

A HISTORY OF CONTRACT
AT COMMON LAW

S.J. Stoljar

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Preface

This book seeks to give a coherent picture of the development of contract at common law, to bring to life the ideas and arguments, strong or weak, subtle or simple, that nurtured contract thinking over the centuries, particularly from the sixteenth to the nineteenth, thus also to show how and why English contract law became as we know it today. The chief emphasis in these pages is on the fundamental doctrines of common law contract, the doctrines that underlie its distinctive bargain character as well as explain how a bargain is formed and how it is to be kept. Accordingly, after dealing with the shortcomings of the earlier debt-detinue system (Part I), detailed attention is paid to the rise of *assumpsit* and consideration (Part II), to the settlement of various supplementary principles relating to simple contracts (Part III), and finally to the problems relating to performance and breach (Part IV). On the other hand, this book has little or nothing to say about the Statute of Frauds, or incapacity, or illegality, or other matters usually associated with contract law; partly because quite a few of these are well enough dealt with elsewhere; partly because some (like mistake or offer and acceptance) have no long or involved history; but mainly because the issues they raise have mostly been rather on the margin of classical contract theory.

Interest in contract history has seen an astonishing revival in recent years, and I have been able to learn a great deal from the contributions of many scholars. Their work certainly shows that so much earlier taken for granted still calls for careful re-examination if the great historical secrets of contract, embedded as they are in often bewildering case law, are to be unravelled and understood. I wish to dedicate this book to the memory of

Professor T.F.T. Plucknett. I should like to think that he would have nodded his approval of this fresh attempt at explaining complex developments and even of treating legal history almost as an extension of legal analysis.

Samuel Stoljar

Canberra 1974

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Principal Abbreviations

- Ames, *Lectures*: J.B. Ames, *Lectures on Legal History* (Cambridge, Massachusetts, 1967)
- Bracton: Bracton, Henry de, *De legibus et consuetudinibus Angliae* (S.E. Thorne (ed), Cambridge, Massachusetts, 1968)
- Fifoot, *History*: C.H.S. Fifoot, *History and Sources of the Common Law* (London, 1949)
- Glanvill: *Tractatus de legibus et consuetudinibus regni Anglie* (G.D.G. Hall (ed.), London, 1965)
- Holdsworth, *H.E.L.*: W.S. Holdsworth, *A History of English Law* (London, 1903–56)
- Milsom, *Historical Foundations*: S.F.C. Milsom, *Historical Foundations of the Common Law* (London, 1969)
- Plucknett, *Concise History*: T.F.T. Plucknett, *Concise History of the Common Law* (5th ed., London, 1956)
- Pollock and Maitland, *H.E.L.*: F. Pollock and F.W. Maitland, *The History of English Law* (Cambridge, 1898)

Part I
The Medieval Beginnings

INTRODUCTORY

How far had a law of contract evolved in the middle ages? What were its principal rules or remedies? These questions are important even in a history more particularly concerned with post-medieval times, for the simple reason that the medieval beginnings had a direct influence upon the shape of things to come: the very emergence of the modern, so-called 'simple', contract, with its characteristic doctrine of *assumpsit* and consideration, is essentially a tale of circumventing, of overcoming the special limitations of the medieval forms of action—those of covenant, debt and detinue.

These, of course, were the contractual actions of the royal courts; it is the king's law that becomes the common law. Not that the latter gave contract a high priority from the very start. Glanvill and Bracton state that 'private agreements' are only occasionally protected in the king's courts,¹ while Bracton surrounds his treatment of contract with a display of Romanist learning, a sure sign that native materials are not pressing or abundant as yet.² As yet, indeed, most contract work was done in the local courts (the courts of the borough, the manor, the merchants' fair) which offered not only a more accessible forum for litigation but also contractual remedies far less rigid or circumscribed

¹ Glanvill, *Tractatus de legibus et consuetudinibus regni Anglie* (Hall (ed.), London 1965), book x, chap. 18; Bracton, *De legibus et consuetudinibus Angliae* (Thorne (ed.), Cambridge, Massachusetts 1968), fol. 100.

² Bracton, fol. 99–100b. Bracton's Romanism has been variously judged, some having more, others less respect for it: see generally H. Kantorowicz, *Bractonian Problems* (Glasgow 1941), 58ff.; T.F.T. Plucknett, *Concise History of the Common Law* (5th ed., London 1956), 261–2; H.G. Richardson, *Bracton* (London 1965), 37ff.

than any the common law so far possessed.³ Still, by the time of Henry III, litigants are increasingly willing to pay a high price for a royal writ. It is clear that royal rather than local law begins to be seen as the more reliable vehicle for important contracts at least: more reliable because, for one thing, royal writs are backed by royal power and, for another, royal courts would adopt, instead of a deliberative approach of accommodation or compromise so typical of the local courts, more definite or at least more explicit rules.⁴ These of course are the features also making for greater certainty of the law, the sort of certainty an expanding credit system could not do without.

