. 5th ed (1889), p 166.

<sup>444</sup> Stevens, n 77 (ed. H Jacobs, 4th ed, 1903).

<sup>445</sup> Stevens noted, p 1, that deeds, as well as being written, sealed and delivered, were 'in practice...always signed'. As to delivery, p 2 'Delivery may be actual...or constructive - i.e. speaking words importing an intention to deliver. As a rule, when the executant touches the seal, he says 'I deliver this as my act and deed', and this is sufficient delivery, although he keeps it in his own possession.' Stevens cited *Doe d Garmons v Knight* (1826) 5 B & C 671 (108 ER 250).

<sup>446</sup> Ibid, p 3.

<sup>447</sup> Ibid, p 16. Stevens also stated 'there must be some consideration to support even a written contract, unless the contract be under seal or of record, is a principle of our law, for *ex nudo pacto non oritur actio*.' and that BOE and 'similar instruments...by the custom of

**(b) Brown (1909)**

Brown - a Professor of Commercial Law at St Mungo's College in Glasgow, Scotland - delivered one of the first condemnations of the doctrine of consideration, noting that few English lawyers had done so.<sup>448</sup> He opined that consideration originated from *quid pro quo*<sup>449</sup> and that it had '*no place in the law of Scotland.*'<sup>450</sup> He also noted that the law of evidence in both countries in the case of contract was, otherwise, closely connected.<sup>451</sup> His criticisms of the doctrine comprised the following:

- **Term Misleading & Illusory Considerations.** Brown (I merge two of his propositions since they are connected) thought the term (name) '*consideration*' suggested the idea of value where such did not necessarily exist. Also, that it '*tends to bring into existence artificial and unreal considerations*' which often formed an excuse for evading the doctrine;<sup>452</sup>
- **Inconsistent Application.** Brown observed that the caselaw was inconsistent;<sup>453</sup>
- **Rules & Distinctions Artificial.** Brown noted that the rules and distinctions which had grown round the doctrine required '*for their just discernment, the utmost energies of the trained legal mind.*'<sup>454</sup>

Brown concluded that the doctrine did '*not fulfil its professed purpose...it gives rise to mis-understanding and confusion; and... it frequently leads to injustice.*'<sup>455</sup>

**(c) Dunlop (1915)**

Until this House of Lords decision, the tendency had been to follow the formulation of Lush J in *Currie v Misa* (1875). However, in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* (1915) ('**Dunlop**'),<sup>456</sup> a case where an agreement was held to be unenforceable for want of consideration, Lord Dunedin, while deprecating the doctrine,<sup>457</sup> followed the formulation of Pollock (see **36(a)**) stating that:

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merchants...import consideration - i.e. consideration is assumed, but, as between immediate parties, this assumption may be rebutted. If the contract be one in restraint of trade, though under seal, consideration is required.'

<sup>448</sup> Brown, n 92, p 3 'Much study and ingenuity have been expended in tracing the history of the doctrine and in endeavouring to reconcile on philosophical principles its many apparent inconsistencies, but few English legal exponents have criticised its intrinsic value...'

<sup>449</sup> Ibid, p 6 'In its origin and early development consideration, or *quid pro quo* as it was then termed...'

<sup>450</sup> Ibid. Also, p 16 'By the law of Scotland consideration is not essential to a contract.'

<sup>451</sup> Ibid, p 17(1) The English contract of record is analogous to the Scottish deed containing a consent to registration for execution. (2) The English deed under seal corresponds to the Scottish tested or holograph deed. Each represents the formal writing of its own system, and is in many cases essential to the validity of the obligation. Apart from the mere theory of consideration, both stand in the same position and are equally binding in law. (3) Both in England and Scotland writing is essential to the validity of many contracts and obligations, not necessarily formal in the sense of being under seal, or tested, or holograph. In modern English law this is chiefly due to the operation of the Statute of Frauds [1677] and similar statutes. In Scotland the result flows partly from statute and partly from the common law. (4) In limited classes of cases not only is writing essential in both countries, but the forms in each have been rendered identical by force of a British statute. (5) In England mercantile matters are not excepted from the general rules as to evidence, unless by statute. In Scotland the common law gives special validity to writings *in re mercatoria*. (6) In England consideration is necessary to the constitution of all contracts whether verbal or in writing, if not under seal. In Scotland consideration is not required in any case.' In Scotland, the use of the earnest (*arles* penny) was age old. J Jamieson, *An Etymological Dictionary of the Scottish Language* (Edinburgh, 1818) 'Arles, Erlis, Arlis, Arlis-Penny, Airle-Penny 1. An earnest of whatever kind, a pledge of full possession...2. A piece of money given for confirming a bargain...3. A piece of money put into the hands of a seller when one begins to cheapen any commodity; as a pledge that the seller shall not strike a bargain, or even enter into terms with another while he retains the *arles*. Lat[in] *arrhabo, arrha*. Gael[ic] *iarlus*.' For the reference to '*arles*', see Maitland, n 500, p 133 ('at Arles the God's penny went towards the keeping up a candle for Saint Trophimus.').

<sup>452</sup> Ibid, p 40 'illusory considerations as a hawk, a beaver hat, a sheet of paper, a stick of sealing wax, or a peppercorn'.

<sup>453</sup> e.g. pp 42-3. 'A promise by a widow to pay a debt incurred by her during marriage is invalid for want of consideration, but a promise by a discharged bankrupt to pay a debt falling under the sequestration is valid. A gift by an uncle to his nephew of sum of money in a bag lying on the table is valid, without consideration, by the mere force of the words, '*Take it you and carry it home with you*', but where the uncle takes the trouble to write out a promissory note and formally to hand it to the nephew in consideration of long and faithful voluntary services, the note is worthless.'

<sup>454</sup> Ibid, p 43 'The rules and distinctions which have grown round the doctrine require, for their just discernment, the utmost energies of the trained legal mind...in England many bargains, morally just and reasonable, deliberately entered into, and satisfactorily evidenced, have been set aside on grounds which may be regarded as purely technical.'

<sup>455</sup> Ibid, p 44.

<sup>456</sup> [1915] AC 847.

<sup>457</sup> At p 855 *per* Lord Dunedin, 'I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce.'

An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.<sup>458</sup>

His formulation tended to be followed by later courts and legal writers, even though other members of the court had a different formulation. Thus, Viscount Haldane indicated that the consideration must be given by the promisee [P].<sup>459</sup> However, this was not in Pollock's (Lord Dunedin's) definition.

### 39. LORD WRIGHT - CRITICISM OF THE DOCTRINE (1936)

In 1936, Lord Wright - an eminent House of Lords judge - published an article, '*Ought the Doctrine of Consideration to be abolished from the Common Law ?*' This article was (probably) the first English article to look at this issue,<sup>460</sup> since, as can be seen - apart from a *plethora* of writing seeking to find the origin of the doctrine - no attention had been given whether the doctrine was of any *practical* use. Further, unlike other writers on the subject, Lord Wright was a commercial lawyer and a judge with many years experience.<sup>461</sup> Refreshingly, he also considered the position under foreign law - such as Scots and South African law - both of which had no such doctrine.<sup>462</sup>

#### (a) Intention not Consideration

Lord Wright dealt, from the outset, with the *fear* factor of seeking to change something long established in the law. He stated:

Rules of law, like everything else in this modern age, must be prepared to justify themselves against attacks, and cannot shelter behind antiquity or prescription.<sup>463</sup>

He noted that there was '*even now*' considerable uncertainty as to what was meant by the term. Lord Wright accepted Pollock's definition<sup>464</sup> - which Lord Dunedin had adopted in *Dunlop* (1915) (see above)<sup>465</sup> - but stated:

That definition involves the idea that the act or forbearance is something of value, something to which the law, in a materialistic or practical sense, can attach value. The definition also involves that the act or forbearance is bought, that it is done or suffered by one party at the request of the other; it is a matter of mutuality, not a motive or emotion of affection, benevolence, bounty or charity which from their nature must be personal to the promisor. I treat detriment to the promisee [P], not benefit to the promisor [D], as the essential factor...<sup>466</sup>

Lord Wright then asked:

The question is...Why is not the contractual intention, if it is properly established, enough in itself ? And the further question is whether the common law test can be logically or consistently applied; is it not rather calculated to defeat than to advance the needs of justice, is its origin to be found not in absolute truth but in historical accidents and in the creation of remedies in contract for remedies *in delicto*, and is its development not to be traced in fictions and evasions ? If it is neither theoretically necessary nor practically satisfactory, is there any need to preserve the idea other than legal conservatism ?<sup>467</sup>

#### (b) Problems with the Doctrine

<sup>458</sup> Ibid.

<sup>459</sup> At p 853 'If a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.'

<sup>460</sup> Lorenzen (a US academic at Yale) had previously written, in 1919, an article in the Yale Law Journal (see n 105) concluding that consideration was an unnecessary pre-requisite. For the views of a Scot's lawyer, see Brown (1909), see **38(b)**.

<sup>461</sup> Wright, n 106, pp 1225-6. He noted that he 'has for over thirty-five years practised as counsel at the Bar, [and] sat as judge in the King's Bench court, [and] in appellate courts under the common law...'

<sup>462</sup> Ibid, p 1226 'I sit in appellate tribunals which administer laws other than the common law, such as the laws of South Africa and Ceylon where the basic law is the Roman Dutch law, or of Scotland where the basic law is the civil law: in these jurisdictions consideration has no place; nor has it a place in the laws of France, Italy, Spain, Germany, Switzerland and Japan. These are all civilised countries with a highly developed system of law; how then is it possible to regard the common law rule of consideration as axiomatic or as an inevitable element in any code of law ?'

<sup>463</sup> Wright, n 106, p 1225.

<sup>464</sup> Ibid, p 1226. For Pollock, see **36(a)**, Lord Wright cited the 4th ed (1921) of Pollock's work.

<sup>465</sup> Ibid, p 1227.

<sup>466</sup> Ibid. That said, it should be note that these are, invariably, reciprocal.

<sup>467</sup> Ibid.

Lord Wright then analysed why consideration was unnecessary. This may be summarised as follows:

- **No Contractual Intention is the Issue - not Consideration.** Considering *Balfour v Balfour* (1919)<sup>468</sup> and *White v Bluett* (1853),<sup>469</sup> the issue was not the presence (or not) of consideration but that there was no intention to contract. That was the crucial matter. Thus, '*consideration cannot be regarded as the conclusive test of a deliberate mind to contract: whether there is such a mind must always remain as the decisive and overriding question*',<sup>470</sup>
- **Consideration Defeats Intention of the Parties.** Lord Wright cited *Foakes v Beer* (1884)<sup>471</sup> as an example where an absence of consideration had the effect of defeating the legitimate commercial expectations of the parties - especially when, had it been in a deed or an *arra* had been given, there would have been no problem.<sup>472</sup> He also cited Lord Dunedin in *Dunlop* (1915).<sup>473</sup> Lord Wright also referred to a South African case, *Conradie v Rossouw* (1919)<sup>474</sup> where de Villiers AJA stated: '*It was a serious mistake in English law when what was merely required as proof of a serious mind was converted into an essential of every contract.*',<sup>475</sup>
- **Scots Law - No Consideration.** Lord Wright noted that Scots law treated consideration as a matter of evidence and not of substance.<sup>476</sup> He also stated '*Modern legal thought has either adopted or is tending to adopt the simple idea that... 'conventio without more = contractus*',<sup>477</sup>
- **Pillans v Van Mierop (1765).** Lord Wright cited this case (see 30), noting that it would have been different if an *arra* had been given ('*if a peppercorn had been sent them*').<sup>478</sup> He also noted that the case - had it been allowed to stand - would have helped deal with the doctrine, but that it was too '*revolutionary*' for its time.<sup>479</sup> Lord Wright also (impliedly) deprecated the tendency of English lawyers (and judges) to be too narrow in their review,<sup>480</sup>

<sup>468</sup> [1919] 2 KB at p 578. A husband promised his wife £30 a month in return for her agreeing to support herself entirely out of it. Atkin LJ had stated: 'it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife... 'To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration.' Lord Wright also cited, at p 1228, various South African cases.

<sup>469</sup> 23 LJ Ex (NS) 36 (1853)(father's promise unenforceable since the father and son did not intend to create a legal obligation). Also, *Rose and Frank Co v Crompton* [1925] AC 445 (honourable pledge clause).

<sup>470</sup> Wright, n 106, p 1229. Lord Wright also stated 'In any system, consideration may be introduced as evidence of that deliberate mind; but it cannot, even under the common law, be decisive: the only question is whether it can be put on a pedestal as the '*sole*' test.' (*underlining supplied*).

<sup>471</sup> 9 App Cas 605 (1884). Lord Wright stated the headnote 'An agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of interest upon the judgment.'

<sup>472</sup> Lord Wright, n 106, p 1231, cited *Pinnel's Case* (1602) 5 Co Rep 117a (77 ER 237) 'the gift of a horse, hawk, or robe, etc, in satisfaction is good'.

<sup>473</sup> See 39(c).

<sup>474</sup> So African LR [1919] App Div 279, pp 322-3. De Villiers was Chief Justice of the Supreme Court of the colony of the Cape of Good Hope.

<sup>475</sup> Lord Wright, n 106, p 1235.

<sup>476</sup> *Ibid*, pp 1236-7 'In Scotland, the common law doctrine of consideration finds no place...It is a matter of proof, not of substance. The contract is good without consideration, though the court requires the additional piece of evidence: hence consideration merely assumes an evidentiary character.' Lord Wright cited Lord Mackenzie, *Roman Law* (6th ed, 1886) 3.3.2 'In Scotland, it is not essential to the validity of an obligation that it should be granted for a valuable consideration, or indeed for any consideration whatever; the rule of civil law, that no action arises from a naked paction, being rejected, and an obligation undertaken deliberately, though gratuitously, being binding. This is in conformity with the canon law by which every paction produceth action.'

<sup>477</sup> *Ibid*, p 1238. Lord Wright cited FP Walton, *Cause and Consideration in Contracts* (1925) 41 LQR 306 (he considered that cause in the French Civil Code, arts 1131 & 1133 should be abolished).

<sup>478</sup> *Ibid*, p 1241.

<sup>479</sup> *Ibid*, pp 1241-2 'This decision, if it had been allowed to stand, would have gone some way to bring the English law in line with continental laws, and would have established deliberate intention as the test of a binding contract; but the decision was too revolutionary.'

<sup>480</sup> *Ibid*, p 1246 'I wonder how things would have gone if the common lawyers had extended their outlook beyond the English cases to a system of law such as the Roman Dutch law or had broken loose from their close adherence to tradition and precedent, or had ever considered scientific theories of contract.'

- ***Business Problems.*** Lord Wright pointed out difficulties arising from the doctrine in respect of: (a) BOE; (b) compositions with creditors; (c) bankers confirmed credits;<sup>481</sup> (d) reliance on a promise.<sup>482</sup> Also, how equity had sought to mitigate the harsh effects of such a doctrine<sup>483</sup> as well as the devices employed to circumvent it.<sup>484</sup>

### (c) **Conclusion - Lord Wright**

Lord Wright concluded that the doctrine was a '*mere incumbrance*'.<sup>485</sup> Instead, the court should look to the intention of the parties. Thus, '*the theory of consideration ought to find no place in our system of contract law.*'<sup>486</sup> However, he accepted that '*there is a dead weight of legal conservatism to be overcome.*'<sup>487</sup> He concluded:

The abolition of consideration would not affect the law relating to mistake, illegality, immorality, impossibility or failure of condition. In conclusion, I see no practical objections to the abolition of the doctrine...<sup>488</sup>

In his later *Essays* (in 1939) he was (perhaps) even more trenchant, stating as to consideration:

No other modern system has any such notion; the Civil Code does indeed provide for '*cause*' as a condition of contract, but it seems to be agreed that the provision is not practically significant: the Roman-Dutch law, the Scots law, know nothing of consideration; modern codes, the German and the Swiss, have disregarded the notion. Consideration is thus clearly no necessary part of a civilised law of contract. Its origin in the common law is obscure and due to a series of procedural accidents; it has had many vicissitudes in its history, and has become riddled with inconsistencies and anomalies. It has prevented the enforcement of many just contracts, and has led to misplaced ingenuity and chicanery. It is true to say that by reason of the technical rule of consideration, many common sense and essential operations of modern commerce are unenforceable in law, such for instance as bankers' commercial credits...the sole condition of the enforceability of a contract, assuming the transaction to be free from illegality, fraud, mistake, or kindred defects, is that the parties should have intended to enter into binding relations of contract. I think this view should be accepted as the rule of the common law.<sup>489</sup>

***In conclusion, Lord Wright raised many salient points against the doctrine and stressed that its abolition would not affect other areas of law.***

## 40. **LAW REVISION COMMITTEE (1937)**

<sup>481</sup> Cf. Goode, n 64 (1st ed), p 89 'To give rise to a contract it is usually necessary that consideration be furnished for the offeree's promise. But exceptionally an abstract undertaking may be enforced (as in the case of a banker's engagement under an irrevocable letter of credit)...'. Also, p 658.

<sup>482</sup> Lord Wright, n 106, pp 1247- 50. Lord Wright, p 1248, cited R Pound, *An Introduction to the Philosophy of Law* (1922), p 156 'the doctrine of consideration with its uncertain lines stood in the way of many things which the exigencies of business called for and business men found themselves doing in reliance on each other's business honor and the banker's jealousy of his business credit, with or without assistance from the law.'

<sup>483</sup> Ibid, p 1250.

<sup>484</sup> Ibid, p 1251 'I should like, but may not here further multiply instances of the working of the doctrine... nor shall I seek to repeat the various absurdities, inconsistencies, and anomalies which have emerged out of the doctrine...Certainly the books are full of strange and artificial notions which have passed muster as valuable consideration.' Examples of such include *Bainbridge v Firmstone* (1838) 8 A & E 743 (112 ER 1019)(consideration was the permission to weigh two boilers). Patteson J at p 744 'there is a detriment to the [P] from his parting with possession for even so short a time'. See also Jenks, n 91, p 53.

<sup>485</sup> Ibid, p 1251.

<sup>486</sup> Ibid, pp 1252. Lord Wright noted the proposal of Holdsworth that a contract should be enforced if in writing. Ibid, p 1253 and Holdsworth, n 95, vol 8, p 47. Lord Wright also stated, p 1253, 'In that way a gratuitous promise would be enforced if there is written evidence.'

<sup>487</sup> Ibid, p 1253.

<sup>488</sup> Ibid, p 1253.

<sup>489</sup> Wright Essays, n 106, pp 375-6. He continued, p 376 'It is true that in most cases of contract there is in fact consideration, and in any disputed case consideration would have the strongest evidential value as going to show the intention to make a binding contract. That is its true function; but that is a very different conception from the present common law, which treats it as the sole condition on which a contract can be valid at all. I do not see any difficulty in leaving it to the court...to decide on all the circumstances of the case whether or not in fact there was a serious intention to contract and, if they find there was, to give effect to that intention. *Pacta sunt servanda*.' [agreements must be kept].



In 1937, the Law Revision Committee ('LC') (of which Lord Wright was a member) considered the doctrine.<sup>490</sup> Its Report contained a useful summary as to its origin and history of the doctrine (see **16(a)**) Also, some clear recommendations. It stated:

No doctrine of the common law of England is more firmly established at the present day than the doctrine of consideration, which in general terms provides that a promise not made under seal shall only be binding in law if the person to whom the promise is given furnishes something in return.<sup>491</sup>

The LC noted that the '*doctrine and the cluster of highly technical rules which have sprung from it*'<sup>492</sup> had to be considered in light of its history. The LC considered that the source of the doctrine was (essentially) the action of *assumpsit* and that it was the means of determining - in the 16th century - whether a remedy could be sought by means of that action.<sup>493</sup> However, what was, at the start, a relatively simple rule became hardened into a substantive rule of law that sometimes produced injustice.<sup>494</sup>

It thus came about that a doctrine, which was originally no more than a test by which it could be ascertained whether the breach of a promise was actionable or not in *assumpsit*, developed into a definite rule of law which requires that something of material value shall be given, or some other detriment shall be sustained, by the recipient of a promise in order to make that promise enforceable. In other words a device designed to provide a test for the enforceability of simple promises by one particular form of action, *assumpsit*, has become a fundamental rule of the law of contract.<sup>495</sup>

#### (a) Present Inadequacies

The LC set out various inadequacies of the doctrine by 1937, viz.

- **Gratuitous Promises & Morally Binding Commitments**. The LC pointed out that the doctrine was not needed to distinguish between onerous and gratuitous agreements since adequacy of consideration was immaterial.<sup>496</sup> Nor between a '*gentleman's agreement*' (i.e. one that the person should uphold on the grounds of morality or moral honour) and one intended to be legally binding since - even if consideration was present - the parties still might have had no intention to enter into a legal relationship;<sup>497</sup>
- **Doctrine contradicts Intention**. The doctrine often compelled the courts to invalidate a promise which the parties intended to be binding. The LC quoted Lord Dunedin in *Dunlop* (1915) that the doctrine may '*make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce.*'<sup>498</sup>
- **No Logic - Past & Nominal Consideration**. The LC pointed out that the doctrine was often illogical. For example, it held that past consideration was inadequate. However, (a) a promise to pay a statute-barred debt was binding; and (b) past consideration given at the promisor's request had been allowed in certain cases to support a subsequent promise.<sup>499</sup> Also, consideration could be wholly nominal;<sup>500</sup>

<sup>490</sup> LC-6, n 636. It adopted the definition of Lord Dunedin in *Dunlop* (1915), see **38(c)**, also stating, p 12, 'It is unnecessary for us to discuss the question whether detriment to the promisee is the exclusive element or whether benefit to the promisor should be regarded as an alternative element.'

<sup>491</sup> Ibid, p 12.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid, p 13 'Towards the end of the 16th century the facts [i.e. evidence] which had to be established before a remedy could be sought by means of the action of *assumpsit* came to be known as the '*consideration*'. They usually consisted of some detriment incurred by the person to whom the promise was given or of the simultaneous exchange of promises.'

<sup>494</sup> Ibid, p 14 'Soon the origin of the doctrine became obscured and it hardened into a substantive rule of law, the working of which sometimes produced injustice, so that we find attempts being made to modify its rigidity.'

<sup>495</sup> Ibid.

<sup>496</sup> Ibid, pp 14-5 'It cannot be to distinguish onerous and gratuitous agreements because adequacy of consideration is wholly immaterial, and some promises which are technically held to be supported by consideration are, in fact, nothing more or less than purely gratuitous promises.'

<sup>497</sup> The LC cited *Balfour v Balfour* [1919] 2 KB 571 and *Rose and Frank v Crompton* [1925] AC 445.

<sup>498</sup> Ibid, p 15 citing *Dunlop* (1915), see **38(c)**.

<sup>499</sup> Ibid. 'It has been necessary in the interests of elementary justice to allow exceptions from the doctrine which cannot be justified on the grounds of any logic. For instance, although past consideration is no consideration, it has been held that a promise to pay a statute-barred debt is binding, though there is recent judicial opinion to the effect that this case is not a real exception. So also a past consideration, given at the request of the promisor, has been allowed in certain cases to support a subsequent promise, on the ground that the subsequent promise merely fixed the amount payable under an earlier promise (to be implied from the circumstances) to pay a reasonable sum.'

<sup>500</sup> Ibid. 'The so-called '*nominal*' consideration - a peppercorn or the like - is merely a pretence adopted to render a gratuitous promise enforceable.'

- ***Hardship or Serious Business Inconvenience***. The LC gave as examples: (a) the rule that a promise to pay a smaller sum in discharge of a greater was invalid unless under seal;<sup>501</sup> (b) a debtor's composition with his creditors;<sup>502</sup> (c) a banker's commercial credit;<sup>503</sup> (d) where a man promised to do something he was already legally bound to do;<sup>504</sup>
- ***Defeats Reasonable Expectation of the Parties***. The LC referred to the gratuitous promise to keep an offer open for a stated period.<sup>505</sup> Also, promises to subscribe to an education (or charitable) institution.<sup>506</sup>

The LC concluded:

Enough has been said to show that to-day in very many cases the doctrine...is a mere technicality, which is irreconcilable either with business expediency or common sense, and that it frequently affords a man a loophole for escape from a promise which he has deliberately given with intent to create a binding obligation and in reliance on which the promisee may have acted.<sup>507</sup>

### **(b) Solution - Abolition or Reform ?**

The LC indicated that the inconvenience and possible injustice resulting from the doctrine raised the question whether it should be abolished and *'There is no doubt much to be said in favour of its abolition'*,<sup>508</sup> also noting that it was not found in Scots, French or German law.<sup>509</sup> However, they stated that, while *'Many of us would like to see the doctrine abolished root and branch'*, such a recommendation would *'probably be unwise'*<sup>510</sup> since:

It is so deeply embedded in our law that any measure which proposed to do away with it altogether would almost certainly arouse suspicion and hostility.<sup>511</sup>

Thus, the LC recommended that an opportunity be taken to *'prune away from the doctrine those aspects of it which can create hardship or cause unnecessary inconvenience'*<sup>512</sup> They made recommendations, with the

<sup>501</sup> Ibid. 'It is true that various devices have been found to circumvent this rule, such as that a change in the time or mode of payment, often quite illusory in character, or the addition by the debtor of a canary or tom-tit, will suffice to constitute consideration for the creditor's promise to forgo part of his debt.' It also cited *Foakes v Beer* (1884) 9 App Cas 605.