We then proceed to discuss the three royal actions, not to be sure in every detail, but enough the better to understand first the rudiments, later also some of the complications and implications, of medieval contract law.

FORM AND SCOPE OF COVENANT

The principal features of covenant can be quickly described. It is first mentioned by Bracton but not yet by Glanvill, which makes the year 1201, the date of its earliest recorded instance, an accurate enough indication of its time of origin.⁵ At first covenant mainly serves to initiate the 'final concord', the agreement or compromise made before and with the approval of a court.⁶ Very soon, however, covenant assumes a wider role to serve a variety of transactions—whether to borrow or repay money, or to build a house, or to perform services, or to ensure a future supply of wool or corn—although its most frequent employment is in connection with leases, so much so that, as Maitland observes, 'the *placitum conventionis* is almost always what we should call an action on a lease'.⁷ Without covenant a lessee would indeed go unprotected, since his 'possessory' interests (in particular, his interest against premature eviction) did not fall within the ambit

³ Local courts were already recognising 'parol conventions' as well as certain quite general 'money counts' several centuries before the common law. On the former, see F.W. Maitland, *The Court Baron* (Selden Society, vol. 4), 115–16; on the latter, S.F.C. Milsom, *Historical Foundations of the Common Law* (London 1969), 293.

⁴ See on this R.C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (Selden Society, vol. 77), 43.

⁵ *Select Civil Pleas* (Selden Society, vol. 3), pl. 89.

⁶ For the final concord or fine, see Plucknett, *Concise History*, 613. The classical account of the later fine as a form of conveyance (the 'common recovery') is of course Blackstone's: *Commentaries of the Laws of England*, ii, 348ff.

⁷ Pollock and Maitland, *The History of English Law* (Cambridge 1898), ii, 217.

of any of the 'real' actions at common law.⁸

Like other early common law writs, covenant too takes a *praecipe* form, but with a modified wording since, unlike other *praecipe* writs which command the restoration to the rightful owner of his land or money or things, this writ commands the defendant's *keeping* of an agreement: *ut teneat conventionem*. Only if he did not comply was he, again as in other *praecipe* actions, to be summoned to appear in the king's court to show why he did not do as told. If there was judgment, this too would order specific performance by the covenantor.⁹ An award for damages was still seen as a poor substitute for specific relief. The Statute of Wales, which represents a sort of précis of contemporary English law, openly laments the fact that there should be cases where a buyer cannot have other redress than in damages, even where the seller deliberately breaks his covenant.¹⁰ But it was damages, not specific relief, which became the normal remedy, at any rate by the fifteenth century. The usual explanation for this is that the common law could not compete with the chancellor's growing jurisdiction based on his power to imprison a disobedient defendant for contempt of court; the common law, by contrast, could only threaten a distress, a measure anyhow of diminishing value if the covenantor had little or no property to distrain upon.¹¹ Even so, one should not forget that damages was often the only practical remedy, especially where specific relief was no longer possible, as where the thing sold was already disposed of or was defective or destroyed: here no amount of gaoling could improve the covenantee's redress so that his best course was to be content with damages. Thus, as so often in the law, the erstwhile abnormal becomes the normal and a remedy appropriate for some purposes becomes the remedy for all.

However this may be, covenant never developed into a prominent or prolific contractual action. Already in the fourteenth century its fate was one of increasing decline. The reason for this is generally linked with the requirement of the seal. It is true that, while in the thirteenth century a covenant was enforceable, sealed or not, in the

⁸ C.H.S. Fifoot, *History and Sources of the Common Law* (London 1949), 261.

⁹ *'Et ideo consideratum est quod conventio teneatur et quod H. habeat seisinam suam us que ad terminum suum x annorum'*: Maitland (ed.), *Bracton's Note Book*, pl. 1739.

¹⁰ Statute of Wales (1284), chap. 10.

¹¹ H.D. Hazeltine, 'The Early History of English Equity', in Paul Vinogradoff (ed.), *Essays in Legal History* (Oxford 1913), 261, 269-70; Plucknett, *Concise History*, 678.

course of the fourteenth the seal became imperative.¹² Still, the seal should not be too quickly blamed. 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. Indeed this 'formalisation' of the covenant should have made it more popular rather than less. For the sealed document invested the terms of the agreement with a new certainty which also excluded wager of law. The decline of covenant must then be otherwise explained, perhaps quite simply by the astonishing success of the so-called 'obligation' or penal bond which, too, rested on a writing under seal.

Apart from advantages of authenticity and proof, the seal did not confer any other superiority upon the covenant. Whether it was an agreement for a lease, a sale, or some service, the covenant was inevitably a transaction of exchange, with mutual obligations, and was thus of a synallagmatic or (more broadly) 'reciprocal' kind. Maitland even doubted whether a covenant would have been enforceable if its gratuitous nature was candidly revealed.¹³ This view, needless to say, does not deny the possibility of a gift in medieval law, one taking effect by the delivery of a thing, whether or not the donee gave anything in return. Nevertheless the word 'gift' (*donatio*) did not then specifically denote a gratuitous transfer, it merely referred to the 'grant' or transfer of a thing *instanter*, quite unlike the word 'covenant', which rather meant an agreement or undertaking to do or pay *de futuro*.¹⁴

The important fact remains that the covenant later did come to include, and to uphold, agreements without consideration, including gratuitous promises. But the reason for this cannot be attributed to the notion, so frequently repeated in the nineteenth century, that the seal 'imports' consideration. Not only did the seal and consideration connote quite different characteristics, the former referring to the authenticity of a contract, the latter to (broadly) the motive or reason for making it, when in the sixteenth century the notion is first advanced it is firmly dismissed.¹⁵ The true reason for the widening of covenant seems

¹² *Anon.* (1346) Y.B. 20 Edw. III (R.S., vol. 2) 148. As late as *Anon.* (1311) Y.B. 4 Edw. II (Selden Society, vol. 42), 171 covenants are still enforced without a writing: see Fifoot, *History*, 257-8, 262-3.

¹³ Pollock and Maitland, *H.E.L.*, ii, 213-14.

¹⁴ The early meanings of 'gift' etc. appear clearly in *Fleta*, iii, chap. 3, just as they are still discernible in Sheppard's *Touchstone*, chaps. 7, 11 and 12.

¹⁵ In *Sharlington v. Strotton* (1566) 1 Plowd. 298, 308-9, where a grant of land to a brother by deed, without livery of seisin, was upheld, not on the ground that the

therefore quite a different one: that, covenant having survived the rise of assumpsit, the principal feature distinguishing it was the seal, in contrast to 'consideration', which became the new and essential requirement of the simple contract. However this may be, even the sealed or formal covenant hardly achieved what one might have expected from its technically wider scope. The reason is that the breach of a gratuitous covenant gave rise to only nominal damages: the covenantee could still not specifically enforce the promised gift.¹⁶

THE ACTION OF DEBT

Debt was undoubtedly the central contractual action in medieval law. Already known and discussed by Glanvill,¹⁷ it was ever growing in application, notwithstanding the attempt by the Statute of Gloucester (1278) to transfer to the local courts claims amounting to less than forty shillings.¹⁸ The form of the writ, also couched in the *praecipe*, well expressed its purposes. Its peremptory style emphasised the plaintiff's right of recovery, its wide restitutory character permitted it to be brought for all kinds of fixed amounts, whether money due under a contract *re*, such as the price for goods sold or money lent, money due under a judgment or custom, or money due as on a failure of consideration.¹⁹

It is remarkable that creditors so frequently, almost doggedly, opted for debt despite the debtor's right to wage his law instead of going to

seal 'imports' consideration but that this 'consideration' was supplied by the natural love and affection for a kinsman. Nor should it be overlooked that this reference to 'consideration' related to the law of uses, not to contract at all. See the informative discussion by A.W.B. Simpson, 'The Equitable Doctrine of Consideration and the Law of Uses' (1965) 16 *Univ. of Toronto L.J.*, 1, 2, 21, 33.

¹⁶ Nor, to mention this in passing, was the covenant specifically enforced in equity which too did not, and still does not, assist a 'volunteer' unless (in some situations) he also happens to be a close relative: see, e.g., *Ellison v. Ellison* (1802) 6 Ves. Jun. 656; *Dening v. Ware* (1856) 22 Beav. 184, 189.

¹⁷ Book x, chaps. 1-18.

¹⁸ The statute was frequently evaded, often through fictitious claims nominated at forty shillings: S.F.C. Milsom, 'Sale of Goods in the Fifteenth Century' (1961) 77 *L.Q.R.*, 257, 258-60.

¹⁹ *Anon.* (1294) Y.B. 21-2 Edw. I (R.S.) 598-600, per Metingham J. Debt even lay as on a *partial* failure of consideration: so where A, in lieu of rent, undertook to build a house worth £14, but built one worth only £6, debt was allowed for the difference: *Anon.* (1293) Y.B. 21-2 Edw. I (R.S.) 110-11. For reasons by no means clear these particular actions apparently disappear thereafter: see R.M. Jackson, *History of Quasi-Contract* (Cambridge 1936), 19-20. See also chap. 14, notes 4-5.

a jury. Upon a wager the debtor could conclusively oppose the plaintiff's claim by a general denial on oath that he owed any money, provided the denial was supported by a number of other persons (usually twelve), the so-called compurgators or oath-helpers, all swearing to their belief that the debtor's oath was true.²⁰ The compurgators might indeed commit perjury, just as the defendant could himself, but that was their personal damnation and did not diminish the validity of the defendant's oath.²¹ Wager of law was not possible where the debt arose upon a writing or obligation, or upon an account, or for rent on a lease, on the ground that these claims did not arise strictly privately between creditor and debtor, but were matters of some publicity or notoriety (as, for example, in account the receipt of money from a 'third hand'); hence these were matters that might be known by the 'country', by neighbours, not just by the two parties involved. In very many situations, however, a debtor could and did resort to his 'law': wager was his typical choice.