<sup>502</sup> Ibid, p 16 'the problem, still unsolved, of discovering the consideration for a debtor's composition with his creditors.'

<sup>503</sup> Ibid, 'Where goods are sold on terms requiring payment of the price by a banker who is not a party to the contract of sale, it has been argued that there is no consideration for the banker's promise to pay the seller the price because such consideration as exists for this promise moves to the banker from the buyer of the goods and not the seller. This defence has never been pressed hitherto, owing to the reluctance of English bankers to rely on technicalities of the law, but it might be insisted on in the type of case in which a dispute arises whether the buyer has carried out his obligation to secure payment by the proper form of bankers' credit (see *Panoutsos v Raymond Hadley Corporation* [1917] 2 KB 473), and the liquidator of a banking company might be virtually compelled to take this point.'

<sup>504</sup> Ibid 'A promise of this kind is sometimes held void for want of consideration, though it is a matter of controversy, in cases where the original obligation is a contractual one, whether this rule applies only where the parties are the same or extends to the case where the second promise is given to a third party. But in either event there seems to be no good reason why the second promise should be treated as invalid, provided that the court has power to decline to enforce it on grounds of public policy when they exist.'

<sup>505</sup> Ibid 'The party receiving and relying upon a promise of this kind may incur considerable trouble and expense in consequence, but if the offer is revoked before the period runs out he is left without any remedy because there is no consideration for keeping the offer open. It is small consolation to him to be told that he ought to know the law. His retort would probably be that the law should be altered.'

<sup>506</sup> Ibid 'as the law now stands certain promises to subscribe to an educational or other charitable institution cannot be enforced because they are given without consideration. It can easily happen (and has happened) that an institution of this character embarks upon a scheme of expenditure in reliance upon such a promise and then suffers heavily when the promise is not performed. The general conscience of mankind regards such a promise as one which should be carried out if it is made after due deliberation, but the law gives no assistance if such a promise is repudiated.'

<sup>507</sup> Ibid, p 17.

<sup>508</sup> Ibid.

<sup>509</sup> Ibid 'A lawyer instructed to prepare a code of the law of contract and starting with a clean slate would be most unlikely to adopt the doctrine. It is peculiar to Anglo-American law and is found nowhere else. The law of Scotland, for certain purposes, recognises the difference between gratuitous and onerous promises, but has always rejected the idea that consideration is essential to the formation of a contract. The French Civil Code recognizes *'cause'* as an element in a contract, but this requirement, which seems to refer either to the motive underlying the making of the contract or to the purpose for which it is made, appears to be largely academic in character. It does not resemble *'consideration'* or give rise to any of the difficulties which have been discussed. German law, so far as concerns the formation of the contract, has regard solely to the intention of the parties to a contract and does not concern itself either with *'cause'* or *'consideration'*. This shows that highly developed systems of modern law can function quite satisfactorily without the aid of the artificial common law doctrine of consideration with its subtle distinctions and refinements.'

<sup>510</sup> Ibid, p 17.

<sup>511</sup> Ibid.

overall effect of treating consideration as evidence of an intent to enter a legal relationship.<sup>513</sup> The LC proposed the following:

- **Writing**. Following Mansfield CJ in *Pillans v Van Mierop* (1765)(see 30) and writers such as Holdsworth, consideration should not be required where the promise was in writing. This was an extension of the position that the same was not required (or, rather, that it was presumed/imported) when in a deed. That said, the LC accepted that this would not prevail if the parties did not *intend* to enter into a legal relationship;<sup>514</sup>
- **Past Consideration is no Consideration**. The LC noted that this was (often) evaded as well as being anomalous.<sup>515</sup> It recommended abolition of the rule, with two exceptions;<sup>516</sup>
- **Pinnel's Case (1602)**. A rule - for which this case was cited as authority - that it was *nudum pactum* to accept payment of a lesser sum in satisfaction of a greater, should be abolished;<sup>517</sup>
- **Existing Duty no Consideration**. A promise made by A to B in consideration of B doing (or promising to do) something he was already bound to do, should be enforced by law;<sup>518</sup>
- **Consideration must move from the Promisee**. This rule should be abolished;<sup>519</sup>
- **Promise to keep Offer open**. The rule that a promise to keep an offer open for a definite period of time (an option) was not enforceable unless the promisee gave some consideration for it, should be abolished;<sup>520</sup>
- **Part Performance in Unilateral Contract**. The LC noted that English law divided parol (oral) contracts into: (a) bilateral, *viz* a promise for a promise; (b) unilateral, *viz*. a promise for an act, which promise becomes binding when the act is wholly performed. The LC recommended that a promise made in the case of (b), should be enforceable as soon as the promisee has entered upon performance of the act - unless the promise included expressly (or by implication) a term that it can be revoked before the act has been completed;<sup>521</sup>
- **Promise with knowledge Promisee will act in reliance**. The LC recommended that a promise which the promisor knew (or reasonably should have known) would be relied on by the promisee, should be enforceable if the promisee altered his position to his detriment in reliance on the promise.<sup>522</sup>

### (c) Conclusion

The LC's suggestions, if adopted, would have improved the otherwise obscure and anomalous nature of the doctrine. However, to a certain extent they were hampered by not considering the law on deeds and specialties - including their abolition.<sup>523</sup>

<sup>512</sup> Ibid.

<sup>513</sup> Ibid, p 18, 'If the view is accepted that all that is necessary in order to render an agreement enforceable is that there should be evidence that the parties intend to create a relationship binding in law, then it seems to follow that this requirement can be satisfied equally well either by consideration regarded as evidence of that intention or by some other evidence of that intention. On this basis, it becomes possible to frame proposals which will carry into effect this purpose, and will, while doing as little violence as possible to any long-established theories, remove the hardships arising from the technical applications of the doctrine which have crept into the law of contracts.'

<sup>514</sup> Ibid, p 19, 'This recommendation does not mean that a promise in writing will be binding in every case. It will still be necessary for the court to find that the parties intended to create a binding obligation. Just as the presence of consideration today does not convert a social engagement into a legal contract, so the presence of writing will not convert a gratuitous promise into a legally binding one *unless the court determines that the parties intended it to be legally binding.*' (*italics supplied*).

<sup>515</sup> Ibid 'The inconvenience of this rule is frequently evaded by means of the fiction that the promise made subsequent to the consideration merely fixes the amount due under an earlier promise deemed to exist contemporaneously with the consideration. In a very important class of case, namely, actions upon cheques and other bills of exchange, the rule does not apply and we can see no reason why it should apply at all.'

<sup>516</sup> Ibid, p 20 'we consider that ...abolition should not be permitted to affect the rule which requires a written promise or acknowledgement for the revival of a statute-barred debt, nor do we desire to make enforceable any promise made on attaining majority to pay a debt incurred in infancy.'

<sup>517</sup> Ibid, pp 20-1. Also, *Pinnel's Case* (1602) 5 Rep 117a (77 ER 237).

<sup>518</sup> Ibid, p 22.

<sup>519</sup> Ibid.

<sup>520</sup> Ibid, p 23 'We consider that the fixing of a definite period should be regarded as evidence of his intention to make a binding promise to keep his offer open, and that his promise should be enforceable. If no period of time is fixed, we think it may be assumed that no contractual obligation was intended.'

<sup>521</sup> Ibid, pp 23-4.

<sup>522</sup> Ibid, p 25.

- This was a pity since - if deeds and specialties were abolished -<sup>524</sup> this would have ended the evidential hierarchy of documents (see 15) and enabled legal transactions to be made: (a) in writing; or (b) orally - greatly simplifying matters (on the heels of this, the LC's recommendation that writing import consideration, would have restricted it to oral transactions);
- The main problem with the LC's suggestions was that they were a half-way house. Therefore, they pleased no one. Thus, the Report was not adopted as proposed.

However, this Report has stood the test of time and two statements of the LC may be born in mind for present purposes '*There is no doubt much to be said in favour of its abolition*' and '*Many of us would like to see the doctrine abolished root and branch.*'<sup>525</sup>

#### 41. THE PERIOD 1937 - 82

Texts on commercial law from 1937 were relatively few and long-standing, such as those by: (a) Chance (it ended in 1980),<sup>526</sup> (b) Charlesworth (it ended in 1997)<sup>527</sup> and (c) Ranking (it ended in 1975) as well as a few other (more minor) texts.<sup>528</sup> In 1945, there was the second edition of Salmond, *Principles of the Law of Contracts*<sup>529</sup> by Salmond and Williams where it was stated (following *Currie v Misa* (1875)):

Consideration...may be said to consist in detriment presently suffered by one party to an agreement or his promise to suffer detriment, the detriment or promise to suffer it being regarded by the law as constituting the inducement to the other party to join in the agreement.<sup>530</sup>

##### (a) Cheshire & Fifoot (1946)

Cheshire and Fifoot, in the first edition their work *The Law of Contract* (1946),<sup>531</sup> stated that consideration:

is an insular and unique phenomenon which cannot be regarded as a logical necessity and which is explicable only by reference to its history...<sup>532</sup> within the somewhat artificial limits adopted, the idea of the purchase price, the offer of money or money value for the [D's] promise, remains the essence of consideration.<sup>533</sup>

As to the worth of the doctrine, Cheshire and Fifoot noted that:

Professional reactions to the doctrine...have oscillated in the course of its history between the extremes of complacency and disgust. For the first two centuries of its existence little or no intelligent discussion can be traced: the courts were content to assert its place in the environment of *assumpsit* without even troubling to define it. In the middle of the eighteenth century its claims to constitute the essential test of contractual liability was challenged

<sup>523</sup> Ibid, pp 17-8 'We have not attempted in this Report to deal with the use of the seal. It is firmly established in other branches of the law and it is not at present, without a special investigation, practical to abolish it. It is outside the terms of our reference on this occasion. It is a question which involves many ramifications and it will no doubt be the subject of some future reference to the Committee.'

<sup>524</sup> In a Memorandum by Goddard J to the Report, pp 35-6, he advocated the abolition of specialties, especially if consideration were eliminated in simple contracts. The seal, Goddard J regarded as '*very much in the nature of a legal fiction*' and the benefits of specialties (longer limitation period and higher stamp duty (which no longer applies)) of doubtful '*practical advantage*'.

<sup>525</sup> Ibid, p 17.

<sup>526</sup> Chance, n 63.

<sup>527</sup> Charlesworth, n 63.

<sup>528</sup> Ranking, n 63. Borrie, n 63 (which commenced in 1967) did not analyse consideration.

<sup>529</sup> Salmond & Williams, n 78. Salmond himself had died in 1924. The definition of a contract, p 23, was curious 'A contract is either (i) a declaration of the will of a person or the combined declarations of the wills of several persons, creating and defining a non-testamentary common law obligation or obligations binding the declarant or declarants in favour of the person or persons indicated in that behalf in the declaration or declarations; or (ii) the combined declarations of the wills of several persons, which declarations coincide with each other in point of content and actually or constructively in point of time, and create and define a non-testamentary common law obligation or obligations between the several declarants.'

<sup>530</sup> Ibid, p 14. Ibid, p 97 'Consideration...means that the particular agreement must have resulted either (i) from the acceptance of a promise offered conditionally on the offeree's accepting not merely by simply expressing his assent, but by giving some specified promise to the offeror, doing some specified act (other than giving a promise to the offeror or simply expressing assent), refraining from doing some specified act, or giving some specified act in the law; or (ii) from the acceptance of an act in the law offered conditionally on the offeree's accepting by giving a specified promise.'

<sup>531</sup> This was primarily intended as a student text to compete with Pollock and Anson, *Introduction*.

<sup>532</sup> Cheshire & Fifoot, n 79, p 41.

<sup>533</sup> Ibid, pp 47-8. The '*purchase price*' idea follows Pollock, see 36(a).

by Lord Mansfield, and, though his main offensive failed in his own lifetime, its echoes, especially the emphasis on moral obligation, reverberated well into the nineteenth century. Then, a hundred years ago, it was established as a vital element in the modern law, no longer to be shaken save by the intervention of Parliament. But, as so often happens with a principle that commands, in any one age, universal applause, satisfaction was succeeded by doubt, and, since the last quarter of the nineteenth century, an ever-increasing volume of criticism has been recorded, culminating in 1934 in a general reference to the Law Revision Committee. The Report of this Committee, issued in 1937, has not yet been adopted, but it may serve to summarize both the various grounds of criticism and the suggestions of reform.<sup>534</sup>

As to the 1937 Law Revision Committee Report (see 40), Cheshire and Fifoot observed (not unfairly):

The bold and simple abolition of consideration would at least have had the merit of rendering all subsidiary changes unnecessary and would doubtless have been absorbed without undue difficulty by the courts.<sup>535</sup>

**(b) Chloros (1968)**

In a paper commissioned by the Law Commission, Chloros (a professor of Comparative Law at King's College, London) looked at consideration by way of a comparative analysis and produced an article '*The Doctrine of Consideration and the Reform of the Law of Contract*'.<sup>536</sup> Although dated, he made some useful statements. He noted that lawyers - since the 1937 Report - had (generally) refrained from analysis.<sup>537</sup> He could find no satisfactory reason for the existence of the doctrine<sup>538</sup> and deprecated the piecemeal reform proposed in the 1937 report.<sup>539</sup> He concluded:

In this article it has been suggested that English law would lose nothing if the doctrine...were to be abolished. If in the past it served a useful purpose in that it enabled English law to pass from the stage of the contractual writs to a general law of contract its survival at the present time is an anomaly. Its mischievous effect can be observed in that it serves to frustrate the legitimate intentions of contracting parties. In fact, in the large majority of cases in which the courts are called upon to discuss consideration every effort is made to avoid its pernicious effects.<sup>540</sup>

The report was useful in that it, basically, endorsed the opinion of Lord Wright some 30 years before (see 40) that consideration was not worth retaining.

**(c) Ranking, Spicer & Pegler (1972)**

Ranking *et al*, in their *Mercantile Law* (1972),<sup>541</sup> provided an un-illuminating definition of a contract.<sup>542</sup> They considered the pre-requisites for the same<sup>543</sup> were:

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<sup>534</sup> Ibid, pp 69-70.

<sup>535</sup> Ibid, p 73.

<sup>536</sup> Chloros, n 112.

<sup>537</sup> Ibid, p 137 'Since the publication of the [report]...lawyers have, on the whole, refrained from any critical reappraisal of the doctrine...although some comments can be found in standard textbooks. There, consideration is generally treated as a subject of great complexity; but as far as criticism is concerned, the prevailing climate may be summed up as inertia and resignation. Indeed it is arguable that all that may be said for or against has already been said and there is nothing further to add.'

<sup>538</sup> Ibid, p 140 'if we assume the present state of the law, it is suggested that no satisfactory reason for the existence of the doctrine can be found.' Also 'the purpose cannot be to establish the seriousness of a promise for this is already required by the rules relating to the intention to create legal relations...Secondly, the purpose of consideration is not to provide evidence of a contract, for though there may be ample evidence of serious intention on both sides to an agreement, the agreement will fail if there is no consideration. Thirdly, the purpose cannot be to establish fairness in dealings, for the principle of law is that consideration need not be adequate. This reasoning also disposes of the view that the law is interested in bargains, for nominal consideration is good consideration.'

<sup>539</sup> Ibid, p 144 'the failure of the Report was a double one. It failed to satisfy those who were in favour of consideration and it did not gain the acceptance of those who wished it see it abolished...In these circumstances it was not surprising that the 1937 Report was shelved.'

<sup>540</sup> Ibid, 164. The report contained a draft text of legislation for further discussion, now dated. One defect of the article was that it failed to look at the law on deeds, specialties and BOE with respect to consideration.

<sup>541</sup> Ranking, n 63.

<sup>542</sup> Ibid, p 1 'A contract may be defined as an agreement between two or more persons, which may be legally enforced if the law is properly invoked. In every contract some right is acquired by one party and a correlative obligation or liability is undertaken by the other. In most contracts both rights and obligations attach to *each* party. It is extremely important to know what agreements constitute contracts in law, since, in respect of an agreement which is not a contract, there is no redress if either party fails to carry it out; while the breach of a contract normally gives rise to a legal remedy.'

<sup>543</sup> Ranking divided contracts into: (a) contracts of record ('A contract of record is the obligation imposed by the entry of the proceedings in the records of a superior court. The principal classes of contracts of record which are now found are (1) judgments; and (2) recognizances'); (b) specialty contracts (however, they (incorrectly) only mentioned a deed and not other writings under seal); (c) simple contract ('one which is created either by an oral promise, by writing not under seal, or by implication').

- (a) offer and acceptance (i.e. a distinct communication by the parties to each other of their intention);
- (b) consideration (except where the agreement was under seal);
- (c) compliance with any particular requirements as to form;
- (d) intention to create legal relations;
- (e) capacity;
- (f) genuineness of the consent expressed in the offer and acceptance;
- (g) absence of any element rendering the contract void or illegal;
- (h) possibility of performance at the time the contract was entered into.<sup>544</sup>

In respect of consideration, they stated that a deed imported it<sup>545</sup> and in the case of simple contracts:

All simple contracts, whether in writing or made by word of mouth, require consideration to support them. By consideration the law means valuable consideration, which must consist of something capable of being estimated in money.<sup>546</sup>

After citing *Currie v Misa* (1875)<sup>547</sup> they stated that '*the more modern approach is to regard consideration as the 'price' paid for the other party's promise*' citing *Dunlop* (1915).<sup>548</sup> They also noted that consideration did not, necessarily, confer a benefit on the person making the promise.<sup>549</sup> And, that - although an agreement not supported by consideration was not enforceable - a bare promise was not necessarily entirely devoid of legal effect since promissory (equitable) estoppel might be invoked.<sup>550</sup> Finally, they noted that consideration must: (a) be of some value in law,<sup>551</sup> (b) move from the promisee;<sup>552</sup> (c) be legal;<sup>553</sup> (d) be possible; and (e) not be past.

#### **(d) Goode (1982)**

In the first edition of his *Commercial Law* (1982),<sup>554</sup> Goode defined a contract as follows:

A contract involves the exchange of equivalents...In the great majority of transactions, the exchange is both simultaneous and immediate...Not every kind of promise creates a legal obligation. The essence of contract is not promise but bargain, the exchange of equivalents. In the language of lawyers, the promisor is not bound unless he receives *consideration* for his promise, whether in the form of a counter-promise or of actual performance.<sup>555</sup>

The definition of contract as an '*exchange*' aligns with older concepts of contract as being a barter (i.e. an exchange of goods) or sale (i.e. an exchange of goods for a price). However, today, a huge range of contracts are not based on exchange. Thus, it is better to see a contract as an agreement between parties - one intended to be

<sup>544</sup> Ranking, n 63, pp 2-3. It is asserted that (f) and (h) are not prerequisites as such and that '*form*' (c) was a separate issue to the substantive requirements. As to (a), it was better expressed by reference to *consensus*.

<sup>545</sup> Ibid, p 9 'It is sometimes stated that a deed imports consideration, which means that the form is sufficient of itself to give effect to the contract.'

<sup>546</sup> Ibid, p 11.

<sup>547</sup> See 35(e). They added 'It should be added that the benefit is given or the detriment incurred 'in return for a promise.'

<sup>548</sup> See 38(c).

<sup>549</sup> Ranking, n 63, p11. They continued 'For instance, X may promise to pay Y the sum of £1 if Y will forbear from suing Z, or in consideration of Y lending money to Z. If the forbearance or lending...is carried out, there is consideration for the promise made by X although he obtains no material advantage there from. Both these kinds of transaction are illustrated by a contract of guarantee.'

<sup>550</sup> Ibid 'Where a promise given without consideration is intended to create legal relations and to be acted upon by the promisee and is in fact acted upon, with the result that the promisee's position is altered, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is consistent with it [they quoted *Combe v Combe* [1951] 2 KB 215, *per* Asquith LJ at p 225]. The reason for this rule is that it would be contrary to the principles of equity that a person should be allowed to enforce rights which he had promised to relinquish, where the promisee has relied on that promise and thereby altered his position. This equitable doctrine is akin to the common law rule of estoppel, and is sometimes referred to as '*promissory*' or '*quasi*' estoppel.' They noted, however, that the equitable principle did not extend to allowing a promisee to sue on a bare promise. 'For example, if a landlord, instead of agreeing to reduce a tenant's rent, agreed without consideration to pay him back part of the rent which had already been paid, the tenant would be unable to sue for that payment, for in order to succeed he would have to show that consideration had been given for the promise.'

<sup>551</sup> Ibid, p 12 'This requirement excludes consideration which consists only of natural love and affection, or which rests upon a moral as distinct from a legal obligation (*Beaumont v Reeve* (1846) 8 QB 483 (115 ER 958)). This is sometimes known as '*good consideration*' to distinguish it from '*valuable consideration*' which alone will support a contract.'

<sup>552</sup> Ibid, p 14 'A person who seeks to enforce a simple contract must show that he or his agent has furnished some consideration to the promisor or to some other person at his request. This is usually expressed by saying that the consideration must move from the promisee.'

<sup>553</sup> Ibid, 'The consideration must not be illegal or of an immoral nature, or contrary to public policy...'

<sup>554</sup> Goode, n 64.

<sup>555</sup> Ibid, p 82.

legally binding. Further, contracts do not have to be an exchange of '*equivalents*' - this concept derives more from canon law interpretations of contract (see 17). As to the necessity for bargain (Goode was referring, in effect, to *consensus*),<sup>556</sup> Goode stated:

The necessity of bargain in contract is disputed by some writers who point to various cases in which the courts have declared binding a promise which induced detrimental reliance by the promisee, even though the act of reliance was not one which had been stipulated by the promisor as the price of the promise.<sup>557</sup>...This however is not because B's expenditure gives rise to a contract but because A's acquiescence perfects the gift in equity and estops A from asserting his title.<sup>558</sup>

Goode indicated that some critics were not satisfied with this.<sup>559</sup> He responded:

As a theoretical conception, in which facts can be assumed without having to be established, the argument is compelling. Unfortunately, life in the real world is not quite so simple. How do we prove that a person has, or has not, acted in reliance on a promise? ...The problem of showing reliance becomes even more difficult where the reliance alleged is not positive (performance) but negative (forbearance)...Secondly, it is far from clear why an act of reliance not requested by the promisor should entitle the promisee to performance of the promise. Surely, his remedy, if any, should be limited to compensation for his wasted outlay? Why should he be given by way of damages the value of an undertaking which he did not purchase and which may be worth a great deal more than the expenditure he incurred in relying on the promise. If there is to be a remedy for detrimental reliance, it should be in tort for reimbursement, not in contract for the performance of a gratuitous promise.<sup>560</sup>

It is asserted that Goode is correct on this. Contract is a matter of common law, proprietary (equitable) estoppel is a matter of equity.<sup>561</sup> Further, a promise is not a contract - and writers such as Bracton and St German carefully distinguished between the two (nude parol and nude contract).<sup>562</sup> Goode also stated:

This principle of proprietary estoppel is sometimes treated as an exception to the requirement of consideration in contracts but, correctly analysed, it has nothing to do with the law of contract as such, but simply an application of the well-established equitable doctrine of acquiescence by which one who stands by and allows another to incur expenditure on property believing he has acquired or is being given rights over it will be estopped from asserting his own ownership or from disputing that of the other party.<sup>563</sup>

<sup>556</sup> As Goode pointed out elsewhere, n 64, p 86 'it takes two to make a bargain.' Also, p 87 'the agreement of the parties is the kernel of their legal relationship.' Ibid, 89 'A contract also requires an intention to create legal relations and a *consensus ad idem*...If the expression of proposed terms is so vague that no clear meaning can be established or so ambiguous that the court is unable to determine which of the possible alternative meanings is the most probable, the matter ceases to be one of mere construction and the whole agreement fails for uncertainty.'

<sup>557</sup> Goode, n 64, p 84. He continued 'For example, it is well established that if A agrees to make a gift of property to B and stands by while B, to the knowledge of A and with his acquiescence, incurs substantial expenditure on the property in the belief that it has become or is about to become his own, A will be estopped from disputing that the property has become vested in B.' Goode cited PS Atiyah, *Contracts, Promises and the Law of Obligations* (1978) 94 LQR 193.

<sup>558</sup> Ibid, p 85.

<sup>559</sup> Goode continued 'This explanation does not satisfy the critics. They are not content with the result but argue that B should have succeeded in contract. Indeed, they go further and contend that one who relies to his detriment on a gratuitous promise has a stronger moral claim to enforcement of the promise than a person who merely gives a counter-promise in exchange and has not yet begun performance.' Goode cited Atiyah 'Is it not manifest that a person who has actually worsened his position by reliance on a promise has a more powerful case for redress than one who has not acted in reliance on the promise at all? A person who has not relied on the promise (nor paid for it) may suffer a disappointment of his expectations, but he does not actually suffer a pecuniary loss.' Goode cited Atiyah, see n 1316, p 202.

<sup>560</sup> Goode, n 64, p 86.

<sup>561</sup> Coke, n 47, vol 1, 352a '*Estoppel*,' comes of the French word *estoupe*, from which the English word stopped: and it is called an estoppel or conclusion, because a man's own act or acceptance stops or closes up his mouth to allege or plead the truth...'. Proprietary estoppel is different to estoppel by deed which appears to have been a common law form of estoppel. See also *Pickard v Sears* (1837) 6 A & E 474 (112 ER 179) *per* Denman CJ at p 473 'the rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded [precluded] from averring against the latter a different state of things as existing at the same time.'

<sup>562</sup> A promise only becomes a contract when accepted by the other party in some form, such as by way of a counter-promise or acceptance of an offer. If not there is no *consensus* and - at least, since Bracton (c. 1250) - *consensus* has been treated as a pre-requisite for a contract. Thus, a promise, *per se*, was (is) not binding in law (cf. canon law). However, it is perfectly possible for a promise to binding in equity even though not a contract. Thus, if a person promises another something - and the other reasonably relies on it to his detriment - equity may estop the promisor from reneging because it would be inequitable (unfair) otherwise. However, this does not turn the promise into a contract - although, as a matter of evidence, the fact that a person does something in reliance on the promise of another - such as forbearance or acting so as to incur a loss (or give profit) to another is *evidence* that the parties had reached mutual agreement (*consensus*) on a matter

<sup>563</sup> Goode, n 64, p 89.

One would agree. Although the courts now administer the common law and equity in the same court, contract is a creature of the common law, not of equity.<sup>564</sup> As for consideration, Goode stated:

Consideration has been defined as benefit to the promisor or detriment suffered by the promisee, but this is misleading. To constitute consideration, the benefit or detriment must not merely follow from the promisee's reliance but must be exacted as the price of the promise. In fact, we can forget about the detriment altogether because, contrary to myth, it has nothing whatever to do with the creation of contract. Consideration is an act or forbearance which is desired by the promisor, and is fixed by him as the price of his own undertaking.<sup>565</sup>

The difficulty with this (as with so many other academic texts which deal with the doctrine) is that the writer descended into his own definition of consideration, as opposed to one laid down by the courts.

***In conclusion, the period from 1937 until the late 1970's reflected little interest in the doctrine, general opinion (likely) being the same as that of Cheshire and Fifoot, that it should be abolished.***

#### 42. ATIYAH (1988)

From the late 1970's there was another spate of academic writing in which attempts were made to determine where the doctrine originated. This led to what now seems to be the accepted conclusion that it was home grown and that it originated in the action of *assumpit* in the Elizabethan period (see 16). Consideration was also given as to the adequacy of the doctrine - especially by the Oxford academic, Atiyah, who argued for its retention on the basis that, if abolished, it would lead to uncertainty as to what promises should be enforced. He initially expressed his views on consideration in 1971 but considerably revised them over time. Therefore, his view as expressed in 1988 is concentrated on.

##### **(a) Freedom of Contract (1979)**

Atiyah, in his *The Rise and Fall of Freedom of Contract* (1979),<sup>566</sup> considered the doctrine - albeit, not at length. In respect of early law he closely followed Simpson (his *History of the Common Law of Contract* which was published in 1975).<sup>567</sup> However, this was somewhat problematic for three reasons since Simpson had:

- argued that the doctrine derived from Chancery (the law on uses) (see 16). This theory is not favoured now. Not least, since the law on the use derived from the common law and not from Chancery;
- sought to find evidence of consideration prior to *Sharlington v Strotton* (1565). However, if there had been a doctrine (pre-requisite) prior to that case, it would have been pleaded in the same. Further, the word '*consideration*' in that case was employed in a number of different senses;
- thought that consideration was the '*motive*' for a contract.<sup>568</sup> However, Simpson did not investigate whether '*consideration*' was a composite reference to various rule(s) of evidence - rather than a distinct concept. Nor, did he consider Elizabethan caselaw relating to the doctrine (nor the *arra*). Nor that the word '*consideration*' meant different things in different contexts.<sup>569</sup>

<sup>564</sup> One may add that the common law was made more flexible by exceptions created by the law merchant (part of the common law but applying specifically to merchants) and by local custom. However, the law merchant has now died out (not least, because a designated group of persons called '*merchants*' no longer exists). And local custom in the commercial field has, in effect, died out or become absorbed into the common law.

<sup>565</sup> Goode, n 64, p 84. Cf. Charlesworth's *Mercantile Law* (14th ed, 1984), n 63, p 50 'A contract involves the exchange of equivalents...In the great majority of transactions, the exchange is both simultaneous and immediate...Not every kind of promise creates a legal obligation. The essence of contract is not promise but bargain, the exchange of equivalents. In the language of lawyers, the promisor is not bound unless he receives *consideration* for his promise, whether in the form of a counter-promise or of actual performance.' Ibid, p 50. Charlesworth also referred to the definition in *Currie v Misa* (1875) and added 'to this definition there should be added that the benefit accruing or the detriment sustained was in return for a promise given or received.'

<sup>566</sup> Atiyah 1979, n 82. As to his prior writings, Atiyah stated p viii 'The historical research which led me to this book has modified my opinions on many important points concerning contractual liabilities, the relationship between contractual and other forms of liability, and above all the central role of promises and consideration.'

<sup>567</sup> Ibid, p viii 'I have...derived enormous benefit from reading his *History*...'

<sup>568</sup> Atiyah 1979, n 82, p 137 'He [Simpson] argues that the word '*consideration*' originally meant the reasons or motives inducing the giving of a promise.' Cf. 'I believe that the general story I tell in this work is broadly in line with [his] *History*, though I am not confident that he himself would endorse that view.' Cf. p 147 'The doctrine of consideration itself was a reflection of a moral ideal, not of some amoral commercial practices'. Atiyah quoted Simpson, n 4, 488 who actually said 'The doctrine...is indeed intensely moralistic...'

<sup>569</sup> See 48(f).



From this, Atiyah concluded that, in the past:

the roles of promise and consideration were the reverse of what they are today. It was the consideration which was the principal ground for the creation of the obligation; the promise played a subordinate role.<sup>570</sup>

This would seem incorrect. Not least, since there is no evidence of a doctrine (pre-requisite) prior to *Sharlington v Strotton* (1565). Further, surely, medieval lawyers accepted the Bracton formulation? That is, that a contract *created* (gave rise to) the obligation - not consideration. And, that the contract was an agreement which satisfied certain pre-requisites - the most fundamental of which was mutual intention (*consensus*). Thus, to medieval lawyers intention was the basic component. Atiyah also accepted that a promise was evidentiary<sup>571</sup> but thought that it evidenced an obligation.<sup>572</sup> However, this would appear to put the '*cart before the horse*' since the medieval thought process (following Bracton) was a progression from:

intention to  
mutual intention to  
contract (assuming the other pre-requisites were satisfied) to  
obligations flowing from the contract.

Further, a promise was not the only evidence of an intention - many other things were.<sup>573</sup> Thus, a contract (not consideration) created an obligation. And, a promise evidenced intention, not an obligation. As it was, Atiyah (substantially) revised matters in his later Essays.

(b) **Essays on Contract (1988)**

Atiyah's Essays contained an article, *Consideration: A Restatement*.<sup>574</sup> This was a revision of an inaugural lecture he gave in 1971<sup>575</sup> in which he qualified some of his prior thoughts<sup>576</sup> and dealt with criticisms of another Oxford academic, Treitel.<sup>577</sup> Much of the material in this Essay is dated (as with the prior material) since 30 years have passed and much has changed in terms of caselaw and analysis. However, some points Atiyah made in respect of the doctrine may be remarked on.<sup>578</sup> He based his essay on his inspiration of the Yale academic, Corbin<sup>579</sup> and his text on *Contract*. However, US law is not the same as English law.

- **Reason for a Promise.** Atiyah stated that consideration '*means a reason for the enforcement of a promise, or, even more broadly, a reason for the recognition of an obligation.*'<sup>580</sup> However, contracts do not just derive from

<sup>570</sup> Atiyah 1979, n 82, p 140. To support this he then cited civilian writers such as Grotius and Pufendorf. However, there is no evidence that they changed English law - although they may have influenced it in some aspects, such as writing importing consideration, see *Pillans v van Mierop* (1765), see 30.

<sup>571</sup> Ibid, p 143 'the older, traditional ideas...seeing the role of a promise as largely evidentiary rather than substantive.'

<sup>572</sup> Ibid, p 145 'the idea of treating a promise as strong, or even conclusive evidence of an obligation was obviously have been of considerable attraction to a pleader...'

<sup>573</sup> In respect of past consideration, Atiyah 1979, n 82, p 153 noted that it was sufficient if it followed a request and concluded that both the rule as to past consideration and the exception in the case of the request 'was to ensure that the [D] was not made to pay for something which had not really benefited him...Only if the promise was given before the consideration was supplied, or if the consideration was supplied at the request of the promisor, could the court be reasonably sure that the promisor had indeed had his benefit'. However, it is asserted that these rules had nothing to do with benefit as such. Rather, a past event did not evidence a present intention (and consensus, which was a union of present intentions) unless requested since, then, the latter act reflected a prior *consensus*.

<sup>574</sup> Atiyah 1986, n 114, ch 8.

<sup>575</sup> Ibid, *Preface*, 'Essay 8 is a revised version of the inaugural lecture I gave at the Australian National University, Canberra, in 1971, and originally published by the Australian National University Press [as *Consideration in Contracts: a Fundamental Restatement*]; it includes some comments by way of reply to Professor Treitel's critique of the original version.'

<sup>576</sup> Ibid, p 179 'I wish to qualify my original ideas in some respects...'

<sup>577</sup> Treitel, n 115.

<sup>578</sup> Atiyah has contributed some wonderful writings. However, one feels his analysis on consideration was the least satisfactory part of his writings since it sought to tar '*common lawyers*' (including practising lawyers) with many assumptions which were his own. Further, he failed to analyse consideration in an historical context or with regard to how commerce (trading) was actually conducted in times past (as opposed to theory). Thus, there was no mention of the *arra* nor the practice of the lesser courts, nor the evidential worth of various instruments (deeds, tallies *etc*), nor why consideration *had* to be nominal (because of problems with the currency).

<sup>579</sup> Atiyah 1986, n 114, p 179 'It is appropriate that this essay should be prefaced with a quotation from Professor Corbin's masterly survey of the law of contract, for the whole essay was originally inspired by Corbin's work, and although today, some fifteen years after it was first written, I wish to qualify my original ideas in some respects, the essay remains thoroughly Corbinian in intent. My chief purpose remains what it was fifteen years ago, to do what Corbin did for American law in the 1930s and to demonstrate that a close analysis of the actual decisions of the courts suggests that English law is in need of a fundamental restatement.'

<sup>580</sup> Ibid, p 241.

promises. Further, consideration was not a reference to a '*reason*'. It sought to prove something more substantive. For example, to prove that '*valuable consideration*' had been given for the purposes of the Fraudulent Conveyances Acts 1571 and 1584. Or, that a price (i.e. money) had been paid. Or, that a (legal) loss or benefit (quantifiable in money terms) had occurred. Further, no caselaw (as far as I am aware) or other legal text, has adopted has such a definition (see **Appendices B & C**), which must remain a personal one;

- **Doctrine as Set of Fixed Rules.** Atiyah stated that '*for a very long time common lawyers have approached the law of consideration in the belief that there is a 'doctrine of consideration' which can be reduced to a set of fixed rules, and that these rules were arrived at by the courts over a period of time culminating in some sort of 'final' form or version towards the end of the nineteenth century.*'<sup>581</sup> However, the only authority he cited for this was another academic (Holdsworth).<sup>582</sup> There is no evidence that common lawyers (especially practicing ones) or the courts ever approached the doctrine<sup>583</sup> in such a way. Or, that the courts came to a '*final*' version at the end of the 19th century. They (manifestly) did not, since the doctrine has remained open to great uncertainty as to its scope until today. Further, this pre-supposes that the doctrine creates (has given rise to) a set of rules, rather than is a set of evidential rules - something he did not explore;
- **What the Fixed Rules Are.** Atiyah stated that: '*The conventional statement of the doctrine...is not perhaps as easily reduced to a simple set of rules as it is often assumed, but few would disagree with the following propositions*'. However, assumed by who? No legal text of his time (or before) asserted that the doctrine could be reduced to a '*simple set of rules*' - nor did anyone seek to do so. Indeed, the basic admittance was that the doctrine (pre-requisite) has always been exceedingly vague in nature. To quote Stone (albeit, in another context, see **3**) - it is '*the lurking place of a motley crowd of conceptions in mutual conflict and reciprocating chaos*'. Atiyah supplied 6 rules (which he called propositions) which he asserted '*few would disagree with*'.<sup>584</sup> However, some of these are too baldly stated<sup>585</sup> and the first contradicts the formulation of Lush J in *Misa v Currie* (1875);
- **Abolition of the Doctrine - Promise.** Atiyah stated that '*talk of abolition of the doctrine is nonsensical...Nobody can seriously propose that all promises should become enforceable; to abolish the doctrine...is simply to require the courts to begin all over again the task of deciding what promises are to be enforced.*'<sup>586</sup> However, a promise, manifestly, is not the same as a contract. A contract requires mutual intention (which does not need to be manifested in the form of promises). Further, consideration was never designed to deal with unilateral promises (commercial or gratuitous). Bracton (and St German) clearly distinguished a '*nude parole*' from a '*nude contract*'. Also - even if a contract is formulated in terms of a promise - there must be a promise and a counter-promise which are *ad idem*, to produce a contract. If not, there is no contract. Which is not to say that the law will not provide a remedy elsewhere, such as by way of estoppel. However, estoppel is much older than the doctrine of consideration and not linked to it. Thus, abolition of the doctrine will not mean that all promises (whether gratuitous or commercial), thereby, will become legally enforceable. This is a *non sequitur*.<sup>587</sup>

<sup>581</sup> Ibid, p 180. Cf. (by 2006, see (c) below, this was expressed as 'The doctrine... is generally seen by lawyers as a set of rules that limit individuals' freedom to make binding legal contracts.' (*italics supplied*). See Smith, n 82.

<sup>582</sup> Atiyah cited Holdsworth, n 95, vol 8, pp 34-48. It is asserted that, at most, what happened was a tendency to alight on the definition of Lush J in *Currie v Misa* (1875), because the doctrine was, otherwise, so uncertain and incoherent.

<sup>583</sup> Atiyah 1986, n 114, p 181 'The word '*doctrine*' also appears to carry certain implications. In this particular area of the law, it seems to carry the implication that the '*doctrine*' is '*artificial*', and has no rational foundation except possibly in so far as it may be argued that gratuitous promises should not necessarily be enforceable.' However, it is artificial. It is a legal fiction ('*in the eye of the law*').

<sup>584</sup> Ibid 'few would disagree with the following propositions. Firstly, a promise is not enforceable (if not under seal), unless the promisor obtains some benefit or the promisee incurs some detriment in return for the promise. A subsidiary proposition, whose claim to be regarded as a part of the orthodox doctrine is perhaps less certain, is sometimes put forward [he cited Treitel], namely that consideration must be of economic value. Secondly, in a bilateral contract the consideration for a promise is a counter-promise, and in a unilateral contract consideration is the performance of the act specified by the promisor. Thirdly, the law of contract only enforces bargains; the consideration must, in short, be (and perhaps even be regarded by the parties as) the '*price*' of the promise. Fourthly, past consideration is not sufficient consideration. Fifthly, consideration must move from the promisee. Sixthly (and this is regarded as following from the first three propositions), the law does not enforce gratuitous promises. Seventhly, a limited exception to these propositions is recognised by the *High Trees* [[1947] KB 130] principle, which, however, only enables certain promises without consideration to be set up by way of defence.'

<sup>585</sup> e.g. 'Past consideration is not sufficient consideration' (this ignores the Bills of Exchange Act 1882, s 27(1) and other exceptions). Also, 'the law of contract only enforces bargains'. While a contract may have been seen in terms of a bargain (exchange) because barter (and sale) were the predominant forms of contract, contract covers in the 20th century and these days (as any practising lawyer knows) a vast range of mutual agreements which cannot be squeezed in definitions of exchange, promise or offer and acceptance.

<sup>586</sup> Atiyah 1986, n 114, p 241. Cf. Ellinghaus, n 99, p 269 'What is nonsensical here is the grossly inflated importance given to consideration, the implication that it forms the sole bulwark against the wholesale enforceability of all promises.'

<sup>587</sup> Atiyah left opaque what he meant by gratuitous promises (pp 241-2). However, if a promise is a promise to '*give*' and it is made from pure liberality and without legal compulsion (as Bracton put it) - such as in a family or charitable context - it is a *gift* not a contract. And, if a promise is made *without* an intent that it be legally binding on the part of *both* parties - there is no mutual agreement (*consensus*) - and, hence, it is not a contract. For example, if the promise was made as a joke by one party. Further, a contract, in older perspective, was an invitation to *trade* (or '*treat*', that is, to engage in business). Thus, in a practical (as opposed to an academic) analysis, it was - and is - usually evident from the matrix of facts and the context whether the promise made was likely to have been intended to be an invitation to '*trade*'. For

**(c) Introduction to the Law of Contract (2006)**

The first edition of this work by Atiyah was in 1961. In 2006, the sixth edition was edited by Smith although Atiyah indicated in the Preface that he had commented extensively on the first draft.<sup>588</sup> It may be noted that various points in (a) and (b) above had fallen by the wayside. The text indicated that there was no '*unitary explanation*' to explain every aspect of the doctrine<sup>589</sup> and that various aspects of the doctrine were now occupied by other legal doctrines such as economic duress, public policy and an intention to create legal relations. It concluded that:

The doctrine...has served and continues to serve many useful functions, but a strong argument can be made that most, if not all, of these functions would be better served by other legal doctrines.<sup>590</sup>

This is a considerable revision to the prior proposition expressed in 1988 (see (b) above), only 18 years before, that abolishing the doctrine would be nonsensical.

**(d) Conclusion**

Despite all the '*intense, insightful and provocative*' writing from the 1970's it is interesting that English academic writing (with rare exceptions) avoided dealing with the rather important *practical* point - *Is the doctrine needed* ? Thus, Lord Wright's article from 1936 remained unanswered.

**43. SINGAPOREAN CASE - GAY CHOON ING v LOH SZE TI (2009)**

In a Singaporean case in 2009 - delivering judgment of the Singaporean Court of Appeal - Phang Boon Leong JA (Leong JA) analysed the doctrine of consideration in what, almost, amounted to a legal article (it was not necessary for the judgment and was termed a '*coda*'). In particular, he noted that the doctrine had been heavily criticised.<sup>591</sup> He thought that, generally, consideration signified '*a return recognised in law which is given in exchange for the promise sought to be enforced*'<sup>592</sup> and he followed Lush J in *Misa v Currie* (1875) in its formulation.<sup>593</sup> In particular, Leong JA made the following observations:

- **Factual Matrix**. He noted the doctrine was '*heavily dependent on the specific factual matrix concerned*'.<sup>594</sup> This useful observation helps identify the reality that '*finding*' consideration - in practice, in an instant case - is evidential. Further, even if the pre-requisite (in legal terms) is present, this has no effect if the parties did not intend a legal act;
- **Past Consideration**. He noted that what '*looks at first blush like past consideration will still pass legal muster if there is, in effect, a single (contemporaneous) transaction (the common understanding of the parties being that consideration would indeed be furnished at the time the promisor made his or her promise to the promisee)*'.<sup>595</sup> This simply reflects that a past act should pass muster if it also evidences a present intention - necessary for there to be *consensus*;
- **Adequacy of Consideration**. He noted that the court '*will not inquire into the actual adequacy of the consideration*' if there was sufficient consideration '*in the eyes of the law*'. However, he accepted that this contributed towards '*the*

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example, a promise made in a pub after a lot to drink, probably, is an idle boast or pure braggadocio while one made in the offices of a law firm may not be.

<sup>588</sup> Smith, n 82, Preface to the 6th edition 'I saw and commented extensively on the first draft...'

<sup>589</sup> Ibid, p 108. Smith, p 108 linked the origin of the doctrine to the action of debt and its requiring reciprocity (*quid pro quo*). And, that contractual claims moved from debt to *assumpsit* and that it was put to '*new uses*' such that '*Consideration, as the concept came to be called, was understood to be equivalent to a good reason ('causa' in Roman law) for enforcing a promise or agreement.*' However '*understood*' by who? And '*causa*' was not the same as good reason in Roman law. No authorities were cited for these propositions.

<sup>590</sup> Ibid, p 128.

<sup>591</sup> [2009] SGCA 3 (8 January 2009), para 64 '*the doctrine of consideration has been heavily criticised...*'. Ibid, para 92 '*the doctrine...is simultaneously bedevilled by both theoretical as well as practical difficulties...*'

<sup>592</sup> Ibid, para 66 '*Very generally put, consideration signifies a return recognised in law which is given in exchange for the promise sought to be enforced. That is why it is stated as a matter of course that consideration must always move from the promisee to the promisor. On a more specific and precise level, the traditional definition adopted is the 'benefit-detriment analysis.'* It also functions as a practical approach.'

<sup>593</sup> Ibid, para 67. Leong JA preferred this to the Dunlop (1915) formula of Lord Dunedin, see 38(c), stating '*the 'benefit-detriment analysis' is probably more helpful in terms of practical application.*'

<sup>594</sup> Ibid, para 72.

<sup>595</sup> Ibid, para 83.

*emaciation of the doctrine'*<sup>596</sup> and he cited other Singaporean authority that, effectively, presumed it in a commercial context.<sup>597</sup>

The above assist in a perception of consideration (like the *arra*) evidencing an intention to be legally bound, one necessary for *consensus*. Leong JA also noted that, at least, some of the ground covered by consideration was now covered by economic duress, undue influence and unconscionability.<sup>598</sup> As for abolition, he adverted to the lack of progress<sup>599</sup> and that - if the doctrine were abolished - '*an alternative (or alternatives) must take its place.*'<sup>600</sup> One would agree. However, this can be achieved by defining the pre-requisites for a contract (see 50). And, since three of those pre-requisites have existed from the time of Bracton (c.1250), it should not be difficult.

#### 44. CHEN-WISHART (2013)

An article - '*In Defence of Consideration*' in 2013 by Chen-Wishart - is somewhat misleading in that it considered, in the main, the appropriateness of enforcing gratuitous promises, concluding that they should not be legally enforceable.<sup>601</sup> However, connecting this to the abolition of consideration<sup>602</sup> is incorrect since abolition of consideration will not, *ipso facto*, render gratuitous promises (nor agreements)<sup>603</sup> legally enforceable and Wishart provides no evidence (including English caselaw) to the contrary.<sup>604</sup> Indeed, abolishing consideration will help clarify the law.<sup>605</sup>

#### 45. CHITTY (2015)

At present, there are a large number of texts on English commercial law (see 2). However, many are student texts. Others do not analyse the doctrine of consideration in any depth. As for the definitions of consideration there is a wide variety of formulation (as expected if the doctrine was evidential, since no adequate formulation is possible). The standard practitioner's work by Chitty provides the best (modern day) textbook description of the doctrine. It states:

##### (a) Consideration

In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed or supported by some '*consideration*'. The purpose of the doctrine of consideration is to put some legal limits on the enforceability of agreements even where they are intended to be legally binding and are not vitiated by some factor

<sup>596</sup> Ibid, para 86.

<sup>597</sup> Ibid, para 96 citing, in particular, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR per VK Rajah JC, at 139 'No modern authority was cited to me suggesting an intended commercial transaction of this nature could ever fail for want of consideration. Indeed, the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship.'

<sup>598</sup> Ibid, para 113.