Still it would be a misconception to think of wager as the unmitigated aberration it was later seen. Not an ideal, it must have been regarded as at least an acceptable method of proof. For, though there can be little doubt that wager lent itself to dishonest practices, sometimes even an honest debtor preferred to wage his law as the quickest way of defeating a false claim. Professor Milsom's recent analysis admittedly does reveal a steady swing towards jury trial;²² but so small is the swing that his statistics strongly suggest that oath-helpers were less easily recruitable or were in any case considered as more similar to jurors than we now tend to assume. The jury too was still rather 'compurgatory' in character, being mainly a body of witnesses: not until the sixteenth century did it fully become a trier of fact, charged with assessing evidence produced in court.²³ Until this happened the courts were in no position to exercise real control, whether over oath-helpers or over jurors, except possibly through a manipulation of the pleadings: by, for example, requiring the debtor to plead not to the general issue but specially, for the simple reason that a general or blanket denial

²⁰ See W.S. Holdsworth, *A History of English Law* (London 1903-56), i, 305; Milsom, *op. cit.*, 261, 265; also W.M. McGovern Jr, 'Contract in Medieval England: Wager of Law and the Effect of Death' (1968) 54 *Iowa L. Rev.*, 19.

²¹ See 'Note' (1587) Gould. 51.

²² Milsom, *op. cit.*, 266.

²³ R.L. Henry, *Contracts in the Local Courts of Medieval England* (London 1926), 50, 91; Holdsworth, *H.E.L.*, ix, 130ff.

may have been perceived as more permissive of perjury than the denial of a specific point.²⁴

DEBT UPON OBLIGATION

In the fourteenth century two kinds of debt were clearly distinguished: debt upon obligation, that is, brought on a writing including a covenant or a bond, and debt *sur contract*, brought for an unpaid price or reward where the contract was already executed by the plaintiff. The former species rested on the rule that debt alone would lie for the recovery of a liquidated sum, even if due under a covenant. For debt was the basic, as it was the original, action for all fixed amounts; indeed the covenant was seen as evidence rather than as the actual source of the debt.²⁵ This also explains the further rule excluding wager of law, since the writing itself proved the indebtedness.²⁶ Just this, furthermore, prepared the phenomenal growth of the penal bond, at least for agreements of financial consequence. In the bond the obligor undertook under seal to pay the obligee a penalty should he (the obligor) fail to perform the 'condition' specified: the obligor, for example, might covenant to pay £100 if he did not repay £50 (the sum actually lent to him) on the exact day agreed, in which case he would, as was said, 'forfeit' the bond, that is, become liable for the full penal debt.²⁷ For the obligee such a bond had other advantages. Since the burden of proof rested on the obligor, it was he who had to show full performance of the condition which was strictly construed against him.

²⁴ So where the plaintiff complained that a house was not 'safe and sound' as expressly warranted, the issue had to be taken on that warranty, not on the contract as a whole: *Anon.* (1455) Y.B. 33 Hen. VI, fol. 38, pl. 17. See more fully Milsom, *op. cit.*, 267-9, also Henry, *op. cit.*, 28ff., 52, for a similar pleading development in the local courts. However the whole picture still remains as confusing as it is obscure.

²⁵ See Pollock and Maitland, *H.E.L.*, ii, 220; Holdsworth, *H.E.L.*, iii, 418. We omit here a third species of debt, the so-called 'contract of record' by which a debtor acknowledged his debt in court and also allowed that the sheriff might levy execution in case of default. Speedy security was further provided by the Statutes of Merchants (1283 and 1285) which authorised the arrest of a debtor and the sale of his possessions if necessary. Of undoubted practical importance (see, e.g., Plucknett, *The Legislation of Edward I* (Oxford 1949), 140ff.), these devices nevertheless contributed little to basic contract doctrine.

²⁶ 'In debt on contract the plaintiff shall show in his count for what cause the defendant became the debtor. Otherwise in debt on obligation, for the obligation is contract in itself': *Anon.* (1385) Bel. 111.

²⁷ For a full account, see A.W.B. Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 *L.Q.R.*, 392, 397, 404, 412.

Then the obligee had the expeditious process of *capias*, under which the obligor could be arrested upon summons or outlawed if he could not be reached.²⁸ Above all, the penalty, regarded as compensatory rather than usurious, gave the creditor-obligee a powerful security *in terrorem* against the obligor. Indeed it was precisely when, in the seventeenth century, equity began to give relief against penal forfeitures, allowing the obligee no greater compensation than his actual loss, that the bond tended to be less and less resorted to.²⁹

Another sort of obligation was the *scriptum obligatorium* in which the debtor both acknowledged his indebtedness in a certain amount and declared his readiness to pay this debt either to his creditor or to the latter's 'attorney' or assignee. Contained in a writing, this obligation constituted virtually conclusive proof, 'estopping' the debtor from denying his debt; as Bracton said, 'if he writes that he owes money, he is bound by the writing whether the money has been advanced or not, and he will not be allowed the defence that the money has not been advanced in contradiction of his writing, because he has written that he owes it'.³⁰ Though these *scripta* were negotiable in that they allowed funds to be assigned, they were not strictly negotiable instruments, as they did not confer a better title upon the holder in due course. Nor were they, strictly speaking, the direct forerunners of the later bills of exchange. These had their separate origin in the 'bills' that merchants began using in the sixteenth but especially seventeenth century. In fact, the latter bills apparently begin to circulate only after the *scripta* disappeared, after having come to be regarded at common law as tainted with 'maintenance'.³¹