<sup>599</sup> Ibid, para 117 'Because so much academic ink has been spilt on the doctrine of consideration over so very many decades (with no concrete action being taken) and because there is...such a dearth of cases on the doctrine itself, it would appear that any proposed reform of the doctrine is much ado about nothing.'

<sup>600</sup> Ibid, para 117.

<sup>601</sup> Chen-Wishart, n 125, p 238 'Informal gratuitous promises are not, and should not be, enforceable since enforcement would: (i) crowd out their trust - and solidarity-building function; (ii) allow the promisee to treat the promisor as a means to her ends without also respecting the promisor's ends by forgiving, releasing or otherwise accommodating the promisor's change of mind; (iii) contradict the norms constitutive of the parties' particular relationship, which would involve a more fluid, open ended reciprocity than is comprised by consideration; and (iv) invite serious practical problems (including the necessity and difficulty of recalibrating the excuses and remedies for non-performance), particularly when affective motivations and extra-legal sanctions render enforcement largely unnecessary, and when the formalities device makes enforceability otherwise possible.'

<sup>602</sup> Ibid, 'In general, transactions in the private domain should remain free from contract, and transactions in the market domain - where reciprocity, trust and social sanctions are not implicit - should only attract state enforcement where the parties' dealings are marked by mutual respect. Consideration marks the boundary between the two.'

<sup>603</sup> See also the observation of the LC in 1937, see 1255, that the doctrine was not needed to distinguish between commercial and gratuitous agreements (i.e. since adequacy of consideration was immaterial). One would agree.

<sup>604</sup> Ibid, p 211. Chen-Wishart states 'The *practical* effect of the consideration doctrine is the unenforceability of informal gratuitous promises.' This is not the same as the legal effect. Wishart also states 'Historically, promises under seal are enforceable only upon delivery to the donee'. However, in English law, since Coke's time, actual delivery was not required for deeds (see n 825). It was required to replicate *seisin*, not required, anyway, for land transactions post 1845 (see 34). It was (and is) not required, anyway, for specialties (i.e. sealed writings not a deed).

<sup>605</sup> Burrows Obligations (in 1998), n 103, p 197 'The law would be rendered more intelligible and clear if the need for consideration were abolished and gratuitous promises that have been accepted or relied on were held to be binding (subject to the operation of normal contractual rules relating to, for example, the intention to create legal relations, duress and illegality).'

such as mistake, misrepresentation, duress or illegality...<sup>606</sup> The present position therefore is that English law limits the enforceability of agreements (other than those contained in deeds) by reference to a complex and multifarious body of rules known as '*the doctrine of consideration*.' The doctrine of consideration is based on the idea of reciprocity: that '*something of value in the eye of the law*' must be given for a promise in order to make it enforceable as a contract. It follows that an informal gratuitous promise does not amount to a contract.<sup>607</sup>

The law in certain cases refused to recognise the '*value*' of acts or promises even though they would, or might, be regarded as valuable by a lay person. This refusal was based on many disparate policies; so that '*promises without consideration*' included many different kinds of transactions which, at first sight, had little in common. It is this fact which is the cause of the great complexity of the doctrine; and which has also led to its occasional unwarranted extensions and hence to demands for reform of the law.<sup>608</sup>

This statement is (perhaps) not felicitously formulated, in part. A promise is not the same as a contract. It only becomes a contract when there is a '*meeting of minds*' (*consensus, agreement*). This is why writers such as Bracton and St German carefully distinguished between a '*nude parol*' and a '*nude contract*'. Thus, a '*gratuitous promise*', *per se*, does not amount to a contract both because it is unilateral and it comprises a promise to make a gift arising from the liberality of a person. Thus, it is not an invitation to trade (to treat, to use the older word). That is, to enter into a commercial transaction.<sup>609</sup> However, Chitty indicates the gist of the doctrine. The need for '*something of value in the eye of the law*'. This indicates that no actual value (or *quantum*) need be proved (such as proving the value of a peppercorn). Thus, consideration is a legal fiction. Finally, Chitty notes that the doctrine has become one of '*great complexity*' which has led to '*unwarranted extensions*'. One would agree.

### **(b) Definition of Consideration**

Chitty considered a number of formulations of the doctrine and also noted various problems with them. This is not unexpected if consideration was a rule of evidence at base - evidence as to whether *consensus* had been reached, in which case no formulation will ever be satisfactory if cast as a pre-requisite.

- **Benefit & Detriment.** Chitty noted that the '*traditional*' definition of consideration concentrated on the requirement that '*something of value*' had to be given. Thus, it defined consideration in terms of some detriment to the promisee or benefit to the promisor. This formulation reflects *Stone v Withipole* (1589) ('*loss to [P] or a benefit [profit] to [D].*'), although this case is not cited.<sup>610</sup> Chitty also noted that it has been asserted that '*detriment to the promisee*' was the essence of the doctrine (this reflects *Webb's Case* (1577) '*not...the profit which redounds to the [D], as the labour of [the cost to] the [P]*', also not cited). However, Chitty indicated that various cases supported the view that benefit to the promisor - even without detriment to the promisee - was sufficient.<sup>611</sup> One would agree since this is the formulation in *Currie v Misa* (1875) which (in effect) follows *Stone v Withipole* (1589). Also, Chitty noted that the English courts had not consistently adopted - in either of these senses - the words '*detriment*' or '*benefit*'.<sup>612</sup> However, Chitty also noted that this view of benefit and detriment stated the doctrine in a way broadly consistent with the case law and that it gave a basis for predicting the course of future decisions.<sup>613</sup> One would agree. If the doctrine is not formulated with reference to the caselaw - one is on the '*high seas*' of endless academic formulations which are subjective (and often changed or discarded by the originators themselves);
- **Performances & Promises as Consideration.** Chitty noted that consideration might consist either of a performance by the promisee - or a promise to do so. And, that '*the parties' mutual promises can amount to consideration for*

<sup>606</sup> Chitty, n 71 (2015 ed), 4-001.

<sup>607</sup> Ibid, 4-001 to 4-002. Chitty continued 'A person or body to whom a promise of a gift is made from purely charitable or sentimental motives gives nothing for the promise; and the claims of such a promisee are regarded as less compelling than those of a person who has provided (or promised) some return for the promise. The invalidity of informal gratuitous promises of this kind can also be supported on the ground that their enforcement could prejudice third parties such as creditors of the promisor. Such promises, too, may be rashly made; and the requirements of executing a deed or giving value provide at least some protection against this danger.'

<sup>608</sup> Ibid, 4-003.

<sup>609</sup> Probably, the word is used to refer to non-reciprocal promises (i.e. there is no acceptance or counter promise).

<sup>610</sup> Chitty, n 71, 4-004. Chitty cited *Currie v Misa* (1875) LR 10 Ex 153, 162 *per* Lush J.

<sup>611</sup> This reflects the *arra*, see n 28.

<sup>612</sup> Ibid, 4-006.

<sup>613</sup> Ibid, 4-007 'Of course the traditional doctrine does not provide complete (or even a very high degree of) certainty. But it does state the doctrine in a way that is broadly consistent with the case law on the subject and that gives some basis for predicting the course of future decisions. The traditional definition also has more support in the authorities than any other definition. For these reasons it will be used in this chapter.' Chitty also noted the formulation of Pollock (see n 1163) and that it was '*so vague as to give no help in determining whether consideration exists on any given set of facts*'. One would agree. There is no doubt that it was idiosyncratic and not supported by earlier caselaw. Also, too vague (and not supported by English caselaw) are formulations which simply treat consideration as the '*reason*' (*causa*) for a contract. One would agree. Even by Elizabethan times (1570's-80's), reference in the caselaw (cf. later legal writers such as Fulbecke and Cowell) to consideration as a synonym for '*reason*' (or a '*motive*') had been superceded by requiring the pleading to allege a loss or benefit.

*each other has long been settled*.<sup>614</sup> One would agree. Since Roman times stipulation has comprised promise and counterpromise and these - if '*mutual*' (i.e. if they were aligned) - evidence *consensus*. Chitty also noted that such promises, if mutual, can '*properly be called a detriment and a benefit*'.<sup>615</sup> One would agree. However, this is to state nothing more than that a promise (and, *a fortiori*, the performance of a promise) may - on the evidence - comprise a detriment or a benefit. However, such detriment (or benefit) itself (like the promise or performance) is simply evidence that a party regards itself as bound and - thus - is evidence for a court to conclude that a contract has been made. Further, although contracts can be made by promise and counterpromise, it is no different if couched as an offer and an acceptance (or, in olden times, as a question and an answer);

- **Invented Consideration**. Chitty referred to the fact that the courts can pre-suppose consideration even if the same is not in the minds of the parties. In short, inventing consideration.<sup>616</sup> The word seems apt.<sup>617</sup> Indeed, so doing is nothing more than the courts determining - on the evidence - that a contract was concluded (as well as a reasonable reluctance of judges to allow persons to escape from contracts on the basis of sophisticated legal technicalities);
- **Motive, Condition, Promise**. Chitty noted (following *Thomas v Thomas* (1842), see **35(b)**) that motive was not the same as consideration. Nor a condition.<sup>618</sup> These principles have been long-standing. Finally, Chitty made the important point that - even though a promise may not give rise to a contract - this did not mean no remedy otherwise.<sup>619</sup>

In conclusion, Chitty adhered to the traditional view of consideration as a detriment or a profit. This is reasonable since its reflected prior caselaw (as opposed to the very varied opinions of legal writers). Also, that consideration was not the same as motive or condition (also, supported by caselaw). And, that there has been a tendency for the courts to presume it, when the parties may not have considered the same. This is unsurprising since the doctrine is a legal fiction (in the '*eye of the law*') viz. a detriment (or benefit) does not have to be factually proved (nor the *quantum*) as such. Finally, that a promise (and performance of a promise) can be (reasonably) couched in terms of a benefit (or detriment) also seems clear - since they, on the facts (evidence), are, invariably, intended to do that (e.g. '*If you come to my house, I will give you £50' etc*').<sup>620</sup>

### (c) **Adequacy of Consideration, Impossible Consideration, Past Consideration**

As to the adequacy of consideration, Chitty noted:

Under the doctrine of consideration, a promise has no contractual force unless some value has been given for it. But as a general rule the courts do not concern themselves with the question whether '*adequate*' value has been given, or whether the agreement is harsh or one sided...<sup>621</sup>

Chitty listed many examples of consideration being upheld even for if for a '*nominal*' sum and it made reference to a trifling value, such as chocolate wrappers<sup>622</sup> or a peppercorn.<sup>623</sup>

- However, as pointed out previously, while '*nominal*', today, has - in general and legal usage - a tendency to refer to a value greater than the actual value (i.e. a declared value), in centuries past it also covered '*no*' value. Thus, an *arra* was, often, of no value whatsoever.<sup>624</sup> However, it still bound a person since it evidenced that mutual

<sup>614</sup> Ibid, 4-008.

<sup>615</sup> Ibid, 4-009.

<sup>616</sup> See also Swain, n 102, p 187. See also *Haigh v Brooks* (1839) 10 Ad & E 309 (giving up a guarantee) discussed in *Westlake v Adams* (1858) 5 CB NS 248 (141 ER 99). Also, Swain, n 102, p 188. Ibid, p 189 'By the mid-nineteenth century, consideration seems to have provided a fairly minimal threshold which could be crossed without too much difficulty, even in the absence of genuine exchange.'

<sup>617</sup> See also MP Sharp, *Pacta Sunt Servanda* (1941) 41 Columbia LR 783, p 794 'The doctrine of consideration can be easily manipulated by the judges, to achieve practical results.'

<sup>618</sup> Chitty, n 71, 4-011 & 012.

<sup>619</sup> Ibid, 4-013 '*Contract*' does not exhaust the category of promises having some legal effect...'

<sup>620</sup> *Gilbert v Ruddeard* (1608) 3 Dy 272b (n)(73 ER 607), see n 889.

<sup>621</sup> Ibid, 4-014. Chitty also noted 'the courts are (even when legislation has not intervened) by no means insensitive to the problems raised by unequal or unfair bargains; but in none of them is a promise held invalid merely because adequate value for it has not been given. Some additional factor is required to bring a case within one of the exceptions: for example, the existence of a relationship in which one party is able to take an unfair advantage of the other. In the absence of some such factor, the general rule applies that the courts will enforce a promise so long as *some* value for it has been given: '*no bargain will be upset which is the result of the ordinary interplay of forces*.' The quotation is from *Lloyd's Bank Ltd v Bundy* [1975] QB 326, at 336 per Denning MR.

<sup>622</sup> Ibid, 4-015. See also *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87.

<sup>623</sup> Ibid, 4-018.

<sup>624</sup> Thus, in Anglo-Saxon times, a tally (a piece of wood) was exchanged, or a coin or piece of leather of no value, or a mutilated coin of legal tender or a handshake or a tomtit (whether dead or alive is irrelevant) or a peppercorn (indeed, a mustard seed could have been used, but it would have been less visible). None of these can be said to be of any monetary value whatsoever. Nor too, a wax seal. The key thing

agreement had been reached and *when*. Also, its delivery satisfied the requirement of delivery.<sup>625</sup> Further, there is no doubt that a person (if so minded) can use an *arra* today and that such is good consideration even if the *arra* is valueless in itself;<sup>626</sup>

- Further, since it is asserted that '*consideration*' was no more than a pleading point in Elizabethan times to evidence '*consensus*', this unsurprising. The *arra* was the same. Its value as a symbol had nothing to do with the value in the underlying transaction, since it was not treated as part of the transaction. Thus, today, consideration can also be of no intrinsic value. Indeed, such is the reason why marriage (as well as moral consideration) was treated, in the past, as '*valuable consideration*'.

Chitty noted that - although consideration did not need to be adequate - it did need to have '*value in the eye of the law*'.<sup>627</sup> Thus,

it must be capable of estimation in terms of economic or monetary value, even though there may be no very precise way of quantifying that value.<sup>628</sup>

While this might be correct in the context of specific pieces of legislation, it is asserted that this statement is (strictly) inaccurate, not being founded on the caselaw. That is, in cases from the Elizabethan period onwards parties were *not* required to prove to the court the monetary value of any alleged consideration (such as sight of a document, an *arra* etc). It was presumed as a matter of law (as a legal fiction). Further, in earlier times trying to do so would have been a disaster since the courts would have been asked to opine on the value of vast amounts of private currency (tokens) used in business transaction which currency - not being legal tender - was (strictly) of no value (indeed, it was a breach of Crown prerogative to issue it and, thus, was a contempt of the sovereign, although no one seems to have been criminally prosecuted for it, for obvious reasons).<sup>629</sup>

- Chitty also mentioned physically impossible and illusory consideration - although this was, in the past, formulated more with reference to the contract and not to the specific pre-requisite of consideration.<sup>630</sup> Similarly, '*discretionary promises*' ('*unless I change my mind*')<sup>631</sup> are better formulated as reflecting an absence of fixed legal intention or *consensus* as opposed to consideration;
- In the case of past consideration, Chitty noted that such was inadequate,<sup>632</sup> while recognising an exception in the BOE Act 1882, s 27 (see 37).<sup>633</sup> However, there is no reason why past consideration should not be adequate consideration if it also reflects a present intention - such as is necessary for *consensus*, being the union of present intentions.<sup>634</sup> Indeed, this is reflected in the BOE Act 1882, s 27. Thus, an antecedent debt (or liability) is good

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was not the value of *arra* it was that it *symbolically* evidenced *value*. And, that its *delivery* (in front of transaction witnesses, in the past) was proof that a person had *agreed* to be bound.

<sup>625</sup> The earnest (*arra*) was not kept, evidencing that it was merely a symbol of delivery. Thus, Abraham did not keep the shoe he was handed to symbolise land (see 6(c)). Further, in Roman times, the ring handed over as an *arra* would have been returned (as would a ring in early medieval times). Otherwise, there would have been a flourishing market in shoes and rings. They would have been returned once the bargain was concluded. So too, tallies. Once the debt was paid, the stick was broken by the creditor and returned to the debtor (a good way to prevent the creditor holding on to it and subsequently asserting the debt had not been paid). So too, with deeds (indentures). On completion of the transaction, they were frequently defaced and returned to the respective parties.

<sup>626</sup> One says this since no court case or legislation has ever challenged the use of an *arra*. See also *Blenkinsop v Clayton* (1817) 7 Taunt 597 (129 ER 238), see 1120. Concluding deals by means of a handshake continues to this day.

<sup>627</sup> Chitty, n 71, 4-022.

<sup>628</sup> *Ibid.* Chitty referred to *R v Pembrokeshire CC ex p Coker* [1999] 4 All ER 1007 dealing with the Local Government Act 1972, s 123(2).

<sup>629</sup> If the courts had concluded in medieval or Elizabethan times that all business transactions effected using private currencies were null and void, there would have been riots. After all, the problem lay with the Crown in refusing to mint small change (and their own debasement of legal tender). At most, a person was not obliged to accept non legal tender (see 159). Likely, this assisted the fact that the worth of an *arra* (as well as consideration) had only to be '*nominal*' (a euphemism for saying that the courts were not inclined to ask about its real value). As it is, from 1919, all legal tender anyway is of nominal (declared) value and courts are not inclined to ask parties to determine the worth of the paper on which, for example, a £1 is printed. In short, the courts (and everyone else), in the case of *legal tender*, treats actual (true) value and nominal value as one and the same.

<sup>630</sup> i.e. a contract which is impossible to perform, is void. Thus, a contract to buy the stars is impossible to perform (and, hence, to enforce) even if good consideration is given (say £20 or it is in a deed). Cf. Chitty, n 71, 4-023.

<sup>631</sup> Chitty, n 71, 4-026.

<sup>632</sup> *Ibid.*, 4-026 'The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to '*past consideration*'; and such past acts or forbearances do not in law amount to consideration for the promise.'

<sup>633</sup> *Ibid.*, 4-035.

<sup>634</sup> e.g. *In Re McArdle* [1951] Ch 669 a promise made in consideration of carrying out work already done reflects an absence of *consensus*, since it is predicated on a mis-understanding of the true situation. Cf. *Goldshede v Swan* (1847) 1 Ex 154 (promise in consideration of your having advanced £750 (i.e. pre-payment) reflected a union of present intentions). See Chitty, n 71, 4-029.

consideration for a party issuing a BOE to pay it. Given that inland BOE are no longer used, this can be modernised by referring to a cheque. Writing out a cheque to pay off a past debt (a bar bill) should be good consideration for enforcing it - without any need to refer to '*consideration*' as a pre-requisite - since it reflects the present intentions of the parties involved (and their *consensus*) that the bar bill should be paid.

Thus, there is no good reason for a court not to enforce the business intentions of the parties. However, this indicates the inadequacy of the doctrine as a pre-requisite since - if the past debt was contained in a deed or if an *arra* (a tiny deposit) was given - there would be no need to even consider the doctrine (so too, if the signature on the cheque/bond *etc.* is treated as an *arra*, which it should be).

#### **(d) Consideration - Aspects**

As to aspects of consideration, Chitty noted that the promisee must provide consideration, but that a benefit to the promisor was sufficient.<sup>635</sup> Also, consideration need not move to the promisor.<sup>636</sup> Chitty also dealt with compromise and forbearance to sue<sup>637</sup> as well as existing duties, stating in respect of the latter:

Much difficulty lies in determining whether a person who does, or promises to do, what he is already in law bound to do thereby provides consideration for a promise made to him...Denning LJ has...said that the performance of an existing duty, or the promise to perform it, was always a good consideration. This radical view has not been accepted; but the requirement of consideration in this group of cases has been mitigated by recognising that it can be satisfied where the promisee has conferred a factual (as opposed to a legal) benefit on the promisor.<sup>638</sup>

Chitty also considered - at great length - problems of consideration in the context of the discharge, and variation, of contractual duties.<sup>639</sup> It then considered part payment of a debt.<sup>640</sup> It also considered proprietary estoppel, distinguishing it from promissory estoppel.<sup>641</sup> However, it may be noted that estoppel - whether proprietary or promissory - is a legal remedy distinct from consideration.<sup>642</sup> Finally, Chitty considered '*special cases*'<sup>643</sup> such as the infancy of a party (which goes to capacity), illegality and public policy - as well as where legislation makes provision on the matter. Also, gratuitous promises and services.<sup>644</sup>

#### **(e) Conclusion**

Wisely, Chitty (and Anson, see below) based their definition of consideration on the formulation in *Currie v Misa* (1875) since there are so many academic formulations which have fallen by the wayside. However, the fact that Chitty takes a huge number of pages to analyse the doctrine and makes reference to a vast collection of cases speaks volumes as to its obscurity and intelligibility. Further, the massive volume of caselaw (and legal articles) obscures some basic points.

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<sup>635</sup> Chitty, n 71, 4-037 & 8 '*The rule that 'consideration must move from the promisee'* means that a person can enforce a promise only if he himself provided consideration for it...But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without suffering any detriment.'

<sup>636</sup> Ibid, 4-040. Chitty also considered more than one promise, joint promisees, several promisees and joint and several promisees. Also, the Contracts (Rights of Third Parties) Act 1999. Ibid, 4-042 to 7.

<sup>637</sup> Ibid, 4-047 'Three situations here call for discussion: in the first a person promises not to enforce a *valid* claim (or performs such a promise); in the second the claim which is the subject matter of such a promise is *invalid* or *doubtful*; and in the third the person in question simply *forbears in fact* from enforcing a claim, without making any *promise* to forbear. The question in all these cases is whether the promise to forbear (or its performance), or the actual forbearance (without any promise), can constitute consideration for a (counter-) promise made by the other party.'

<sup>638</sup> Ibid, 4-062. See also *Ward v Byham* [1956] 1 WLR 496, 498 and *Williams v Williams* [1957] 148, 151.

<sup>639</sup> Ibid, 4-078 *et seq.*

<sup>640</sup> Ibid, 4-117 *et seq.*

<sup>641</sup> Ibid, 4-140 'Proprietary estoppel is said to arise in certain situations in which a person has done acts in reliance on the belief that he has, or that he will acquire, rights in or over another's property...It is distinct from promissory estoppel, both in the conditions which must be satisfied for it to come into operation and its effects. But under both doctrines some legal effects can be given to promises which are not contractually binding for want of consideration; and it is this aspect of proprietary estoppel which calls for discussion in the present chapter.'

<sup>642</sup> For example, estoppel preventing a person from asserting the contrary to a *record* or estoppel by *deed* are far older than the doctrine of consideration (and a deed does not require consideration anyway).

<sup>643</sup> Chitty, n 71, 4-186 'Mutual promises are generally consideration for each other, but difficulty is sometimes felt in treating one of the promises as consideration for the other if the former suffers from some defect, by reason of which it is not legally binding. The law on this topic is based on expediency rather than any supposedly logical deductions which might be drawn from the doctrine of consideration.'

<sup>644</sup> Ibid, 4-198 and 4.199. These are better treated as akin to gifts since they originate from pure liberality. They are not a business transaction (an invitation to trade or to treat).



- The *arra* symbolised value. Thus, it could be nominal (indeed, of no actual value). And, it could not be past (since it evidenced a present intention). It was also only used in commercial transactions - not when gifts were given. That is, when the parties intended a legal act of a commercial nature. Further, the *arra* satisfied the pre-requisites of *consensus* and, when delivered, of delivery - pre-requisites for a valid contract since the time of Bracton. Thus, the *arra* evidenced the intention of the parties to be legally bound. However, the *arra* became a formal pleading point by 1567. Therefore, effectively, the *evidence of consensus* and delivery - of the parties being bound - was that '*value was given*' in some way. In short, consideration inherited the mantle of the *arra*. It could be nominal (indeed, of no value, such as a peppercorn) but it could not be past (unless it reflected a prior *consensus*, such as a request or a promise). It did not apply to a gift. Further, it was not needed for a deed since the seal was an *arra*;
- Further, '*value*' - by pleading extension in Elizabethan times - was not just a specific money sum. The fact that a party had lost money (or that the other had made a profit) was good evidence of a contract being concluded. It was treated the same as value given ('*valuable consideration given*'). Similarly, a past debt or any forbearance was the same - since it reflected a loss to a party (and gain to another).

In conclusion, if one considers the entire caselaw provided by Chitty on the doctrine, it can all be fitted into the doctrine being an extension (in evidential terms) of the *arra* (save, of course, for the doctrine stipulating the same as a pre-requisite, not being a matter of evidence). Thus, leaving aside certain historical changes<sup>645</sup> and matters wrongly categorised,<sup>646</sup> the modern day doctrine is the replication of a pleading point - save for treating it as a pre-requisite and not as a matter of evidence. This, though, is doomed to failure since the doctrine will keep expanding to include more (and more) examples of acts which (in truth) simply evidence the fact that an agreement has been reached.