DEBT UPON CONTRACT

It is our second category, debt *sur contract*, which was the great exemplar

²⁸ This process was introduced by statute of 1352 (25 Edw. III, st. 5, chap. 17) which extended *capias* to debt but not to covenant: see Milsom, *Historical Foundations*, 217-18. This greatly enhanced the advantages of debt as compared with the older procedure under which a defendant had first to be attached by pledges and then by better pledges: see Pollock and Maitland, *H.E.L.*, ii, 593. Outlawry had special utility in relation to joint obligations since it enabled debt to proceed against at least one obligor assuming the others could not be reached.

²⁹ Simpson, *op. cit.*, 415, 421.

³⁰ Bracton, fol. 100b. Estoppel by deed is perhaps the oldest part of the law of evidence: Holdsworth, *H.E.L.*, ix, 130, 178.

³¹ Fifoot, *History*, 221; J.M. Holden, *History of Negotiable Instruments* (London 1955), 9, 13.

of debt, being the action applicable to the most usual and often entirely informal transactions which, executed on one side, therefore called for the recovery of either money lent, or the price of goods sold, or the rent for land, or the agreed reward for services rendered. That debt would lie on a contract *re* had already been stated by Glanvill.³² Whether debt would also lie for services performed under a covenant was, however, not settled until the fourteenth century. Thus to a claim for work done, an objection that the plaintiff should have sued in covenant, not debt, was overruled by Sharshulle J.: 'If one were to count simply of a grant of a debt, he would not be received without a specialty; but here you have his service for his allowance, of which knowledge may be had, and you have *quid pro quo*.'³³ For much the same reason debt was allowed for rent on a lease, whether or not the deed itself was enforceable.³⁴ The general principle then was that debt would lie for a fixed reward, provided the agreed benefit or *quid pro quo* was already conferred, for once so conferred the existence of a specialty was no longer essential.

The *quid pro quo* thus denoted the recognised *causa debendi* and as such became the hallmark of debt *sur contract*. Indeed it called attention not just to the 'real' but also to the bilateral nature of the contract, since the *quid pro quo* required reciprocity or mutuality in the parties' relationship, as no actionable debt could arise without an agreed exchange of money for things or services. The 'real' and 'reciprocal' elements were thus intimately linked, in some ways too rigidly so. A plaintiff was unable to recover unless the debt had fully arisen; that is, he had in fact completed the whole, not just part, of the agreed services.³⁵ Nor could he recover unless the parties had expressly quantified the exchange by agreeing to a fixed price for a specified performance. If, said Brian C.J., 'I bring cloth to a tailor to have a cloak made, if the price be not determined beforehand that I shall pay for the making, he shall have no action of debt against me'.³⁶

Furthermore, the benefit rendered had to be for the debtor personally, which excluded liability for goods supplied or services rendered to a

³² Book x, chap. 3.

³³ *Anon.* (1338) Y.B. 11-12 Edw. III (R.S.) 587; Fifoot, *History*, 247.

³⁴ *Prior of Bradstock's Case* (1371) Y.B. 44 Edw. III, Mich., fol. 42, pl. 46.

³⁵ See e.g. *Veer v. York* (1470) Y.B. 49 Hen. VI (Selden Society, vol. 47), 163, where a priest sued in debt for five marks for chanting for a soul, but failed as he had been retained for a whole year for ten marks.

³⁶ *Anon.* (1473) Y.B. 12 Edw. IV, East., fol. 9, pl. 22.

stranger, even if this was at the defendant's request including his promise to pay the amount due.³⁷ This caused much discussion in relation to a father's promise of money to a prospective son-in-law if he married the daughter as her father wished. At first it was taken for granted that the daughter's marriage, however much instigated by the father, could be of no relevant benefit to him, precisely because this did not appear to be a proper or typical bargain as far as the father was concerned.³⁸ Thirty years later, some judges nevertheless inclined to the view that a daughter's marriage was a sufficient *quid pro quo* if only because, the marriage having taken place at the father's 'commandment', he had, as Moyle J. said, if not exactly a *quid pro quo* at least 'the same in effect'.³⁹ The judges, in short, were prepared, understandably, to extend the notion of benefit to include, so to speak, indirect advantages.