***In conclusion, Chitty sets out the modern formulation of the doctrine but, in so doing, shows many of its defects.***

#### 46. ANSON (2016)

Anson's *Law of Contract* (2016)<sup>647</sup> - like Chitty (see above) - followed *Currie v Misa* (1875) in the basic definition of consideration. A number of points may be noted:

##### (a) Nature of the Doctrine

- **Benefit or Detriment**. Anson asserted there was controversy as to the importance of the *Currie v Misa* (1875) formulation in terms of benefit to the promisor or detriment to the promisee.<sup>648</sup> Consideration must be given in return for the promise. It was (usually) given at the request of the promisor. A benefit conferred (or detriment suffered) otherwise than in return for the promise did not constitute consideration (one would agree, since no evidence of mutuality);<sup>649</sup>
- **Past Consideration**. Anson noted that past consideration was not part of the same transaction and, thus, was no consideration at all.<sup>650</sup> Exceptions lay in the case of a previous request of the promisor and an antecedent debt;<sup>651</sup>
- **Adequate Consideration**. Anson noted that the '*most trifling detriment or benefit will suffice*' and that the courts were prepared to find a contract where the consideration was virtually non-existent.<sup>652</sup>

<sup>645</sup> For example the Statute of Enrolments Act 1536, Fraudulent Conveyances Acts 1571 & 1584 and parts of the Statute of Frauds 1677 all dealt with valuable consideration legislatively. However, they have been repealed.

<sup>646</sup> Chitty refers to *infants* making contracts. However, this goes to Bracton's pre-requisite of capacity, not to consideration. Further, all forms of estoppel are not pre-requisites of a contract (nor part of consideration). They comprise a distinct legal remedy - unaffected by any abolition of consideration or change to the pre-requisites of a contract.

<sup>647</sup> Anson (2016), n 76, ch 4.

<sup>648</sup> Ibid, p 97 'It is universally conceded that detriment to the promisee in return for the promise is a good consideration...Yet the element of benefit cannot be entirely disregarded, since there are some cases in which a promise has been held not to be gratuitous on the ground that it secured some benefit to the promisor, though without any real detriment to the promisee.' Reference was made to *Edmonds v Lawson* [2000] QB 501. One would agree - an *arra* reflected benefit to the promisor (a token payment with paying the full sum, later) and, often, loss to the promisee (the seller) who had given the goods and had to wait for his money. However, this '*loss*' was, often, illusory since the seller was compensated for this, see also n 29.

<sup>649</sup> See *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291. Also, *Combe v Combe* [1951] 2 KB 215 (forbearance not in return for a promise to pay). Anson, n 76, p 98 also noted that consideration should be distinguished from a condition, p 98.

<sup>650</sup> Anson (2016), n 76, p 101 'In the case of past consideration...the promise is subsequent to the act and not independent of it; they are not part of the same transaction...Past consideration is, in effect, no consideration at all.' *Roscorla v Thomas* (1842) 3 QB 234.

<sup>651</sup> Ibid, p 102.

Anson then considered issues such as motive, impossibility, uncertainty, forbearance to sue - as well as the performance of (or promise to perform) an existing duty and the discharge of a debt. It also considered promissory estoppel.

### (b) Criticisms of the Doctrine

Anson criticised the continued worth of the doctrine and the points it made may be summarised as follows:

- **Contractual Intention**. This - already a distinct pre-requisite of a contract - covered consideration in the sense of showing an intention to be legally (as opposed to) morally bound;<sup>653</sup>
- **Economic Duress**. Aspects of the doctrine (including the pre-existing duty rule) had been justified by the need to discourage improper pressure and coercion. However, this was, now, '*more directly and effectively served*' by recognising economic duress as a ground to void a contract;
- **'Bargain' View of Contract**. There was a view that consideration, offer and acceptance were an indivisible trinity of perceiving contracts, at base, as bargains. However, enforcing bargains (even if it was accepted that contracts could be so categorised) was a different point to what pre-requisites were required for their formation. One would agree. The word '*contract*' derives from the Latin '*contractus*' - itself a translation of the Greek '*synallagmata*' (exchange). However, today, it is simply not possible to categorise all business transactions as an exchange - they are multitudinous in their nature. Thus, by 1876, Pollock (see **36(a)**) termed a contract to be a '*legally enforceable agreement*' (no different to Bracton in c. 1250 (an agreement with vestments)). Thus, the issue is what pre-requisites a contract should have - and whether consideration is needed;
- **Consideration Covered Variety of Functions**. Anson indicated that consideration covered (albeit, '*obscured*' might be a better word) other issues such as an intention to create legal relations, economic duress, privity of contract *etc* and that these were now separate components. Thus, Anson accepted that there was '*considerable force*' in the 1937 Law Revision Committee Report (see **16(a)**) which stated that '*in many cases consideration was a mere technicality, irreconcilable either with business expediency or common sense*';
- **Proprietary Estoppel**. This should be distinguished from the formation of contracts.<sup>654</sup>

### (c) Conclusion

Anson's comments on past and adequate consideration reflect the nature of the *arra*, which token evidenced that the parties were bound. Thus, there had to be a present, not past, intention - to achieve a present union of wills. Also, its value was symbolic; it need have no value in itself. Further, Anson's criticisms of the doctrine have much merit. In particular, its reference to business expediency and common sense (quoting the 1937 report). English commercial law is not just an academic exercise endlessly analysing legal fictions - fun though that may be. It *must* be of use to the business community and be intelligible. Thus, commercial law is a living and evolving mechanism to regulate business transactions - something, sometimes forgotten. As a result, abolition of the doctrine must be considered. However, prior to this, brief reflection may be made on possible errors in past analysis.

## 47. ERRORS IN ANALYSING THE DOCTRINE ?

With a greater range of legal and other data now available to us today, it is worth looking back and noting what seem to be errors in the legal analysis (playing, to some extent, the devil's advocate).

### (a) Errors - Source of Doctrine

- **Historical Origin**. As previously noted (see **16**), in Victorian times, there was a marked tendency to seek the origin of the doctrine from outside the common law - whether it be Roman or canon law or the Court of Chancery. Also,

<sup>652</sup> Anson referred to *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 (chocolate wrapper) and to *Haigh v Brooks* (1839) 10 A & E 309 (113 ER 119)(surrender of document which turned out to be worthless).

<sup>653</sup> Anson (2016), n 76, p 136 'Attempts have been made to justify the doctrine on the ground that it is essential both to the form and the substance of a contract. Consideration, it has been argued, is a formal necessity which serves to distinguish those promises by which the promisor intends to be legally bound from those which are not seriously meant...Consideration is cogent evidence of the existence of such an intent, but it is by no means conclusive proof that it is present. The abolition of the doctrine would therefore simply mean that the test of contractual intention would assume a greater significance in the law of contract. Few persons would contend that this constituted an insuperable objection to a change in the law, for civil law systems seem to exist quite happily without the need for consideration.'

<sup>654</sup> *Ibid*, p 138 'its role [that of consideration] should be confined to the formation of contracts and that it should be supplemented by the principle of promissory estoppel.'

some of the writers were from other legal systems (Langdell, Holmes and Ames, for example)<sup>655</sup> or they were over-influenced by foreign (civilian) techniques when analysing the English law of contract - the influence of Savigny on Pollock and Anson, for example. Also, most were academics with little (or no) knowledge of English commercial law in practice. Therefore, they never thought to consider rather mundane issues such as the law of evidence, pleading points, tallies, *arras*, coins, tokens, the law merchant, London customs, *etc* but, rather, they selectively extracted material from the Yearbooks and from texts that only dealt with the king's court. The result was a myopic and distorted view. One which seems, quite clearly, wrong.

***The doctrine of consideration was 'home grown' - deriving from the common law - and not a foreign or a Chancery import;***

- ***Where & When it Developed.*** Many English legal text writers prior to the 1960's made little attempt to determine with precision exactly *where* and *when* the doctrine developed. However, it seems clear that - even in *Sharlington v Strotton* (1565) - the word '*consideration*' was used in different senses and with no suggestion that it was a pre-requisite for a contract.<sup>656</sup> It would also seem reasonable to assert that consideration originated in the action of *assumpsit*, that it was a pleading point and that it arose in the period 1565-89. Cases of importance appear to be:

*Lord Grey's Case* (1567) - actual delivery of an *arra* not required to be pleaded;

*Calthorpe's Case* (1574) - Dyer CJ, 'consideration is a cause or meritorious occasion, requiring a mutual recompense [*quid pro quo*], in fact or in law. Contracts and bargains have a *quid pro quo*';

*Webb's Case* (1577) - 'not...the profit which redounds to the [D], as the labour of [the cost to] the [P];

*Stone v Withipole* (1589) - (Coke) - 'The consideration is the ground of every action on the case, and it ought to be either a charge [loss] to [P] or a benefit [profit] to [D].'

However, the above were not pre-requisites *per se*. Rather, they were pleading points in the king's court (not in the lesser courts) to evidence three of Bracton's pre-requisites for a valid contract, *viz.* (a) *consensus*; (b) delivery; (c) a fixed price having been agreed (for a sale)(see 12). The *arra* symbolically evidenced that the parties were bound, and its delivery, *when*.<sup>657</sup> The *quid pro quo* reflected the fact that most contracts could be seen in terms of exchange. If a person delivered his '*this*' it was evidence both that a *consensus* had been concluded and that there had been *delivery* on his part - this being the basis to persuade the court that the other party was in breach of contract and must now deliver his '*that*' (or damages). The fact that the P had suffered loss (or the D profit) was also evidence that *consensus* had been reached - not least, in that common sense dictated that a person would not lose money (or financially benefit another) in a commercial context unless he thought that he had concluded a contract. Finally, the: (i) Statute of Enrolments 1536; and (ii) Fraudulent Conveyances Acts 1571 and 1584, required evidence of a '*valuable consideration*' having been given, *viz.* money or marriage.<sup>658</sup>

***The doctrine originated as a pleading point in the king's court in the action of assumpsit c. 1567-89. It was an evidential point;***

- ***Evolution of the Doctrine.*** Much earlier legal analysis seems to have been founded on a '*source of the Nile*' type premise. That is, that it might be possible to locate one particular case from which the doctrine sprang. However, this is unlikely and no one (to date) has been able to identify such a case. Nor, indeed, a doctrine, as such, in early times. If consideration developed from the common law (caselaw) then - as usual - its development would be crab-

<sup>655</sup> This is not to decry Holmes, *The Common Law* (1881, n 87) as an excellent piece of writing. However, Ames (often) found fault with some of Holmes' observations on English law. See also Gilmore, 98, p 112, fn 36 (quoting Professor Howe) 'The Common Law is not primarily a work of legal history.' Further, none of the American writers had available to them details of cases that we now do.

<sup>656</sup> Simpson in his *History of the Common Law of Contract* (1975) and Kiralfy, in his *The Action on the Case* (1951) sought to find '*consideration*' in early caselaw. However, it seems clear that the word was employed in a number of senses and not as a pre-requisite. Simpson also defined '*consideration*' as the '*motive*' for a contract (and Atiyah, the '*reason*'). However, it seems clear that this was not the basis for the doctrine which perceived consideration in terms of '*value*' (and, initially, *quid pro quo*). That is not to say that '*motive*' was not used to distinguish a gift from a contract (the former arising from pure liberality). Or to distinguish marriage (treated as '*valuable*' consideration) from other forms of moral consideration (friendship, family relations *etc*) some of which were, also, treated as '*valuable*' at one time or another. However, consideration was not defined by the courts as a pre-requisite in such terms.

<sup>657</sup> This was no different to Biblical, Roman and Anglo-Saxon law. A Brown, *Savigny's Treatise on Obligations in Roman Law* (London, 1872), p 125 'The *arrha*...amounts to making the contract practically solemn...Its operation on a contract is twofold, namely -1. The property in the *arrha* does not pass to the holder of the *arrha*, but is either returned or entered in account as part of the price; also, 2. It is not a substitute for the performance of the contract, but it is a corroboration of it.' Brown quoted Justinian's Institutes (see Sandars, n 252, p 362, 3.23 'what is given as an earnest only serves as proof that the contract has been made'). Also, the Digest (see Watson, n 252, vol 2 p 60, Digest 18.1.35 (*Gaius*) 'The common practice of giving earnest in respect of a purchase does not suggest that without the earnest there would be no contract but facilitates proof of the fact of agreement on the price.')

<sup>658</sup> Although (ii) referred to '*good*' consideration, this was interpreted to mean '*valuable*' consideration.

like <sup>659</sup> (as has proved). Further, if it was a matter of evidence (a pleading point) this will be even more so. This also can be determined since Blackstone (in 1766) was uncertain, from his formulation, as to exactly what it meant. Thus, the doctrine has evolved with many mutations (evolutions) since what it meant in Elizabethan times is not the same as it was in 1766 (in the time of Blackstone) or in 1875 (*Currie v Misa*). Nor, as it is today, when it covers more acts (which are, actually, evidential at base). Further, it is likely that the doctrine (rule) was not the creation of the Elizabethan courts. Rather, it was the creation of legal writers who took Dyer CJ's reference to a 'material cause' to be to a 'pre-requisite' and, then, to posit that this was separate to Bracton's pre-requisites of *consensus* and *delivery* - even though there is no evidence that Dyer CJ intended this (being a conservative judge who knew his Bracton, it is unlikely that he would have introduced a new pre-requisite on a sidewind). Thus, the development of the doctrine of consideration has been crab-like with many mutations. Further, it seems quite possible that it was the creation of English legal writers - not of the courts - which the courts subsequently picked up.<sup>660</sup>

***In conclusion, the doctrine is home-grown and it developed as a pleading point in the king's court in the context of the action of assumpsit in the period 1567-89. This, to evidence Bracton's pre-requisites of: (a) consensus; (b) delivery; (c) a fixed price in the case of a sale; as well as to evidence 'value' (money/marriage) having been given for the purpose of certain Acts.***

### **(b) Errors - Evidence required for a Valid Contract**

The evidence required to prove a contract has changed greatly over the centuries as writing has increased and parol (oral) contracts decreased. Various errors (mis-assumptions) may have been made in the past with respect to evidence to prove that a contract was concluded - especially with regard to the legal value of handshakes and oaths and why a deed was enforceable.

- ***Evidence - Handshake & Oath.*** In early societies when the law was rudimentary and most people were illiterate, evidence that people had entered into a contract was basic - and simple. This was so in Biblical times. Also, in Anglo-Saxon England which - as well as being influenced by the Bible - would have been influenced by Germanic law and custom (from AD 410) as well as by Scandinavian law and custom (from AD 886, when the Vikings started to settle in England). Maitland (it seems) was unsure whether a *handshake* was binding, to make a contract.<sup>661</sup> However, in Biblical times, as well as in later Scandinavian law, it (clearly) seems to have been - not least, because it comprised an *arra*.<sup>662</sup> Also, in Anglo-Saxon law and medieval law.<sup>663</sup> So too, drinking to seal the bargain. Contrariwise, Holmes thought (it seems) that a *simple oath* was binding to make a contract in Anglo-Saxon and in medieval times.<sup>664</sup> However, it was not so in Biblical times and it was (unlikely) to have been so in Anglo-Saxon and early medieval times in the secular sphere - which is why it was, often, accompanied by other acts. That is, it was supplementary - not constitutive.<sup>665</sup>

***A handshake was an arra and it bound the parties. So too, a drink to seal the bargain. The extent to which the king's court accepted this - as opposed to the lesser courts - post 1066 is less certain (see 11(b)). As it is, a handshake or a drink to seal the bargain (as well as an arra) was evidence - for hundreds of years - that a parol (oral) contact had been made. Further, such would have been used in a vast number of everyday transactions.***

- ***Evidence - Unsealed Writings & Tallies.*** Holmes thought that, *post-1066*, an unsealed writing (an *escrow*) was of evidential worth.<sup>666</sup> This would seem unlikely - at least, *post-Glanvill* (c. 1189).<sup>667</sup> As for tallies, English writers on consideration have tended to miss out discussion of them. However, they would have been a common and simple method to evidence debts (as Exchequer practice shows) and it is asserted that they (likely) bound a person in the lesser courts well before the king's court accorded them some degree of evidential worth (on the basis of the law merchant or local custom) in 1294.<sup>668</sup>

***Tallies, whether simple tallies or those with a seal and/or writing, were an arra - evidencing consensus. Also, delivery (when delivered). They are age old and bound a party.***

<sup>659</sup> Cf. Ibbetson *Words and Deeds*, n 121, p 93 'The requirement of a deed in the action of covenant was not introduced by a single bold stroke, but rather in the stumbling, crab-like manner beloved of the common law.'

<sup>660</sup> The imprecise formulations of writers such as West, Fulbecke, Cowell and Sheppard, likely, created confusion - not least, in that the latter two were civilians and, thus, much influenced by the civilian concept of contract.

<sup>661</sup> See n 366.

<sup>662</sup> See ns 180 & 367.

<sup>663</sup> See text to n 366.

<sup>664</sup> See n 400.

<sup>665</sup> In civilian writing it seems to have supplementary. See Grotius, 27(e).

<sup>666</sup> See n 421.

<sup>667</sup> See n 178.

<sup>668</sup> See n 552 (Metingham CJ).

- ***Evidence - Deed.*** Much legal writing makes a point that the king's court was restrictive in not wishing to deal with commercial transactions unless in the form of the deed and that the action of covenant precluded this.<sup>669</sup> However, this would seem to be over-emphasis since any writing *post* 1066 - almost necessarily - was in the form of a deed. That is, the seal was ubiquitous since people, in early times, did not sign. Further, restrictions on a deed having to be on parchment (or paper) seem only to have come later.<sup>670</sup> Thus, all writings would have been sealed - the only alternative being a mark (such as a cross, the Anglo-Saxon practice) since people in those days did not sign. Thus, one suspects that - *post* 1066 - the courts would have, initially, accepted the Anglo-Saxon form of a mark or sign, but that it went out of fashion, the seal (introduced by the Normans) being treated as better evidence. Further, a person did not have to have a seal - another person's seal could be used. Also, it did not have to be elaborate.<sup>671</sup> Thus, by 1154, those who made writings (i.e. the rich and important as well as merchants) - likely - had seals. As a result, any restriction on the need for a deed in the king's court would (in practice) not have been onerous and, for smaller and everyday transactions, writing would have been avoided by using easier forms of evidence such as a tally, a handshake and/or drink to seal the bargain, an *arra* etc.

***A deed was not difficult to effect (the requirement that it be on parchment or paper may not have come in until Elizabethan times (perhaps 1566). Certainly, paper did not come to England until the 14th century. Thus, any requirement in the king's court - as to evidence having to be by way of deed - was (in practice) not onerous.***

- ***Consideration - Deed.*** A modern error that has crept in, in some writing, is that consideration is only '*imported*' in the case of deeds.<sup>672</sup> However, it is also imported in the case of specialties (sealed writings under the common law that do not meet the requirement of a deed),<sup>673</sup> statutory specialties,<sup>674</sup> BOE and promissory notes (an exception secured under the law merchant). In any case, the seal is an *arra*;
- ***Courts - Business Friendly.*** Some legal writing also posits the idea that the king's court was not user-friendly towards commercial transactions. However, the reign of Edward I (1272-1307) and probably before - surely - evinces the opposite. The king's court *was* prepared to accept the tally on the basis of the law merchant and it was also prepared to accept local custom - when these could be pleaded. Further, to be a '*merchant*' was not very restricted - anyone who bought and sold as a profession was a merchant. Similarly, anyone involved in trade tended to be a citizen of London (or other commercial town) as well as be a member of a guild or other trade body, since he obtained considerable privileges from it.<sup>675</sup> Further, '*foreigners*' were well treated by the courts.<sup>676</sup> Also, there were masses of local courts where commercial disputes could be vented, without the need to go before the king's court (which would have been more expensive and more time consuming anyway). In conclusion, the courts were - in general - receptive to a wide range of evidence being produced before them, to show that a contract had been concluded. That is, to evidence *consensus* and delivery. As it is, most business transactions would, probably, have avoided the king's court on the ground of cost and on the basis that the matter could be dealt with more expeditiously elsewhere.

In conclusion, a doctrine of consideration was not needed for hundreds of years since deeds, tallies, handshakes, drinks to seal the bargain and the *arra* (see below) were used - and accepted - as good evidence (also, many deeds and debts were evidenced as a matter of '*record*', such as debts recorded pursuant to various Acts). Further, since people did not '*sign*' documents before the 16th century, all writings - almost inevitably - would have been sealed. Hence, there was no need for '*consideration*' as evidence of (or a pre-requisite for) a contract. The law

<sup>669</sup> e.g. Cheshire & Fifoot, n 79, p 5 (in 1946) 'This limitation [writ of covenant could not used unless the promise on which P relied was in a document under the D's seal]...was crippling, and as a result the common law missed the opportunity of establishing at any early age a general remedy in contract.' Cf. London custom, see n 590.

<sup>670</sup> See n 584.

<sup>671</sup> Stoljar Contract, n 101, p 6 'Far from being a pretentious symbol, it was more like a signature authenticating a document; a blob of wax bearing some personal mark or scratch would suffice.'

<sup>672</sup> Anson (2016), n 76, p 96 'Consideration is required in all contracts not made by deed.' Cf. Chitty, n 71 (2015), p 399 is more circumspect 'In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed or supported by some '*consideration*'. See also Burrows, n 103 (albeit this is only a Re-statement and not purporting to state present English law) p 8 'To be legally binding, an agreement, unless made by deed, must be supported by consideration.'

<sup>673</sup> The Law Commission recommended in 1998 that, except as provided in statute, an instrument should only be a speciality if the instrument was a deed. See McBain Deeds, n 35, p 24, n 625. However, this has not been enacted and the Law of Property (Miscellaneous Provisions) Act 1989 ('*LPMPA*'), while abolishing seals for individuals and imposing a face value requirement, did not seek, *per se*, to abolish any distinction between deeds and specialties (whether under the common law or statute). Nor the common law on BOE and promissory notes. As to whether the Act created a new type of specialty, see *Ibid*, n 600. Further, there is nothing to stop an individual sealing a document, the *LPMPA*, s 1(1) only providing that it is not required for a deed, *viz*. 'Any rule of law which (b) requires a seal for the valid execution of an instrument as a deed by an individual...is abolished.'

<sup>674</sup> McBain Deeds, n 35, Pt 2, pp 9-11.

<sup>675</sup> McBain Law Merchant, n 134, pp 73-83.

<sup>676</sup> *Ibid*.

and business got on quite happily without it. Which leads to the final issue - *Why* did the doctrine develop in Elizabethan times ?

### (c) Why the Doctrine Developed - Role of the Arra

It is asserted that the doctrine of consideration developed in the action of *assumpsit* - in part - as a result of the *arra* becoming a legal fiction in 1567 (*Lord Grey's Case*). This point was missed by legal writers since the nature and origin of the *arra* was not discussed in legal text books. Indeed, the *arra* was scarcely ever mentioned, since all legal writers from Bracton (c. 1250) were - usually - looking at the king's court and knew little (or cared little) - or nothing - about the lesser courts and business practice at a lesser level.

- **Arra**. The *arra* was a brilliant device where there was no immediate payment or delivery. Since Biblical times, to evidence that a contract was made (in those times, mainly sale and barter transactions) a token was handed over. It did not have to be of any worth itself but - symbolising value - it evidenced that a person was bound. And, when delivered, it symbolised delivery of the price or goods. Likely, when the full payment was made (in a sale) or full delivery in the case of barter (goods for goods) the *arra* (if valuable) was returned. If not, if worthless, it was discarded. And, if the person reneged on the deal, if the *arra* was of worth, the innocent party kept it (so, if you did not trust the other party, you probably asked for a valuable *arra* - which, also, could count as part payment). In Anglo-Saxon times, the *arra* would have been ubiquitous since there was no legal tender for 200 years. Thus, for example, one gave an *arra* (in the presence of witnesses) to buy a horse/cow *etc* for a stipulated price and the seller then went to get it, to hand over. In the meantime, the parties were bound. In medieval times, the *arra* became standardised - God's Penny (the reference to 'God' indicating the church's approval of the device). Because the *arra* symbolised 'value' - but did not, itself, have to have any value since it was not the subject of the contract - it could be of nominal value (including of no value). However, it could not be past. It had to be present. It was insufficient for a person to say they had handed over an *arra* in the past - it had to be presently exchanged to enable a present union of minds;
- **Elizabethan Arra**. Even in Elizabethan times, the *arra* was extensively used. The seal on a deed was an *arra*. And, in parol (oral) transactions, a token - such as a piece of leather or lead or private currency - was used. These had no value - which it (likely) why they were so often discarded - but they evidenced that the parties were bound even in the absence of transaction witnesses who were not legally required. However, by the 1560's, many of the lesser courts were in (terminal) decline and the volume of commercial business handled by the king's court increased. Thus, the issue of pleading came more to the fore in the king's court as well as the *arra*. As it was, in *Lord Grey's Case* (1567), Dyer CJ accepted that it was unnecessary to prove the actual delivery of the *arra* (in that case, of 2 (or, possibly, 7 shillings). The result is that the *arra* became a legal fiction - a pleading point.