How strong the idea of *quid pro quo* had become in other situations reveal. Suppose a sale included goods which turned out to be *res aliena* or non-existent: how could one say that the buyer received a benefit? Some earlier Year Books imply just that, since according to them a debt could not be denied once the debtor had received anything even if the true owner were to take the benefit away.⁴⁰ But later cases rather suggest the opposite: it was held that a seller could not sue in debt upon a sale of non-existent things precisely because without a *quid pro quo* the sale was void; Perkins even indicates the same result where the goods bought were *res sua*, things the buyer already owned.⁴¹ Nor should we be misled by certain other unorthodoxies. Moyle, for example, thought that debt would lie on a promise to pay a hundred shillings to a carrier if he would carry for another or to a surgeon if he would treat the other to 'make him safe and sound'.⁴² This, as it happened, was a minority view, but the point is that it could have been shared by the majority. For Moyle was still not making a concession to charity;

³⁷ See *Anon.* (1421) Y.B. 9 Hen. V, fol. 14, pl. 3.

³⁸ *Anon.* (1428) Y.B. 7 Hen. VI, Mich., fol. 1, pl. 3, where the court firmly resists the suggestion that the father has a *quid pro quo*, 'and thus this cannot be said to be a bargain; just as though I gave you my horse on approval, this cannot be called a bargain'.

³⁹ *Anon.* (1458) Y.B. 37 Hen. VI, Mich., fol. 8, pl. 18.

⁴⁰ See Ames, *Lectures*, 91; Milsom, *op. cit.*, 271.

⁴¹ *Anon.* (1478) Y.B. 18 Edw. IV, fol. 5, pl. 30, per Vavisor and Littleton, which compare with Prisot's remarks in *Anon.* (1458) Y.B. 37 Hen. VI, Mich., fol. 8, pl. 18. On *res sua*, see Perkins, *Profitable Books* (ed. 1586) par. 93.

⁴² *Anon.* (1458), *supra*.

as in the case of the daughter he was seeing the acts done as bestowing an indirect but still very real benefit upon the promisor, if only because the benefits were rendered at his express request.⁴³

In this way arguments about the *quid pro quo* kept the action of debt upon a distinctly synallagmatic course just by holding to the idea of benefit. In this way, moreover, debt *sur contract* played a crucial role in contract history, certainly a more pervasive role than debt upon obligation, however practically important bonds were for a long time. For the 'obligation' was more akin to the notion of 'grant' than to ideas of reciprocal benefits. Hence it followed, for instance, that if the name of the debt in the action differed from that given in the bond, the variance would be fatal, quite unlike a debt upon contract where a similar variance would not give rise to a non-suit since there, as earlier explained, the deed was only evidence, and no more, of the terms of the transaction between the two sides.⁴⁴

DEBT AND DETINUE

Given the restitutory objective of debt, it is easy to understand its close liaison with what became known as the action of detinue. In its early form debt had indeed been doing the work of both actions. In this early form of debt-detinue the writ commanded the defendant to return money or movables of which the plaintiff was 'unjustly deforced', and even Glanvill includes among the *causa debendi*, in addition to sale or the loan of money, such items as the loan of fungibles or the deposit of things or their letting for use, all transactions which clearly contemplate the return of chattels *in forma specifica*.⁴⁵ However in the fourteenth century the remedies for money and things separate from each other: henceforth detinue is to be the distinctive action for the recovery of specific chattels (or their value), whether claimed by a buyer or a bailor, whereas debt continues to serve for the recovery of money alone. Accordingly, in the writ *de forciat* is replaced by *debet* and *detinet*, and in the denial *non tenetur* by *non debet* and *non detinet*. For the time being this separation did not affect the rule that, in an action by or against personal representatives, the declaration had to be in the *detinet*,

⁴³ An opposite view is advanced by Paul Vinogradoff, 'Reason and Conscience in Sixteenth Century Jurisprudence', *Collected Papers* (2 vols., Oxford 1928), 190; but the cases or dicta do not really support him once they are more closely examined.

⁴⁴ *Prior of Bradstock's Case*, *supra*.

⁴⁵ Glanvill, x, chap. 3.

not in the *debet*, while in an action for a price consisting not of money but of fungible things (as where a lessee or vendee was to pay in kind by way of a specified quantity of, say, wheat) the declaration could not be in the *detinet* but had to be *debt in the detinet*.⁴⁶ Clearly it somehow seemed odd to say that the things representing a rent or price were 'detained' *tout court*, since this implied that the plaintiff 'owned' these things, when in truth he had no prior property in what was being detained. The form *debt in the detinet* was then a sort of compromise, except that the new variant was still a part of debt, not of detinue, inasmuch as the plaintiff was claiming a price, not the return of a thing belonging to him.⁴⁷

All this shows again how closely debt and detinue had been connected and therefore raises the question why they should have broken apart. Perhaps the short answer lies in the increasing association of detinue with bailment and the latter's own peculiarities. Consider the situation of a bailor lending or depositing with a bailee a thing (say a valuable chattel or charter) which is lost or destroyed through no fault of the bailee. After Bracton the rule was that a bailee must return the same thing or its equivalent, even if lost or destroyed, unless the loss was due to inevitable accident or to circumstances palpably beyond the bailee's control: a rule, perhaps needless to add, which did not apply to a borrower of money who was always liable notwithstanding any similar misfortune on his part.⁴⁸ The law relating to detinue thus began to

⁴⁶ This form is already mentioned in *Anon.* (1310) Y.B. 3-4 Edw. II (Selden Society, vol. 4), 26. Holdsworth, *H.E.L.*, iii, 355, concluded from this that the buyer would normally have to resort to 'debt in the detinet'; but surely the latter action was confined to *debts*, whether a rent or price payable in kind instead of in cash. It was thus typically an action for the seller, not for the buyer whose remedy lay in detinue. See further, chap. 2 at note 3.