Dyer CJ's statement also seems sensible since (likely) people were no longer physically handing over *arras* as a matter of business practice. Dyer CJ would also have well aware that - in deeds - a person was estopped from denying what was set out in the deed. Thus, in a deed, a statement that a person had given 1d in earnest would be upheld - even if he had not actually done so (absent fraud *etc*). Since an *arra* did not have to be of any value (but it *symbolised* value) and - since it could not be past - it is likely this spawned (in part) the use of the word '*consideration*' which, also, could be nominal and could not be past.

- **Consideration wider than an Arra**. Consideration was not identical with an '*arra*' since, although both were evidential - to evidence the fact that the parties had reached *consensus* (a pre-requisite for a contract) - the *arra* tended to be used in sale or payment transactions. However, '*consideration*' was used in a wider sense to evidence any act or forbearance which indicated that *consensus* had been reached. Such an act could, quite reasonably, embrace where a party had acted on a presumed contract and lost money (i.e. suffered a detriment) or had acted to the profit of the other (alleged) contracting party. Thus, consideration embraced such evidence;
- **Quid Pro Quo folded into Contract**. Similarly, it is understandable that '*quid pro quo*' which was evidence of delivery - a pre-requisite of a contract - would become (in time) folded into '*consideration*' when delivery died out as a pre-requisite of a contract and became a term of a contract, not a pre-requisite.

That the *arra* was connected to '*consideration*' (in part) seems clear since the former became a legal fiction and was transmuted into the latter as a pleading point while - in practice - the *arra* would not have died out for a long time after. The fact that it became a legal fiction, however, killed off the *arra* in time since business people will have realised that it was unnecessary for parties to oral contracts to go to the bother of handing it over, to evidence that they were bound (i.e. reached *consensus*). What has proved to be a disaster for English law, however, is the following:

- Consideration as a pleading point in *assumpsit* became a pre-requisite for a contract;
- English law drew a distinction between deeds where no consideration was required (because of the seal which, anyway, was an *arra*) and signed writing - without realising that a signature was as much an *arra* as a seal. Thus,

to draw such a distinction was absurd. Although Mansfield CJ sought to rectify this anomaly in *Pillans v Van Mierop* (1765) he was unsuccessful.

#### **(d) Conclusion**

Past analysis of the doctrine of consideration may have been hampered by a rather myopic (and academic) analysis of an area of law commercial law where business practice was (and is) hugely important. Also, by a failure to consider relevant Elizabethan caselaw and, instead, to develop grand theories (and *ex post facto* rationalisation) as to the origin and importance of the doctrine (which writers then, at times, defended emotionally). However, for the purpose of this article, the origin and worth of the doctrine in the past is not important. What is, is whether the doctrine is of use in the commercial context of the 21st century. This is now considered.

#### **48. ABOLISHING THE DOCTRINE**

When considering the abolition of the doctrine some, initial, issues may be noted:

- Most historical articles on the doctrine are of little use since there have been many developments in the last 20 years - including the Law of Property (Miscellaneous Provisions) Act 1989. Also, most legal articles (and most texts) have never considered abolition in detail;
- The distinction between a deed and a writing, now, is not even wafer thin (it is now, simply, a writing declaring that it is a 'deed', see 49(a)). Also, there have been developments *post*-2000 in respect of areas such as a legal intention to contract, promissory estoppel, economic duress *etc.*;
- We now live in an electronic and global age. Thus, abolition must be considered in the context of today - not even ten years ago. Further, abolition must be considered not just as an academic, 'Ivory Tower', issue but in the context of modern business and the work of practising commercial lawyers. Also, against the background that other legal systems have no such doctrine and that English law is now operating in a global market place.

Thus, the starting points are the articles of Lord Wright in 1936 and the 1937 Law Committee Report (as updated) as well as modern legal texts. Reasons for abolition are as follows:

##### **(a) Origin & Purpose of Doctrine Misunderstood**

The origin of the doctrine was in the action of *assumpsit*. It was a rule of evidence when pleadings were formulaic. However, all the forms of action have long gone as well as have Elizabethan rules of pleading. Today, in civil cases, according to the Civil Evidence Act 1968, parties can submit any evidence they (reasonably) deem relevant to support their case. And the judge is not (unlike Elizabethan times) looking at just one piece of evidence (or fact) to support the existence of a contractual pre-requisite. He is looking at the whole matrix of facts - including evidence provided by witnesses who are cross-examined - as well as, often, copious amounts of written material. This enables him to determine 'in the round' whether 'consensus' has been reached and a contract made. In short, the law of civil evidence is entirely different today than *pre*-1968. Further, the doctrine is a case of a pleading point (a rule of evidence) metamorphosizing into a pre-requisite. Thus, it is doomed to failure since (as has happened) this has simply produced a huge volume of caselaw comprising, at base, examples of acts by which 'consensus' might be evidenced (profit, loss *etc.*).<sup>677</sup> The net result is a legal *cul-de-sac*, since the doctrine duplicates an already existing pre-requisite, *viz.* *consensus*.

***In conclusion, the doctrine was evidential - nothing more.***

##### **(b) Other Legal Systems - Scots Law**

Until modern times, legal texts and articles made little (or no) attempt to consider English law on a comparative basis. And, there was an arrogance that English law was 'superior' to the laws of other countries - regardless of any anomalies and absurdities. Today, things are different. Also, trade with Scotland and other major nations which lack such a doctrine, is immense and there is no evidence that these countries suffer legal problems due to the absence of such a doctrine. Or, that their trade and business transactions are affected. The opposite - matters

<sup>677</sup> Although unaware of the Elizabethan position on how consideration developed, Llewellyn (a US academic), n 108, p 778 noted "Consideration...is...an historically collected agglomeration of states of fact...like pebbles in a pudding-stone...". This is exactly what one would expect of evidential acts (*viz.* acts to evidence *consensus*) gathered together.

are less complicated. Finally, it is manifest that - if Scots and English law was aligned - this would help commerce and reduce legal complexity.

***In conclusion, other legal systems have no doctrine and there is no evidence that their commerce or law is impoverished as a result.***

#### **(c) English Trade & Commercial Law**

The lifeblood of this country is (and has been) trade. We are a trading nation and our commercial law should not be a *via crucis* for the business man or merchant. If so, it has a negative - not a positive - effect. As it is, the doctrine is as clear as mud to business people - and to most lawyers. Chitty takes a large number of closely written pages to explain it. Thus, unless there are compelling business reasons for its retention, it should go.<sup>678</sup> However, there are no such compelling reasons - the opposite. As Lord Wright pointed out (see 39) the doctrine often defeats the legitimate business expectations of contracting parties and creates contractual uncertainty.<sup>679</sup> Further, it has resulted in (obvious) judicial circumlocutions (*'invented considerations'*) to mitigate its harsh effects.

***In conclusion, the doctrine causes problems for English trade and business without any concomitant benefits.***

#### **(d) Consideration - Absence of Definition**

Despite more than 400 years having past, there is still no agreed definition of consideration - itself, fairly good evidence that it was a pleading point and evidential at base. Thus, Pound (in 1922) stated:

although we have been theorizing about consideration for four centuries, our texts have not agreed upon a formula of consideration, much less our courts upon any consistent scheme of what is consideration and what is not. It means one thing - we are not exactly agreed what - in the law of simple contracts, another in the law of negotiable instruments, another in conveyancing under the Statute of Uses [1536] and still another thing - no one knows exactly what - in many cases in equity.<sup>680</sup>

Nearly a 100 years have passed since Pound wrote and the position is no clearer. As a *tabula in naufragio*, the main commercial texts cite Lush J in *Currie v Misa* (1875). *viz* that consideration is:

some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.

This sentence is hardly a good definition of a pre-requisite for a contract; it is too vague and loose. Further '*some*' actually means '*any*'. However, no acceptable new definition has appeared. As it is, *any* 'benefit...or loss' is better expressed as an evidential matter rather than as a pre-requisite (since the latter needs, to be such, to have a clearly defined core of meaning, which is lacking).

***In conclusion, after 400 years there is still no good definition of consideration - good reason to suppose that it was evidential and - even if not - that it should be now.***

#### **(e) Consideration, Benefit, Detriment, Nominal**

In the English language the word '*consideration*' has always been open ended - and it remains so to this day. Further, even in its legal context, it means many things to many people.<sup>681</sup> The words '*benefit*' and '*detriment*' are

<sup>678</sup> There is a real danger that academic analysis on commercial matters completely forgets this. Llewellyn, n 108, p 782 was (likely) making this point when he indicated that the law of contract - one which dealt with day-to-day business transactions - needed to be '*critically restudied as a whole in terms of wherein it serves well, wherein it is out of joint.*' (*his italics*).

<sup>679</sup> Hooley, n 122, p 34 'The doctrine...has been used as one of the piecemeal solutions adopted by the English courts. However, reliance upon that doctrine has made flexibility the victim of certainty. With certainty the parties to a contract know where they stand. They can expressly allocate risk and insure accordingly.' See also H Beale & T Dugdale, *Contracts between Businessmen* (1975) 2 Brit J Law & Society 45 at pp 45-8. See also *Printing and Numerical Registering Co v Sampson* (1875) 19 Eq 462, 465 *per* Jessel MR 'if there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into shall be held sacred and shall be enforced by the Courts of Justice'. See also Sharp, n 1376.

<sup>680</sup> Pound, n 1241, p 155.

<sup>681</sup> Cf. Reiter, n 116, p 444 'The '*doctrine of consideration*' is thus many doctrines: no definition can rightly be set up as the one and only correct definition'. One would assert that it is, actually, one doctrine (pre-requisite) but a number of loose rules. See also Phang, n 123, p 22 (doctrine '*far too malleable*').



even *more* open ended in the English language and have no clear referent. Further, they can be interpreted both subjectively and objectively.

- Thus, in a court case, a party may think that he has suffered no loss (or secured no profit). However, a court may hold - as a legal proposition - that he has. In the context of consideration, the result is '*invented consideration*' - the word being (it is asserted) an adequate description of where a judge holds that a benefit/detriment exists a matter of law, not fact. However, this is nothing more than saying than - on the *evidence* - the judge so finds it. And he so finds it, for concluding that a contract was made;
- Further, since benefit/detriment - as well as any act, forbearance or promise - can be accorded (at least) a nominal or symbolical economic (money) *value*,<sup>682</sup> the connection of this with the requirement in 1567 that an *arra* could be formally pleaded becomes clear. All comprise formal evidence of the parties being bound ('*value given, your lordship*').<sup>683</sup> No need to show money being physically handed over (or to prove a specific actual loss or detriment) because the rule of pleading no longer requires it (usefully aligning the situation with deeds - the value expressed in the deed cannot be controverted). Further, past consideration is not good - unless it also reflects a present intention.

However, because '*detriment*' and '*benefit*' are so wide (so vacuous), they can mean anything. This is appropriate since, at base, they simply reflect that someone has lost money or gained it (in fact or the eye of the law) - something that, invariably, happens in a commercial context since people (unless in a gift situation) do not hand over money (including losing, or gaining, the same) without wanting something in return. However, to retain the terms of '*benefit*' and '*detriment*' accords consideration some degree of '*cover*' when it has none, since these are simply examples of '*value*'. Thus, today, consideration - in English law - actually means '*any act*' which (in the end) *can be shown to have some economic value - whether actual or nominal (including symbolic)*. But there is no need to retain even this latter part in italics since a vast number of contracts concluded today cannot, usefully, be analogized to comprise a sale, an exchange or to involve money.

- Thus, consideration is '*any act*' which a party asserts (or the court determines) is sufficient to evidence a contract (that is, a party being bound). This sounds like a rule of evidence. No different to a party asserting to a court - in times past - that he gave a token (of no value) as an '*act*' to evidence being bound;
- Thus, '*detriment*' and '*benefit*' are, simply, the results of acts and to try and make them have a distinct legal technical meaning is as fruitless as trying to make '*consideration*' have a distinct legal technical meaning when it is too open ended to attain this.

***In conclusion, the words 'consideration' and words 'benefit' and 'detriment' do not have a sufficient core of accepted meaning to make legal technical terms out of. And, since the latter two (themselves) represent 'value', they are little more than a pleading extension of the arra - which, itself, represented 'value' - the delivery of which was evidence of consensus. And, since, virtually 'any act' can be hypothesized to have 'value' (even symbolic) all modern day definitions of consideration are nothing more than expressions of the fictionalization of the arra.***<sup>684</sup>

#### **(f) Consideration - What it Covered**

If one considers all that the concept of '*consideration*' has covered over the course of history (at its widest) all these matters no longer exist or they are now adequately dealt with as separate issues.

- **Valuable Consideration.** Thus, '*valuable consideration*' was required for the Statute of Enrolments 1536 and the Fraudulent Conveyances Acts 1571 and 1584. All were repealed in 1863 - more than 150 years ago. Also, '*valuable consideration*' may have helped, in the past, to distinguish a gift from a commercial act. However, consideration does not prevent a gift being such, today (moreover, the matrix of facts in a case presented to a judge, invariably, distinguishes between an intention to make *gift* - as opposed to an intention to make a *commercial* act - far more than referring to consideration);
- **Sale - Fixed Price Pre-requisite.** It was a pre-requisite of a sale that the parties had agreed (from Bracton's time) on a '*fixed price*'. By Elizabethan times, '*fixed*' was no longer required, providing the means of determining it was otherwise possible. Today, the Sale of Goods Act 1979, s 2(1) covers the sale of goods for '*money*'. Thus, no

<sup>682</sup> Reynolds & Treitel, n 115, p 1 (when considering one of two possible definitions of consideration) '*any act, forbearance or promise which has economic value can be regarded as a benefit or detriment sufficient to constitute consideration.*'

<sup>683</sup> Just as *quid pro quo* was (likely) - effectively - pleading '*slang*' in the king's court for saying '*subject matter delivered*'. - that is, '*my client fulfilled his part by handing over the goods (or paying the price etc.)*'.

<sup>684</sup> When the *arra* was handed over it symbolised loss (of value) to one party and benefit (in value) to another. However, when the *arra* became a pleading fiction (no delivery necessary) it was inevitable that loss (of value) to one party or benefit (in value) would be pleaded - as occurred.

common law principle is needed. Further, in other cases, payment (a *quantum meruit*) is implied - including for 'common' callings;

- **Delivery As Pre-requisite**. It was a pre-requisite of a contract (from Bracton's time) that there be delivery. Thus, consideration was treated the same as - or closely linked to - *quid pro quo* (also called exchange, 'this for that'). No such pre-requisite of delivery exists today;
- **Good Consideration**. This term was used in the Fraudulent Conveyancing Acts 1571 & 1584 (although interpreted to mean 'valuable' consideration). These Acts are repealed (see above). 'Good' was also used to preclude usurious contracts as well as those that were illegal or contrary to public policy. The former (usury) no longer applies. The latter void a contract as made and are not pre-requisites for a contract;
- **Consideration - Legal Intention**. *Eastwood v Kenyon* (1840) held that *moral* consideration was insufficient for the purposes of the doctrine. More properly, this issue is better categorised as a pre-requisite for a contract - one that requires an intention to create legal relations.<sup>685</sup>

***In conclusion, none of the above now apply. As a result, the doctrine, today, reflects the fictionalization of the arra.***

#### **(g) Consideration - Errors in the Doctrine**

There are errors in the doctrine, affecting the caselaw. It is thought that consideration has to be 'nominal.' However, the word did not mean in the past what it means today. In the past, it included something of symbolic value but no actual value (or else an *arra* would not have been adequate consideration). Thus, later writers (and *Currie v Misa* (1875)) refer, more accurately, to a legal fiction ('*in the eye [sense] of the law*'). As a result, reference to the 'adequacy' of consideration is meaningless. It is better to say that consideration can be of no monetary value. Also, past consideration is no limitation if it reflects a prior *consensus*.

#### **(h) Consideration - Inconsistent Application/Rules & Distinctions Artificial**

Large numbers of writers have pointed out anomalies, artificial distinctions, unreal considerations, inconsistent caselaw and unintelligibility including Brown (1909), Lord Wright (1936) and the Law Revision Committee (1937). Further, there has been no consistency in the definition - both by legal writers and the courts, with everyone (basically) providing their own formulation and, indeed, saying the opposite of what they mean.<sup>686</sup> As a result, the doctrine has more holes than a Gorgonzola cheese - and this is of no benefit to practicing lawyers who have to advise clients.

#### **(i) Consideration - Solemnity of the Deed**

In the past, much was made of the solemnity of a deed - although this existed long before consideration appeared and its binding nature was due to the seal being an *arra*.<sup>687</sup> The deed was held to 'import' (presume) consideration. Further, this was a ground for not importing it in the case of writings not under seal ('*parol*'), as indicated in *Rann v Hughes* (1778), overruling *Pillans v Van Mierop* (1765). However, since 1989, a deed does not require to be sealed in order to be a deed in the case of an individual.<sup>688</sup> Further, in the case of legal persons the tendency is now to sign (or, if sealed, to simply state as such without attaching any wafer or LS). Thus, the only, formal, distinction between a deed and any other writing, now, is that the former must make reference to its being a deed on its face. As a result, any solemnity has gone. Thus, retaining the need for consideration in the case of writing is absurd. Consideration should be limited now - in any case - to oral agreements. However, these are few and far between nowadays and all the other above points for the abolition of the doctrine apply to them.

#### **(j) Conclusion**

In respect of criticisms:

<sup>685</sup> Halsbury, *Laws of England* (4th ed), vol 9(1), para 727 'much of the work of the doctrine of consideration could be undertaken by the principle of intention to create legal relations; once such an intention is shown, there is almost a presumption that consideration exists. See also Simpson Innovation, n 65, pp 263-4.

<sup>686</sup> See ns 1127-8.

<sup>687</sup> Cf. Cohen, n 108, p 582 'Promises under seal were binding (because of the formality) long before the doctrine of consideration was ever heard of'. See also Swain, n 102, p 217.

<sup>688</sup> In the case of *corporations aggregate*, legislation generally provides for signatures as an alternative to sealing. In the *case of corporations sole*, as a matter of practice, if a seal is used, it is also signed.

- Lord Wright considered the doctrine to be an '*incumbrance*', '*riddled with inconsistencies and anomalies*' which had led to '*misplaced ingenuity and chicanery*' and that it '*ought to find no place in our system of contract.*' This was over 80 years ago;
- The Law Revision Committee in 1937 noted that consideration was a '*cluster of highly technical rules*' and that there was '*no doubt much to be said in favour of its abolition*'. Also, that '*many of us would like to see the doctrine abolished root and branch*';
- In 1986, Chloros - in a report commissioned by the Law Commission - concluded that '*no satisfactory reason for the existence of the doctrine can be found.*'

There is no evidence than practising commercial lawyers or businessmen would disagree with this (textbook writers in modern times have also expressed a negative view).<sup>689</sup> Thus, the doctrine should be abolished - whether by a court or by the Law Commission. The starting point should be the above criticisms. However, the doctrine is longstanding. Thus, one must consider the fear of Vitalstatistix in the Asterix series:

Vitalstatistix, the chief of the tribe...has only one fear, he is afraid the sky may fall on his head tomorrow. But as he always says, tomorrow never comes.<sup>690</sup>

#### **49. CONSEQUENCES OF ABOLITION - WILL THE SKY FALL ?**

Many fears are never realised. And, many legal fictions, maxims, rules of law *etc.* have fallen by the wayside over the centuries without any detrimental effect on the legal order. Abolition of the transfer of *seisin* in the case of land as well as the abolition of '*market overt*' to name but two.<sup>691</sup> It is asserted that abolition of the doctrine of consideration would effect no substantive change in commercial and business practice - apart from helping clarify a very confused area of law. For the practising lawyer it will simply mean that he/she will not have to put in written documents the fiction 'for [£1 or US\$ 1] and other consideration the receipt and adequacy of which the parties accept'.

- As it is, the doctrine does not, presently, affect deeds, specialties (i.e. documents under seal which are not deeds), BOE, promissory notes, confirmed letters of credit or the *arra* (*earnest*). Thus, abolition will not affect these matters;
- Further, abolition of the doctrine will not affect promissory estoppel, nor any other form of estoppel. Nor will it affect simple promises (*pollicitations*) given in a commercial context. These are not contracts and they have never been treated as such at common law.<sup>692</sup> Nor will it affect the law of gift<sup>693</sup> - nor a promise to make the same.<sup>694</sup>

In short, abolition of this legal fiction will not cause the sky to fall. And, it will not result in the disappearance of any factors which go, presently, to make up the doctrine. They will revert to their original role as evidence which may (or may not) be useful to determine whether parties have made a contract. However, to assuage any fears, a staged process might be a good idea: *viz.* (a) abolishing deeds and specialties; (b) placing the pre-requisites for a *gift* in legislation; and (c) placing the pre-requisites of a *contract* in legislation.

<sup>689</sup> e.g. Burrows *Obligation* (in 1998), n 103, p 197 ('The law would be rendered more intelligible and clear if the need for consideration were abolished'). See also H McGregor, *Contract Code* (Sweet & Maxwell, 1993) 1-3 (abolish consideration). See also Treitel *Landmarks* (in 2002), n 85, pp 14 & 28 (consideration too blunt an instrument in various cases).

<sup>690</sup> See n 37.

<sup>691</sup> In the case of *seisin*, see the Real Property Act 1845 (see 34). In the case of market overt, it should have been abolished by the Sale of Goods Act 1893. However, it lingered on. When it was finally abolished in 1994, Reynolds observed 'Lovers of curiosities in the law may sigh with regret at the passing into legal history of a rule of medieval origin, as may those who wish to facilitate the sale of stolen goods. *All others should welcome this long overdue event.*' (*italics supplied*). See FMB Reynolds, *Abolition of Market Overt* (1995) 111 LQR 76 at p 76.

<sup>692</sup> As indicated in the writing of St German (1528, see 18) a promise made in a commercial context was not a *contract* since there was no *consensus* or delivery. Further, the promise was not enforced by virtue of any doctrine of estoppel even though not a contract.

<sup>693</sup> The law of gift developed long before consideration came on the scene. Further, the distinction between it and a contract related to the fact that the intention of the donor had to be one of purely liberality *viz.* he was not inviting the donee to trade (treat) - that is, to enter into a commercial transaction.

<sup>694</sup> As indicated in the writing of St German (1528, see 18) a gratuitous promise was not a contract. It was a promise to make a gift. Further, the promise was not enforced by virtue of any doctrine of estoppel even though not a gift. Kreitner, n 124, p 1879 (in respect of US law) wrote (in 2001) 'Contract is commonly understood as the law of enforceable promises, where the border of enforceability is the promise lacking consideration, or paradigmatically, the promise to make a gift.' However, this not so under English law. A gift can still be a gift even with consideration (although consideration is not needed for a gift). Further, abolition of consideration does not mean, *ipso facto*, that an English court will, thereby, immediately enforce all gratuitous promises. A contract has nothing to do with a gratuitous promise.

- Abolishing deeds and specialties will help simplify the law as to the forms of evidence - reducing them to written and oral. Also, it will make it easier to clarify other consequences flowing from abolishing consideration;
- If gifts are defined in legislation, this will help distinguish them from contracts as well as help in determining the continued worth of the doctrine.

In respect of these matters:

**(a) Deeds & Specialties**

Once, there was a distinction between deeds and other instruments in writing since the former required: (a) sealing; (b) delivery; (c) to be on paper and parchment.<sup>695</sup> The Law of Property (Miscellaneous) Provisions Act 1989 ('LPMPA') abolished (c). As to the others:

- **Sealing**. By the LPMPA, a deed was no longer required to be sealed by an individual. In the case of legal persons the seal has become otiose since, in most cases - thanks to legislation - they can sign not seal. Even where they do seal, most legal persons do not use a seal or wafer or even a circle (LS, *lex sigilli*) or other mark to represent the same. The document simply says '*sealed*' (creating an estoppel). In 1972, Lord Wilberforce described sealing as '*mumbo jumbo*'.<sup>696</sup> Doubtless, the seal will be abolished in due course;
- **Delivery**. The requirement of delivery in the case of a deed was a legal fiction by Elizabethan times<sup>697</sup> and it has no purposive element now since delivery, in general, is no longer a pre-requisite for a contract.

However, the LPMPA also introduced two new requirements to make a deed. Attestation in the case of individuals and that a writing, to be a deed, must declare on its face that it is such. As to these:

- **Attestation - Individuals**. The LPMPA requires deeds to be attested in the case of individuals. This is a makeweight and unnecessary since other writings by individuals can also be (and often are) attested. Thus, it does not distinguish a deed from them. Further, it has been ignored by the Court of Appeal in a case; sensibly so, since attestation is a minor formality.<sup>698</sup>
- **Deed**. A deed must also declare on its face that it is a deed. However, this will not save it if it fails to satisfy other pre-requisites (such as attestation for an individual). Also, a court is unlikely to accept such a face value declaration *per se*.<sup>699</sup>

Thus, today, the law on deeds is complicated and obscure. It is also purposeless in major part - since a pre-requisite of delivery has no purpose and sealing (as such) is not required for individuals. As for specialties, it has long been uncertain whether they include deeds or not and, indeed, what is their precise nature. However, specialties are said, generally, to comprise a document under seal which is not a deed. That said, since *Morton* (1873), it is possible for awards and certificates *etc* - although made in the form of a deed and otherwise satisfying the pre-requisites of such - not to be such and they are, possibly, not also specialties (see **35(d)**). In short, a legal minefield. Thus, there is a good case for abolishing deeds and specialties.<sup>700</sup> The only reason why they are preserved at present is that (it is said) deeds have 5 benefits not accorded to writing. As to these:

- **Merger**. If a debtor enters into a deed (or a specialty) to secure a debt (or other obligation) owed by him under a simple contract, the remedy under the latter merges into the superior remedy under the deed (or specialty). However, for this to happen: (i) the security must be taken in respect of the same obligation; (ii) it must be of higher efficacy; (iii) the transaction must be between the same parties; and (iv) the parties must, generally, intend merger to occur. Today, the only real benefit from merger is an extended limitation period (see below). If deeds and specialties are abolished, abolishing this benefit would result in no loss;<sup>701</sup>

<sup>695</sup> See *McBain Deeds*, n 35.

<sup>696</sup> *Ibid*, Pt 2, p 12.

<sup>697</sup> See n 825. Also, *McBain Deeds*, n 35, Pt 1, pp 29-30.

<sup>698</sup> *McBain Deeds*, n 35, Pt 2, p 12 and *Shah v Shah* [2002] QB 35 *per* Pill LJ.

<sup>699</sup> *Ibid*, Pt 1, p 30.

<sup>700</sup> Cf. Holmes Common Law, n 87, p 273 (writing in 1881) stated: 'the law of covenants is breaking down. In many States it is held that a mere scroll or flourish of the pen is a sufficient seal. From this it is a short step to abolish the distinction between sealed and unsealed instruments altogether, and this has been done in some of the Western States.'

<sup>701</sup> *McBain Deeds*, n 35, Pt 1, p 9. A deed also imports certain statutory provisions pursuant to the Law of Property Act 1925, ss 101-3 (certain powers conferred on a mortgagee if a mortgage is by way of deed). These provisions are very rarely availed of and ss 101-3 can be amended to cover documents in writing. *Ibid*, p 8.

- **Limitation Act 1980.** Under this Act the limitation period for a specialty (which is taken to include a deed) is 12 years, but 6 years for a simple contract. If deeds and specialties were abolished, the loss of this would not appear to be problematic and, if necessary, the limitation period for simple contracts could be extended;<sup>702</sup>
- **Interpretation.** This has had a long (and chequered) history. A deed may be interpreted differently to a writing. In particular, a party to a deed might be estopped to a greater extent. However, rules of interpretation and of estoppel (those that remain and that are useful) now apply to documents in writing. Thus, the abolition of deeds would result in no loss;<sup>703</sup>
- **Privity.** The common law rule was that, generally, a contract could not confer rights (or impose obligations) on a person not a party to it. This was affected by the Contracts (Rights of Third Parties) Act 1999. Abolition of deeds will improve the position *re* privity.<sup>704</sup>
- **Consideration.** A deed imports consideration.

In conclusion, deeds and specialties should be abolished. This will reduce the categories of documents in writing as well as remove much complexity and obscurity. Such can be achieved simply (**Appendix D**). If there is a fear that the '*sky might fall*' if deeds and specialties are abolished, then the benefits of privity and consideration (and, possibly, an extended limitation period) can be extended to apply to all documents in writing intended to be legal acts - achieving, in the case of consideration, what Mansfield CJ desired in *Pillans v Van Mierop* (1765).<sup>705</sup>

#### (b) Gifts

It is possible that the presence of consideration helped distinguish a contract for a gift. However, one is dubious (manifestly, it did not do so in Elizabethan times). In more recent times the courts have indicated that the fact there is consideration does not preclude a transaction being a gift. Further, that the courts will determine the category of a transaction - regardless of how the parties categorise it.<sup>706</sup> Defining a gift in legislation is not problematic (see **Appendix D**).

***In conclusion, deeds and specialties should be abolished. And, gifts should be defined in legislation.***

#### 50. DEFINING THE PRE-REQUISITES FOR A CONTRACT

If deeds are abolished and the definition of a gift placed in legislation, it remains to define a contract. The pre-requisites of Bracton (see **12**) have stood the test of time. He referred to:

- (a) capacity of the parties;
- (b) subject matter;
- (c) *consensus* (i.e. mutual agreement).

Bracton also referred to '*delivery*' and to '*conjunction*' which are no longer pre-requisites - as well as the fact that a contract could be oral or in writing. However, today, it need not be.<sup>707</sup> To Bracton's pre-requisites, the intention of the parties to effect a legal (as opposed to a moral or other) act - that is, to enter into a legal relationship - should be added. Provision should also be made to deal with void contracts. That is, where the contract is, *inter alia*, impossible, illegal or against public policy (the latter two were covered - in the past - by the need for '*good consideration*').

#### (a) Definition of Pre-requisites

A suggested definition of a contract is as follows: '*A contract*<sup>708</sup> *is made if:*

<sup>702</sup> Ibid, p 9.

<sup>703</sup> Ibid, pp 4-6.

<sup>704</sup> Ibid, pp 7-8. The Act can also cover former deed polls, by specifying that it extends to all documents intended to have legal effect.

<sup>705</sup> Cf. Holdsworth, n 95, vol 8, p 48 (he proposed that, where a contract in writing was validly executed (i.e. signed), consideration should be presumed.

<sup>706</sup> See n 835.

<sup>707</sup> As indicated, it can be effected by mere act such as pointing, see n 464.

<sup>708</sup> The word '*contract*' is the most appropriate word and reflects modern usage to indicate a legally binding agreement, as opposed to any other agreement. Further '*contract*' is the Latin translation of the Greek '*synallagmata*' and both 'symbolise a '*meeting of minds*'. Cf. McGovern Covenants, n 411, p 577 'In Roman law *conventio* was a general term covering all contracts; just as people are said to come

- (a) the parties have capacity;
- (b) there is subject matter capable of contract;<sup>709</sup>
- (c) the parties intend a legal act;<sup>710</sup>
- (d) a mutual intention is reached [consensus]<sup>711</sup>

Also, 'A contract is void if: (a) impossible; (b) illegal; (c) contrary to public policy.'

As to these:

- **Definition of Contract.** There is no point in defining a contract as such since they are so varied. Thus, Bracton held a contract to be an agreement that was vested (that is, it satisfied certain pre-requisites) and Pollock (in 1876) held it to be a 'legally enforceable agreement. All lengthier definitions have proved fruitless. Further the word 'contract' - and the reference to the same in (b) - excludes a gift. It was never termed a contract since it was not viewed as a business transaction and there was no 'exchange' involved;
- **Legal Act Intended.** This excludes a moral intention or a purely social arrangement/joke *etc.*<sup>712</sup> the former the result of *Eastwood v Kenyon* (1840);
- **Mutual Intention.** This (an 'agreed intention') is the English translation of *consensus*. Bracton referred to '*consensus ad idem*' (mutual consent) and, over the centuries, no one has come up with a better expression which reflects the union of minds, as expressed in many cases:
  - Bible, 2 Kings, ch 10, v 15 - is your heart right, as my heart is with your heart ?
  - *Anon* (1477) Sjt Pygot - it cannot be a perfect bargain unless each party be agreed <sup>713</sup>
  - *Reniger v Fogossa* (1550) - union...of two or more minds in anything done or to be done <sup>714</sup>
  - West (1598) - true contracts be those, which are by mutual consent of both parties (see **26(a)**)
  - Pothier (1761) - concurrence of intention in two parties<sup>715</sup>
  - *Dickinson v Dodds* (1876) - the two minds were at one, at the same moment in time <sup>716</sup>
  - *Household Fire In. Co v Grant* (1879) - minds of the parties should be brought together at one and the same moment. <sup>717</sup>
  - *Naas v Westminster Bank* (1940) - a meeting of minds in a common intent. <sup>718</sup>
- **Impossible/Illegal/Contrary to Public Policy.** In these cases it could either be said that they are not contracts *or* that they are such, but void. The latter is more rational - not least since parties (rarely) deliberately enter into contracts they know to be impossible, illegal or contrary to public policy. Such things usually happen (or are found out) later.

**(b) Including Other Matters in the Definition**

Does reference need to be made to: (a) promise and counterpromise; (b) offer and acceptance ; or (c) question and answer ? One would assert not since these have, always, simply reflected formulas (categories) to evidence *consensus*.

- Thus, in Roman times, the stipulation reflected (a) and (c) although the stipulation faded away in later Roman times (see 7). So too, the Anglo-Saxon formula, which was couched more in terms of (b) and (c)<sup>719</sup> and this likely

together (*convenire*) in one place, so a covenant was a '*meeting of the minds*', an element of every contract. [He cited Digest 2.14.1.3]. So too in England it was said that '*a contract and a covenant are of much the same effect*' [he cited Statham, n 50, Covenant, no 9- see Klingelsmith, vol 1, p 342 *per* Yelverton J 'contract and covenant are of much the same effect'] ..Glanville uses the words '*covenant*' and '*contract*' interchangeably...'

<sup>709</sup> That is, that (a) there is a subject matter (one cannot contract about nothing) and; it is (b) identifiable and (c) alienable.

<sup>710</sup> Both parties must intend it be a legal act. If only one does, it is not a contract (since no mutual agreement). However, there might still be proprietary estoppel. *Cheshire & Fifoot*, n 79, p 75 (in 1945) 'such an intention [to create legal relations] is necessary...as a[n]...element in the formation of contract.' Swain, n 102, p 190 'some of the functions of consideration would be taken over by the doctrine of intention to be legally bound, but in the nineteenth century the courts were not yet expressly articulating such a principle. It was not until 1919 that they unequivocally did so [citing *Balfour v Balfour*].'

<sup>711</sup> A '*mutual intention*' or '*mutual agreement*' reflects the nature of *consensus*.

<sup>712</sup> As Pollock, n 75 (in 1876), p 2 'If people make arrangements to go out for a walk or to read a book together, that is no agreement in a legal sense. Why not ? Because their intention is not directed to legal consequences...'

<sup>713</sup> YB 17 Edw 4 pl 2 fo 1a-2b, Seipp no 1477.013.

<sup>714</sup> *Reniger v Fogossa* (1551) 1 Plow 1 (75 ER 1) at 17.

<sup>715</sup> Cited by Smith (in 1847), n 1129. For a definition by Immanuel Kant (in his *The Metaphysics of Morals* in 1797)(that a contract was a '*an act of the united choice of two persons*'), see Swain, n 102, p 151.

<sup>716</sup>(1876) 2 ChD 463, 472 *per* James LJ 'It must, to constitute a contract; appear that the two minds were at one, at the same moment in time...!'

<sup>717</sup> (1879) 4 Ex D 216 *per* Thesiger LJ.

<sup>718</sup> [1940] AC 366 *per* Lord Wright at p 403.

continued until, at least, until the 15th century at a market level and for the lesser courts. In terms of the king's court, Bracton referred to a promise and a counter-promise - although it is clear from his writing that no formal stipulation was required;

- In the case of (b), anyway, it is more a 19th century invention (although Fleta (c.1290) referred an 'offer'). Blackstone (in 1766) did not refer to offer and acceptance - though there were passing references in 18th century cases.<sup>720</sup> Addison, a legal writer, referred to offer and acceptance in 1849<sup>721</sup> as did Leake (1876).<sup>722</sup> For his part, Lucke thought that the concept of 'offer' and 'acceptance' derived from contracts concluded by post in the 19th century.<sup>723</sup>

As it is, today, contracts are of such a varied nature that trying to squeeze them into formulaic categories such as (a)-(c) contradicts reality.<sup>724</sup> Further, since these are simply examples (evidence) of the acts by which parties reach *consensus*, they can be dispensed with for the purposes of any definition of a contract - leaving the judge to determine from the entire matrix of facts (evidence) presented to him whether a '*mutual intention*' was or was not achieved.

## 51. CONCLUSION

The doctrine (pre-requisite) of consideration originated in the action of *assumpsit* as a pleading point - an evidential requirement. It derived, in large part, from the fictionalization of the *arra* in 1567. Unfortunately, it became a pre-requisite for a contract. It is a legal fiction which is confusing, ill-defined,<sup>725</sup> opaque, replete with anomalies and exceptions, not helpful to commerce and unnecessary. It should be abolished. And, the sky will not fall as a result. In 1913 - more than 100 years ago - a New York law professor summed things up:

After all these years of discussion and adjudication, well-trained lawyers are still in doubt as to fundamental questions concerning consideration. There is not even a full agreement as to what it is. I believe that an able judge might, by an authoritative statement, overrule the entire doctrine, and declare that the common-law rule of consideration is not now enforced. This would require courage as well as an accurate knowledge of the subject...But if the courts will not bring about this result, the time has come when the legislature should act. This could be accomplished by a brief statute stating in accurate terms that the doctrine of consideration is abolished.<sup>726</sup>

Rarely, was a truer word said.

<sup>719</sup> See n 341.

<sup>720</sup> See *Harman v Vanhatton* (1716) 2 Vern 717 (23 ER 1071) ('a voluntary offer'). See also *Turton v Benson* (1718) 1 P. Wms 496 (24 ER 488) ('offers made and not accepted'). Swain, n 102, p 182 stated that Ballow (*Treatise of Equity*, 1st ed, 1737) was the first English writer to discuss offer and acceptance). *Ibid*, p 183 'From the second edition of Chitty [1834] onwards, the doctrine of offer and acceptance was a standard feature of contract treatises.'

<sup>721</sup> Addison, n 72 (2nd ed, 1849). See also *Jackson v Galloway* (1838) 5 Bing (NC) 75 (132 ER 1031) at p 75 *per* Tindal CJ 'Every contract consists of a request on one side, and an assent on the other.'

<sup>722</sup> SM Leake, *Elementary Digest of the Law of Contracts*, 1st ed (1867), p 12.

<sup>723</sup> Lucke, n 236 p 293 'Before the nineteenth century the words 'offer' and 'acceptance' were occasionally used in the courts, but no technical rules attached to them. In the nineteenth century the courts had to deal frequently with contracts concluded by post and it was in this context that 'offer' and 'acceptance' became technical terms. Writers gave ever-growing prominence to these notions in their expositions of contract law.'

<sup>724</sup> Cf. Burrows, n 103, p 8 '*Consideration*' means that, in exchange for a promise by one party, a counter-promise or performance is given by the other party.' However, this is to categorise all contracts in terms of promise. Yet, as any commercial solicitor will confirm, contracts nowadays are so varied in scope that to treat them - whether as a whole or with regard to a specific clause - as '*promises*' is to badly strain the meaning of the word '*promise*.' So too, to treat them as stipulations or a question and answer or an offer and acceptance - albeit these formulas (categories) are, sometimes, useful in the context of a judge analysing a specific case. Cf. Smith, n 82 (2006), p 92 where contracts were seen in terms of promises, agreements and offers and acceptances *viz*. 'most contracts are created by promises or agreements, making a promise or agreement (or any other arrangement that satisfies the offer and acceptance requirements)...'

<sup>725</sup> Cf. Confucius, *Analecs*, xiii, 3 quoted by RM Jackson, *The Scope of the Term 'Contract'* (1937) 53 LQR 525 at p 536 'if the names of things are not properly defined, words will not correspond to facts. When words do not correspond to facts, it is impossible to perfect anything. Where it is impossible to perfect anything, the arts and institutions of civilization cannot flourish. When the arts and institutions of civilization cannot flourish, law and justice do not attain their ends; and when law and justice do not attain their ends, the people will be at a loss to know what to do.'

<sup>726</sup> Ashley, n 104, p 436. He also stated, pp 435-6 'We still maintain as requisite a technicality existing simply because of its historical development, and involving such an important topic as contract. We envelop an obligation of everyday use with a legal rule, which is unnecessary, and which frequently works rank injustice.' *Ibid*, p 435 'With such importance attached to a technical requirement of the law, it is not unreasonable for the lay public to ask for a scientifically accurate definition of the term '*consideration*'. It is believed, however, that no satisfactory definition can be given'. One would agree. And that the inability to provide the same is the result of seeking to make a rule of evidence a pre-requisite.

**APPENDIX A - COINAGE**

Imperial Rome, <i>post</i> 2 BC	Gold and silver coins were issued by authority of the Emperor. Bronze coins (commonly called large, middle and small brass) were issued by authority of the Senate. Imperial medallions were also issued in all metals, but were not intended to circulate as money. <sup>727</sup>
Britain c. 410	Probably after the Roman administration left Britain, the coinage imitated Roman coins for a time. <sup>728</sup>
AD c. 602	The laws of Aethelberht (558-616, the first laws of the Anglo-Saxons period still extant) contain a tariff of fines for homicide and assaults, with payment in shillings or <i>sceattas</i> . <sup>729</sup>
AD c. 688-94	The laws of Ine (king of Wessex 688-725) refer to pence, the word (possibly) coming from <i>pand</i> (pledge) or <i>pendere</i> (to weigh) (one would suggest the latter). <sup>730</sup>
AD 926-30	Ordinances of Aethelstan (king, 924-39) 'there shall be one coinage throughout the king's realm, and no man shall mint money except in a town....if a moneyer is found guilty [of issuing base or light coins] the hand shall be cut off with which he committed the crime, and fastened up on the mint.' Also 'In Canterbury there shall be seven moneyers: four for the king, two for the archbishop, one for the abbot. In Rochester, two for the king and one for the bishop. In London, eight; in Winchester six; in Lewes two; in Hastings one; another in Chichester; two in Southampton; two in Wareham; [one in Dorchester]; two in Exeter; two at Shaftesbury, and one in [each of] the other boroughs. <sup>731</sup> These ordinances (laws) may be said to establish the Crown prerogative to issue legal tender, with others having a Crown licence to do so. <sup>732</sup>
AD c. 962	The laws of Edgar (king, 943-75) 'one coinage shall be current throughout all the king's realm, and no one shall refuse it.' <sup>733</sup>
AD 991-1002	The laws of Aethelred II (king, 978-1016). 'Moneyers who issue false coins to be slain.' Also, 'no one except the king shall have a moneyer.' <sup>734</sup> Also, 'moneyers who work in a wood or elsewhere shall forfeit their lives, unless the king is willing to pardon them.' <sup>735</sup> Also, coiners of false money (base coin) to lose a hand. <sup>736</sup> Also, 'no one shall refuse pure money of the proper weight, in whatever town in my kingdom it

<sup>727</sup> Jewitt, n 184, p 122. Treating the sovereign as having the sole prerogative to issue coinage probably derived from the Persian Empire of Alexander the Great (356-323 BC), see Davies, n 148, p 87 'After Alexander the power to coin money became more obviously, though not exclusively, a jealously guarded sovereign power...'. The words '*money*' and '*mint*' likely derive from the Roman goddess, Moneta. Ibid, p 88 'When, according to legend, the Gauls overran most of Rome in 390 BC, the cackling of the geese around the temple on the Capitol alerted the defenders against what would otherwise have been a surprise attack, and so saved them from defeat. In return the Romans built a shrine to Moneta, the goddess of warning, or of advice. It is from Moneta that we derive both '*money*' and '*mint*'.

<sup>728</sup> Ibid, p 19 'The earliest coins of the Anglo-Saxon period appear to have been rude imitations of some of the later current pieces of their Roman predecessors...It seems doubtful whether at first they had coinage of their own, the probability being that those of the Romano-Britons continued...to be circulated. Some of the *sceattae* bear more or less rude figures and uncouth heads and devices, some being evident imitations of the well-known type of Romulus and Remus suckled by the she-wolf, and others of equally well known types.'

<sup>729</sup> Attenborough, n 315, pp 5-17. Ibid, p 176 'The *sceatt* was the predecessor of the penny and was apparently intended to be of the same standard (21 grs)...The Kentish shilling was...a (Roman) ounce of silver and therefore four times the value of the later West Saxon shilling and five times that of the Mercian shilling.' For the derivation of shilling, see Einzig, n 182, pp 260-1.

<sup>730</sup> Ibid, pp 37-61. There were 5 pence to the West Saxon and Mercian shillings and, probably, that of the Wessex shilling as well. Ibid, p 191 See also Jewitt, n 184, pp 19-20.

<sup>731</sup> Ibid, pp 135 & 208.

<sup>732</sup> Earl of Liverpool, n 132, p18.

<sup>733</sup> Robertson, n 180, p 29.

<sup>734</sup> Ibid, p 69.

<sup>735</sup> Ibid, p 71.

<sup>736</sup> Ibid, p 75. Also included were those who paid coiners to issue false money and who sold dies 'in secret and sell them to coiners for money, engraving upon them a name which is that of another moneyer and not that of the guilty one.'



	be coined, under pain of incurring the fine for insubordination to me'. <sup>737</sup> Also, moneyers [mints] to be in every town. <sup>738</sup>
AD c. 1101	<i>Decree of Henry I with regard to False Money and Moneychangers.</i> 'All burgesses and all those...who dwell in boroughs shall swear so as to maintain and preserve my money in England that they will countenance no falsification of my money.' <sup>739</sup>
Laws of Henry I c. 1113	'These are the jurisdictional rights which the king of England has in his land solely and over all men, reserved through a proper ordering of peace and security...counterfeiting his coinage ( <i>falsaria monete sue</i> ). <sup>740</sup>
William I (1066-87)	Denominations. Silver pennies only. So too, in the reign of William II (1087-1100). <sup>741</sup>
Henry I (1100-35)	Denominations. Silver pennies only. <sup>742</sup> So too, in the reigns of Stephen (1135-54) and Henry II (1154-89). <sup>743</sup>
Richard I (1189-99)	Denominations. Silver pennies and halfpennies. <sup>744</sup>
John (1199-1216)	Denominations. Silver pennies, halfpennies, farthings. <sup>745</sup>
Henry III (1216-72)	Denominations. Gold penny (in 1257). Also, silver pennies. <sup>746</sup>
Edward I (1272-1307)	Denominations. Silver groat (4d), penny, halfpenny and farthing. <sup>747</sup> So too, in the reign of Edward II (1307-27). <sup>748</sup> See also Statute of False Money 1299. <sup>749</sup>
Edward III (1327-77)	Denominations. Gold - various. Silver groat, halfgroat, penny, halfpenny, farthing. <sup>750</sup> See also the Statute of Money 1335. <sup>751</sup> Also the Treason Act 1351 (high treason to counterfeit money). <sup>752</sup>

<sup>737</sup> Ibid, p 77. Also, 'we have decreed with regard to traders who bring money which is defective in quality and weight to the town, that they shall name a warrantor if they can. If they cannot do so, they shall forfeit their *wergeld* or their life, as the king shall decide, or they shall clear themselves by the same method as we have specified above, [asserting] that they were unaware that there was anything counterfeit about the money with which they were carrying on their business. And afterwards such a trader shall pay the penalty of his carelessness by having to change his [base money] for pure money of the proper weight obtained from the authorised moneyers. And town-reeves who have been accessories to such a fraud shall be liable to the same punishment as coiners, unless the king pardon them, or they can clear themselves by a similar oath of nominated jurors, or by the ordeal specified above.'

<sup>738</sup> Ibid, p 77-8 'moneyers shall be fewer in number than they have been in the past. In every principal town [there shall be] three, and in every other town [there shall be] one. And they shall be responsible for the production by their employees of pure money of the proper weight, under pain of incurring the same fine as we have fixed above. And those who have the charge of towns shall see to it, under pain of incurring the fine for insubordination to me, that every weight is stamped according to the standard employed in my mint; and the stamp used for each of them shall show that the pound contains 15 *ores*. And the coinage is to be maintained by all at the standard which I lay down in your instructions....'