⁴⁷ Thus in *Anon.* (1377) Y.B. 50 Edw. III, Trin., fol. 16, pl. 8, an action of debt is upheld where a rent was for four quarters of corn precisely because the plaintiff could claim no prior property in these goods. Similarly in *Anon.* (1455) Y.B. 34 Hen. VI, fol. 12, pl. 33, it is said by Moyle J. that, if a cow or horse is sold for another thing, the writ is debt, not detinue. The same case mentions the chancery clerks' hesitations about debt: '*ils de Chancery ne voient faire nul tel bref en le debet en nul maner de chose, mais de deners tantum etc, pur que semble tiel bref purra estre en le Detinet, etc.*'

⁴⁸ Bracton, fol. 99. Glanvill, x, chap. 13, still thought the bailee as strictly liable as a pecuniary debtor. Britton's view that the debtor was as excusable as a bailee, if the loss occurred without fault, was plainly erroneous: cp. Milsom, *Historical Foundations*, 229. In the fourteenth century the bailee begins to be excused where the loss occurred through theft, though later again this excuse is made much more strict: see *Southcote's Case* (1601) 4 Co. Rep. 83b.

develop differently from debt, a difference which became still greater when detinue extended in the direction of trover, thereupon becoming available also against third parties, such as a mere 'finder' of a chattel or a person who otherwise got it into his hands, for if either of these refused to return what he had to the owner, he could be said to detain it wrongfully. These connections with tort did not wholly wash away the contractual origins of detinue: even today we are not always clear whether it belongs to contract or tort.

REAL AND CONSENSUAL CONTRACTS

So far only covenant furnished a 'consensual' contract, in the sense of permitting an entire future relationship. A buyer and seller, having covenanted under seal, could sue each other independently, without prior execution: one for the money, the other for services or for merchandise.¹ Outside covenant, on the other hand, the 'real' constituents of debt and detinue excluded purely executory obligations. A seller could not claim the price unless he had fully performed, while the buyer had a corresponding duty to pay for executed performance but not for anything less. It follows that there could not even be a contractual relationship until a debt arose upon a completed *quid pro quo*, with the further consequence not only that a promisor could abandon his performance if prepared to sacrifice his ultimate payment, but that the payor, too, could meanwhile withdraw, since again no debt could materialise until the whole benefit was received. This rigid framework was to create many difficulties for the law of sale.

SALE OF GOODS

Consider, to begin with, the sale of goods which attracted so much attention in the fifteenth century. If the transaction amounted to what the Year Books sometimes describe as a 'bargain and sale',² that is,

¹ See, e.g., *Groome's Case* (1348) Y.B. 21 Edw. III, fol. 11, pl. 2, where the court admitted each covenantor's 'independent' right to sue. For the doctrine of 'independency', see further chap. 12.

² In or shortly after the sixteenth century, 'bargain and sale' acquired another and more special meaning describing a species of conveyance of land, this as a result both of the Statute of Uses (1535) which 'executed' the equitable 'use' held by the vendor in favour of the vendee and of the Statute of Enrolments (1536) which required

a transaction consisting not just of a 'bargain' (or 'accord' or agreement) to exchange specific things for a specified price, but a bargain accompanied by a delivery of the goods, the seller could sue for the price, the 'real' requirements of debt being satisfied. But the problem could be more complex from the buyer's point of view. In the typical case, the buyer took immediate delivery, so that the only claim remaining outstanding was the seller's claim for the price still owing to him: which also explains why we hear so much more of sellers' actions than of buyers' rights. Consider however the less typical case where the buyer, for one reason or another, did not take immediate delivery. It is often supposed that the buyer still had *detinue* to fall back on, but this view needs to be more fully discussed.

To succeed in *detinue*, the buyer had to show some prior property in the goods, for the simple reason, as we have seen, that *detinue* was originally an action for the return or restitution of things already owed by him.³ Hence to legitimise the use of *detinue*, the law had first to concede that the goods bought but not yet taken away might nevertheless 'belong' to the buyer if he paid the whole or at least part of the price, for the seller's acceptance of the price might be regarded as a sort of 'grant' by him amounting to a 'constructive' delivery, with the seller thus turning into constructive bailee. When precisely this happened we do not know. But it is worth remembering that, under the Bractonian doctrine, which had not changed, a sale was only then 'perfect' (i.e. no longer defeasible by a *locus poenitentiae*) if the buyer had paid the price or at least part of it.⁴ This doctrine thus implied that the buyer acquired a right of property, provided he had paid something, being given credit for the rest. Or, putting it in another way, the buyer's right to have or take delivery implied a passing of property, that is, a 'passing' by operation of law as distinct from a transfer of property

formality for the contract of sale. See Sheppard's *Touchstone*, chap. 10; more generally Plucknett, *Concise History*, 615.