<sup>739</sup> Ibid, p 285. Also 'if anyone has been discovered with false money, and has vouched a warrantor for it, the prosecution shall be directed against the latter, and if he [the original defendant] succeeds in proving him guilty, justice in accordance with my laws shall be executed upon the warrantor himself. If, however, he does not succeed in proving him guilty, justice in accordance with my laws shall be executed upon the forger himself, namely he shall lose his right hand and suffer castration. If, however, he has not vouched a warrantor for it, he shall go to the ordeal to prove that he is unable to name or recognise anyone [as the person] from whom he received it.' Also 'I forbid any moneyer to recast money, except in his own county and in the presence of two lawful witnesses from the same county. And if he has been seized recasting money in another county, he shall be regarded as a forger.' Also, 'no one shall venture to change money except a moneyer.'

<sup>740</sup> Downer, n 40, p 109.

<sup>741</sup> Jewitt, n 184, p 34. Davies, n 148, p 139 'during the reign of William I [1066-87] the weights of the penny were if anything higher on average and less variable than were those issued in the generation before the Conquest.' Also, 'William I is known to have operated fifty-seven mints, details of over fifty of which are given in the Domesday survey.'

<sup>742</sup> Ibid. Davies, n 148, p 139 'Most of Henry's coins were impure, light in weight, light in weight and of execrable workmanship.' In the time of Stephen barons established their own currencies. Ibid, p 140.

<sup>743</sup> Ibid, pp 35-6. In his reign, in 1180, were issued '*short cross*' pennies.

<sup>744</sup> Jewitt, n 184, p 36.

<sup>745</sup> Ibid, p 37.

<sup>746</sup> Ibid. The gold penny was the first struck by an English sovereign and not repeated until Edward III (1272-1307). In 1248, '*long cross*' pennies were issued to try to prevent clipping (by extending the cross to the outer edge, mutilation was visible).

<sup>747</sup> Ibid, pp 37-8 (groat not mentioned). Also, Davies, n 148, p 144.

<sup>748</sup> Ibid, p 39.

<sup>749</sup> 27 Edw 1 (Importation and exportation of coin, rep 1832).

<sup>750</sup> Ibid, p 39.

Richard II (1377-99)	Denominations. Gold - various. Silver groat, halfgroat, penny, halfpenny and farthing. <sup>753</sup> So too, in the reigns of Henry IV (1399-1413) and Henry V (1413-22). <sup>754</sup> See also Acts of 1381 <sup>755</sup> and 1400. <sup>756</sup>
Henry VI (1422-61)	Denominations. Gold - various. Silver groat, halfgroat, penny, halfpenny, farthing. <sup>757</sup> So too, in the reigns of Edward IV (1461-83) and Edward V (1483). <sup>758</sup>
Richard III (1483-85)	Denominations. Gold - various. Silver groat, halfgroat, penny and halfpenny. <sup>759</sup>
Henry VII (1485-1509)	Denominations. Gold - various. Silver testoon (shilling), groat, halfgroat, penny, halfpenny, farthing. <sup>760</sup> So too, in the reign of Henry VIII (1509-47). <sup>761</sup> An Act of 1487 made the forging of foreign coin current in the realm to be treason. <sup>762</sup> An Act of 1503 specified what was the currency of the realm as well as indicating that money that was clipped or diminished was not current in payment (not legal tender). <sup>763</sup>
Edward VI (1547-53)	Denominations. Gold - various. Silver crown, half crown, testoon (shilling), six pence, groat, three pence, half groat, penny, halfpenny, farthing. <sup>764</sup> See also an Act of 1541 on the Counterfeiting of Tokens. <sup>765</sup>
1548	The face value was placed on coins. <sup>766</sup>
Mary I (1553-8)	Denominations. Gold - various. Silver half crown, shilling, six pence, groat, half groat, penny. <sup>767</sup> An Act of 1553 made counterfeiting (forging) foreign coinage current in the realm, treason. <sup>768</sup>

<sup>751</sup> 9 Edw III st 2 (1335), rep 1863). Seeking to deal with the counterfeiting of English sterling 'divers people beyond the sea do endeavour themselves to counterfeit our sterling money of England, and to send into England their weak money, in deceit of us...'. It provided, s 1 (none shall convey gold or silver out of the realm without the king's licence), s 2 (no false or counterfeit sterling to be brought into the realm, no sterling farthing or halfpenny be melted to make vessels), s 4 (black money not be currency of the realm), s 7 (exchanges of money to be established where it pleased the king and his council), s 9 (search to be made for money carried out and false money brought in). See also Act of 1343 (17 Edw 3 stat). '*Black money*' would have covered Continental silver coins that sought to mimic English legal tender. See also E Fletcher, n 185, pp 19, 32.

<sup>752</sup> 25 Edw 3 c 2 n (rep in part) '[high treason] if a man counterfeit...his [the king's] money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called Lushburgh, or other like to the said money of England, knowing the money to be false, to merchandise or make payment, in deceit of our said lord the king and of his people.' See also Act of 1351 c 13 (25 Edw 3, c 13, rep 1863)('the money of gold and silver which now runneth, shall not be impaired in weight nor in allay; but as soon as a good way be found, the same be put in the ancient state, as in the sterling.').

<sup>753</sup> Jewitt, n 184, p 40.

<sup>754</sup> Ibid, p 41.

<sup>755</sup> 5 Ric II st 1 c 2 (rep 1863)(none to transport gold or silver out of the realm without the king's licence). See also Act of 1393 (17 Ric 2 c 1, rep 1863), This prohibited the melting of money. Also 'no gold nor silver of Scotland, nor of other lands beyond the sea, shall run in any manner of payment within the realm of England, but shall be brought to the bullion, there to be molten into the coin of England, upon pain of forfeiture of the same, and of imprisonment, fine, and ransom of him which doth contrary.' Also, no exchange of English for Scots money.

<sup>756</sup> 2 Hen 4 c 5 (rep)(he that carries gold or silver out of the realm shall confess so much). Also: (a) 11 Hen 4 c 5 (1409, rep)(gally half-pence shall not be current in payment in the realm); (b) 13 Hen 4 c 6 (1411, rep)(no gally half pence or foreign money shall be current in the realm); (c) 3 Hen 5 c 1 (1415, rep)(felony to import or offer in payment any sort of money forbidden by former statutes); (d) 3 Hen 5 (1415)(treason, to clip, wash or file money); (e) 9 Hen V c 11 (1421, rep)(no English gold shall be received in payment but by the king's weight) 'the king...hath remised and pardoned to all his liege people, which betwixt this and the said feast of Christmas shall cause to be coined of new at the king's coinage within the Tower of London, their money of gold that is not of just weight nor of good allay, that is to say, all that to him pertaineth for this new coinage of such gold as afore...'; (f) 2 Hen 6 c 6 (1423, rep)(for what causes only gold or silver may be carried out of the realm); (g) 2 Hen 6 c 9 (1423) (money called blanks shall be wholly put out); (h) 8 Hen 6 c 24 (1429, rep)(none shall pay alien merchants in gold but in silver); (i) 27 Hen 6 c 3 (1448, rep 1863)(merchant strangers to carry no gold or silver out of the realm).

<sup>757</sup> Jewitt, n 184, p 42.

<sup>758</sup> Ibid, p 43.

<sup>759</sup> Ibid, p 43.

<sup>760</sup> Ibid.

<sup>761</sup> Ibid, pp 44-5.

<sup>762</sup> 4 Hen 7 c 18 (1488, rep 1863). Cf. 1 Edw 6 c 12 and 1 Mary sess 1 c 1.

<sup>763</sup> 19 Hen VII c 5 (1503, rep 1832).

<sup>764</sup> Jewitt, n 184, pp 45.

<sup>765</sup> 33 Hen 8 c 1 (1541)(counterfeiting letters or privy tokens to receive money or goods in other men's names). Also, 5 & 6 Edw VI c 19 (1552)(exchanging gold and silver for money for profit).

<sup>766</sup> Earl of Liverpool, n 132, p 21 'a new practice was introduced in [1548] of notifying to the public the rate or value of some of our silver coins, by placing on them figures, denoting at what rate, or value, they should be taken in payment.'

<sup>767</sup> Jewitt, n 184, pp 46-7.

<sup>768</sup> 1 Mary sess 2 c 6 (rep 1832) (counterfeiting or forging foreign coinage current in the realm). See also 1 & 2 Philip & Mary c 11 (1554, rep 1832).

Elizabeth I (1558-1603)	Denomination. Gold - various. Silver crown, half crown, shilling, six pence, groat, threepence, half groat, three half pence, penny, three farthing, half penny. <sup>769</sup> An Act of 1570 made counterfeiting (forging) foreign coinage not current in the realm, misprision of treason. <sup>770</sup>
James I (1603-25)	Denominations. Gold - various. Silver crown, half crown, shilling, six pence, half groat, penny, half penny. Also, copper farthing <sup>771</sup>
Charles I (1625-49)	Denominations. Gold - various. Silver pound (20 shillings), ten shilling piece (half pound), crown, half crown, shilling, six pence, groat, three pence, half groat, penny and half penny. Also, copper halfpence and farthing. <sup>772</sup>
Charles II (1660-85)	Denominations. Gold - various. Silver half crown, shilling, sixpence, half groat, penny (and, later, also fourpence (groat), threepence, half groat. Also, copper halfpence and farthing. Also, tin or pewter - half pence, farthing. <sup>773</sup> An Act of 1662 punished the melting of current silver money. <sup>774</sup>
James II (1685-89)	Denominations. Gold - various. Silver - crown, half crown, shilling, sixpence, fourpence, threepence, twopence, penny. Also, tin or pewter - half pence, farthing. Gun money - as silver. <sup>775</sup>
William & Mary (1689-1702)	Denominations. Gold - various. Silver - crown, half crown, shilling, sixpence, fourpence, threepence, twopence, penny. Also, copper and tin - half pence, farthing. <sup>776</sup> An Act of 1695 prohibited counterfeiting and clipping of coin. <sup>777</sup>
Anne (1702-14)	Denominations. Gold - various. Silver - crown, half crown, shilling, sixpence, fourpence, threepence, twopence, penny. Also, copper - farthing. <sup>778</sup>
George I (1714-27)	Denominations. Gold - various. Silver - crown, half crown, shilling, sixpence, fourpence, threepence, twopence, penny. Also, copper - halfpenny, farthing. <sup>779</sup> So too George II (1727-60). <sup>780</sup> So too, George III (1760-1820) save for: copper - twopence, penny, halfpenny, farthing. <sup>781</sup> So too, George IV (1820-37), save for the copper twopence. <sup>782</sup> So too, William IV (1830-7) with silver - groat and three half pence and in the case of copper, no two pence was issued. <sup>783</sup>
Victoria (1837-1901)	Denominations. Gold - various. Silver - crown, half crown, florin (2 shillings), shilling, sixpence, groat, threepence, twopence, penny. Also, copper - penny, halfpenny, farthing, half farthing. Also, bronze - penny, halfpenny, farthing, <sup>784</sup>

<sup>769</sup> Jewitt, n 184, pp 48.

<sup>770</sup> 14 Eliz 1 (1572, rep 1832). See also 18 Eliz c 1 (1572)(rep 1832)(diminishing, falsifying, scaling or lightening currency of the realm (or foreign coinage current in the realm to be high treason).

<sup>771</sup> Jewitt, n 184, p 50.

<sup>772</sup> Ibid, p 52.

<sup>773</sup> Ibid, p 53.

<sup>774</sup> 14 Cha 2 c 31 (1662, rep 1819).

<sup>775</sup> Jewitt, n 184, p 55 'Silver being scarce in this reign, an issue of base money was resorted to, some of which, being struck from the old cannon and domestic utensils melted down, is called *'gun money'*'.

<sup>776</sup> Ibid, p 56.

<sup>777</sup> 6 & 7 Will 3 c 560 (1694, rep 1867). Sections (a) imposed a penalty on persons for selling or paying for silver money for more than it was coined; (b) buying or selling clippings; (c) goldsmiths only to buy and sell bullion. See also 8 Will 3 c 1 (1696, rep 1867) Act for importing and coining guineas and half guineas and 8 Will 3 c 1 (1696, rep 1867)(Act for the further remedying the ill state of the coin of the kingdom). See also 9 Will 3 c 26 (1697 rep 1867). It made it high treason for a smith (except at the Royal Mint) to make or mend any die-stamp. So too persons conveying out of the Royal Mint such a die-stamp and concealing the same. Also, high treason for a person to mark the edges of currency of the realm or any diminished or counterfeit coin. It was a felony to blanch copper for sale or mix blanch copper with silver. Also, 9 Will 3 c 2 (1697, rep 1867)(An Act to prevent the further issue of hammered silver coin of the realm and to re-coining the same).

<sup>778</sup> Jewitt, n 184, p56.

<sup>779</sup> Ibid, p58.

<sup>780</sup> Ibid, p 59.

<sup>781</sup> Ibid, p58.

<sup>782</sup> Ibid, p 60.

<sup>783</sup> Ibid, p 61.

<sup>784</sup> Ibid, p 62.

**APPENDIX B - DEFINITIONS OF CONSIDERATION : 1574-1800**

- Calthorpe's Case* (1574) Dyer CJ, A consideration is a cause or meritorious occasion, requiring a mutual recompense [*quid pro quo*], in fact or in law. Contracts and bargains have a *quid pro quo*. (see **23(a)**).
- Webb's Case* (1577) It was objected, here was not any consideration for to induce the *assumpsit*; for the [D] by this letter of attorney gets nothing but his labour and travel [*travail*]. But the exception was not allowed of. For in this case not so much the profit which redounds to the [D], as the labour of the [P] in producing of the letter of attorney, is to be respected (see **23(b)**).
- Lord Gerard's Case* (1581) Dyer CJ - *un consideration est causa meritoria pur que il granteroit, et poet estre appelle perbien causa reciproca, sc un mutuell cause...*(a consideration is a meritorious cause for which it is granted and it can equally be called a reciprocal cause; that is to say, a mutual cause).<sup>785</sup>
- Stone v Withpole* (1589) Coke (counsel for P) no consideration can be good, if not, that it touch [i.e. it must comprise] either the charge [loss] of the [P], or the benefit of the [D] (see **23(f)**).
- West, *Symboleography* (1598) The consideration of instruments ..is the motive cause, for which the instruments are made, as money or other goods, affection natural or such like.' Also 'lawful cause or consideration' (see **26(a)**).
- Fulbecke, *Parallele* (1601-2) A consideration which is the proper material cause of a contract, may in the concluding of bargains be either expressed or implied...(see **27(b)**).
- Cowell, *The Interpreter* (1607) Consideration (*consideratio*) is that with us, which the Grecians call [*synallagmata*, exchange]: that is, the material cause of a contract, without the which no contract binds. [repeated in 1708 ed](see **27(c)**).
- Doderidge, *English Lawyer* (1631) Quoted Dyer CJ (see above) 'a consideration is a cause or occasion meritorious requiring mutual recompense in fact or in law...' (see **27(g)**).
- Finch, *Law or a Discourse* (1636) consideration must be some *cause or occasion meritorious*, amounting to a mutual recompense [*quid pro quo*] in deed or in law (see **27(h)**).
- Noy, *Principal Grounds & Maxims* (1641) A contract is properly where a man for his money shall have by the assent [agreement] of another certain goods, or some other profit at the time of the contract, or after. In all bargains, sales, contracts, promises, and agreements, there must be *quid pro quo* presently, except day be given expressly for the payment, or else it is nothing but communication [negotiation] (see **28(a)**).
- Sheppard, *Abridgment* (1675) Consideration is a term of law of use and considerable in gifts, grants and contracts. And in a contract it is said to be the material cause of a contract with[out] the which no contract is binding. [Also] Some contracts also have in them a consideration, called *quid pro quo*, where there is in the agreement something that is a recompense in deed or in law, and [this] is the material cause of the engagement, by which it is made obligatory (see **28(d)**).
- Blount, *Law Dictionary* (3rd ed, 1717) Consideration (*consideratio*) is the material cause, the *quid pro quo* of any contract, without which no contract binds.
- Wood, *Institutes* (1720) The consideration is the motive or cause of the contract. As in consideration of natural love and affection, for settlement in the stock or blood, for money paid or secured to be paid for payment of debts, for marriage already had to be had *etc.* There is a *good* consideration, and a *valuable* consideration. Natural love and affection is a good consideration, but not a valuable consideration, as money, marriage *etc.* (see **29(b)**).
- Terms of the Law* (last ed, 1721) Consideration is the material cause of a contract, without which no contract can bind the party...there is consideration of nature and blood, and valuable consideration.
- Jacob, *Law Dictionary* (1729) Consideration (*consideratio*). Is the material cause, or *quid pro quo*, of any contract, without which it will not be effectual or binding...Also, there is a consideration of nature and blood; and valuable consideration in deeds and conveyances:... Jacob also stated (*contract*)(*contractus*) 'Is a covenant or agreement between two or more persons, with a lawful consideration or cause. (see **27(c)**).
- Bailey, *Dictionarium Britannicum* (1730) Consideration (*in a legal sense*) is the material cause of a bargain, or *quid pro quo* [of a] contract either expressed or implied, without which it would not be effectual or binding; expressed, as when a man bargains to give a certain sum of money for any thing; or else implied, as when the law enforces [implies] a consideration.

<sup>785</sup> See fn 802.

- Bacon, *Abridgment* (1736) Consideration is defined as a cause or occasion meritorious, that requires a mutual recompense [*quid pro quo*] in fact or in law (see **29(e)**).
- Blackstone, *Commentaries* (1766) the consideration upon which it [the contract] is founded; or the reason which moves the party contracting to enter into the contract. '*It is an agreement, upon sufficient consideration.*' The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing which is the price or motive of the contract, we call the consideration...(see **31(e)**).
- Powell, *Essay on Contract* (1790) A consideration is the material cause of a contract or agreement; or that, in expectation of which, each party is induced to give his assent to what is stipulated reciprocally between both parties (see **33(b)**).

**APPENDIX C - DEFINITIONS OF CONSIDERATION : 1800 - 2016**

- Montefiore, *Commercial Dictionary* (1803) Consideration, is the money or other beneficial act done towards or paid to another, for which a certain equivalent beneficial advantage is to be communicated.
- Comyn, *Law relative to Contracts* (1807) The civilians hold, that in all contracts...there must be something given in exchange, something that is mutual or reciprocal. The thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void (see **33(c)**).
- Potts, *Law Dictionary* (1815) Consideration, is the material cause of a contract, without which it would not be effectual or binding. Consideration in contracts, is something given in exchange, something that is mutual, and reciprocal; as money given for goods sold, work performed for wages.
- Chitty, *Law of Contracts* (1826) A valid and sufficient consideration, motive, or inducement to make a promise, upon which a party is charged, is of the very essence of a contract not under seal, and must exist, although the contract be reduced into writing...This consideration may arise either by reason of a benefit resulting to the party promising, or to a third person, at the request of the former, by the act of the promisee; or on occasion of the latter sustaining any loss or inconvenience, or suspending or forbearing any right or remedy at law, or in equity, at the instance of the person making the promise (see **33(d)**).
- Whishaw, *New Law Dictionary* (1829) Consideration is the material cause of a contract, without which it cannot bind the party.
- Tomlins *Popular Law Dictionary* (1838) Consideration. The *quid pro quo*; the matter of inducement to a contract or transaction; the object in view which is introductory to the dealing. Considerations are by law required to be lawful, and not have for their object the carrying into effect any fraudulent or injurious act.
- Fox, *Simple Contracts* (1842) Every promise must be paid for. The party promising must have a *quid pro quo*. The equivalent for his promise is called a consideration: a contract, without a consideration, is one-sided, and does not bind. It is termed in law '*nudum pactum*'. (see **33(e)**).
- Smith, *Law of Contracts* (1847) Any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charge upon, the person to whom it is made (see **35(b)**).
- Holthouse, *New Law Dictionary* (1850) Consideration (*consideratio*). This word, as applied to contracts, generally signifies the thing given in exchange for the benefit which is to be derived from the contract.
- Currie v Misa* (1875) A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other (see **35(e)**).
- Pollock, *Principles of Contract* (1876) An act or forbearance of the one party, present or promised, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable. In the phrase of our medieval books - a phrase which appears to be peculiar to English usage - there must be *quid pro quo*. But when the *quid* is once established, the *quantum* is for the judgment (see **36(a)**).
- Anson, *Law of Contracts* (1879) no promise, which is not under seal, is binding *unless the promisor obtains some benefit in return for his promise*, and this benefit is called '*consideration*' (see **36(b)**).
- Sweet, *Dictionary* (1882) The consideration in a contract, conveyance or other legal transaction, is an act or promise by which some right, interest, profit or benefit accrues to one party, or by which some forbearance, detriment, loss or responsibility is given, suffered or undertaken by the other, and in return for which the party who receives the benefit, or for whom the detriment is suffered, promises or conveys something to the other.<sup>786</sup>
- Jenks, *History of the Doctrine* (1891) A consideration is a detriment voluntarily incurred by the promisee [or a benefit conferred on the promisor at the instance of the promisee] in exchange for the promise.
- Dunlop Pneumatic Tyre Co* (1915) An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable (see **38(c)**).
- Cheshire & Fifoot, *Law of Contract* (1946) the idea of the purchase price, the offer of money or money value for the [D's] promise, remains the essence of consideration (see **41(a)**).
- Kiralfy, *Potter's Outlines* (1958) a legal contract consists either of an agreement supported by facts which constitute '*consideration*' or a document under seal.

<sup>786</sup> C Sweet, *A Dictionary of English Law* (1st ed, 1882).

- Jenks, *Book of English Law* (1967) the classical form of the doctrine, that a valuable consideration is a benefit given or promised to the undertaker, or, some loss or liability incurred by the promisee, in return for the promise given by the undertaker.
- Ranking *et al*, *Mercantile Law* (1972) All simple contracts, whether in writing or made by word of mouth, require consideration to support them. By consideration the law means valuable consideration, which must consist of something capable of being estimated in money (see **41(c)**).
- Mozley & Whiteley, *Law Dictionary* (9th ed, 1977) A compensation, matter of inducement, or quid pro quo, for something promised or done. Valuable consideration is necessary to make binding every contract not under seal. It need not be adequate but must be of some value in the eye of the law and must be legal: it must also be present or future, it must not be past. There is also a consideration called the consideration of 'blood'; that is, natural love and affection for a near relation. This is, for some purposes, deemed a *good* consideration; but it is not held to be a valuable consideration, so as to support an action on a simple contract. It is sometimes called a *meritorious* consideration.
- Goode, *Commercial Law* (1982) Consideration has been defined as benefit to the promisor or detriment suffered by the promisee, but this is mis-leading. To constitute consideration, the benefit or detriment must not merely follow from the promisee's reliance but must be exacted as the price of the promise. In fact, we can forget about the detriment altogether because, contrary to myth, it has nothing whatever to do with the creation of contract. Consideration is an act or forbearance which is desired by the promisor, and is fixed by him as the price of his own undertaking (see **41(d)**).
- Chitty, *Law of Contracts* (2015) Followed *Currie v Misa* (1875)(see above).
- Anson, *Law of Contracts* (2016) Followed *Currie v Misa* (1875)(see above).

## **APPENDIX D - DEEDS, DEFINITIONS OF CONTRACT & GIFT**

### **Deeds and Specialties**

- (a) Deeds and specialties are abolished and the fact that a document is by way of deed or specialty shall have no greater effect than if in writing;
- (b) All references in legislation to a deed or specialty shall be as if to a writing;
- (c) The following benefits of a deed or specialty shall apply to any writing intended to have legal effect: (a) privity; (b) consideration.

### **Contract**

1. **Pre-requisites**. A contract is made if the:
  - (a) parties have capacity;
  - (b) subject matter is capable of contract;
  - (c) parties intend a legal act; and
  - (d) a mutual intention ('*consensus*') is reached.
2. **Void**. A contract is void if, *inter alia*, it is:
  - (a) impossible;
  - (b) illegal;
  - (c) contrary to public policy.

### **Gift**

1. **Pre-requisites**. A gift is made if the:
  - (a) parties have capacity;
  - (b) subject matter is capable of gift;
  - (c) donor has a gratuitous intent;
  - (d) donee accepts (unless legislation does not require or in the case of (e)(iii));
  - (e) gift is:
    - (i) in writing; or
    - (ii) oral, with delivery to the donee (or to his order); or
    - (iii) by way of trust (which may be oral, in the case of personalty).
2. **Promise to Give**. A promise to give, not otherwise satisfying s 1, is invalid as a gift.
3. **Giving and Acceptance**. Giving by the donor, and acceptance by the donee (where required), need not be contemporaneous. However, for the gift to be valid the donee must accept it prior to the donor revoking the gift.
4. **Condition**. A gift may be subject to a condition(s) precedent or subsequent.

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