³ This need for prior property is still stressed in *Anon.* (1356) Y.B. 30 Edw. III, Mich., fol. 25, pl. 25; *Anon.* (1377) Y.B. 50 Edw. III, Trin., fol. 16, pl. 8.

⁴ Bracton, fol. 61b, 62. Even if the buyer had paid earnest, either party could still 'repent', although the buyer then forfeited the earnest while the seller had to restore to the buyer double the amount. See also *Fleta*, ii, chap. 58, *de emptionibus et enditionibus*. Maitland (Pollock and Maitland, *H.E.L.*, ii, 208) rightly points out that earnest is not the same as part payment, though the two got later confused. The idea of earnest still survives in the rules of deposit, strictly so called, which deposit forms part of the price, if eventually paid up, but is forfeited if the buyer reneges.

by actual delivery. In other words, the new availability of detinue simply came in the wake of this permutation of property: *contractus est permutatio rerum*, as Bracton said.

So far detinue would only lie if the buyer acquired a clear right to delivery, since only then would property pass. Take then a situation where, the buyer having as yet paid nothing or little, the seller merely agreed to keep the goods until paid in full by a certain date. Here the seller obviously refused to give immediate delivery, although for the time being he might be expected to be something of a bailee. But what sort of bailee? The answer emerges from two cases, one in 1429, the other in 1443. In the first,⁵ the plaintiff counted on a bailment in detinue for wool, to which the defendant pleaded that the plaintiff had bought the wool but had not paid on the day agreed. The plaintiff thereupon argued that the seller could not raise this non-payment without showing delivery; to which the seller rebutted that, since the wool was left with him, that 'countervails' a delivery (*le quel contrevail un livre*). In the second,⁶ where a seller similarly withheld property (a charter), the plaintiff argued that the former could not plead *non detinet* and non-payment as well. It may be that, purely technically, the seller should not have pleaded the general issue, but should have 'confessed' the contract and only then 'avoided' it on the ground that the condition of payment was unfulfilled. But this hardly affected the substance of his case. Nor was the plaintiff helped by the example he put: 'where I bail goods to you for rebailment and you then sell me a horse for a certain sum, and I say to you that you take the goods delivered to you by me in payment which you agree, and then later in an action of detinue brought by me for the horse, and you plead generally that you detain nothing, if all this matter is found I recover [the horse].'⁷ Obviously this result only followed because the seller was paid for the horse through the exchange offered and accepted by him: it did not follow from the fact that the seller was called a bailee.⁷

Indeed the seller would not really have objected to being called a bailee so long as it did not give the buyer any special rights to the goods. What the seller (not only soundly, but, one would think, successfully) did object to was the buyer's quite outrageous demand for property

⁵ *Anon.* (1429) Y.B. 8 Hen. VI, fol. 10, pl. 24.

⁶ *Anon.* (1443) Y.B. 22 Hen. VI, fol. 33, pl. 50.

⁷ For a different interpretation of these cases, see however Milsom, 77 *L.Q.R.*, 257, 269, 274-5.

in, or delivery of, the goods without either having obtained credit or so much as tendering the price. For as a later Year Book stated the law: 'if I buy from you a horse for 20 shillings, you retain [you have a right to detain] until you are paid the 20 shillings, but if [the condition is] that I shall pay next Michaelmas, here you will not detain the horse until payment'.⁸ The general position, then, was very clear: the seller would not be liable in detinue unless the buyer had paid the price or unless he expressly gave credit to the buyer, in which case, however, the latter would take immediate delivery. The debt-detinue system did not function outside an effective permutation of property.

But in the fifteenth century there appear statements that could be taken as supporting a much broader doctrine, namely, that property might pass upon a mere bargain, one without either payment or delivery. So in *Doige's Case*,⁹ Fortescue C.J., distinguishing between a sale of land and a sale of goods, said that in the former the property can only be transferred by livery of seisin, while in the latter it may pass by agreement,¹⁰ while a year later Danby similarly asserted that property passes *par le bargain fait*.¹¹ It should be carefully noted that in the former case the buyer (of land) had in fact pre-paid the price, while in the latter such pre-payment can be presumed,¹² so that both statements have to do not with a mere bargain but with what was in fact a 'perfect' bargain and sale. Nothing therefore supports Prisot C.J.'s oft quoted opinion that a 'bare contract', even without a *quid pro quo*, can be sufficient to maintain an action of debt, and presumably also one of detinue.¹³ In any case this view found no real support in later law: a

⁸ 'Note' (1465) 5 Edw. IV, fol. 2, pl. 20. The position where the buyer is given credit is considered below.

⁹ (1442) Y.B. 20 Hen. VI, fol. 34, pl. 4.

¹⁰ 'If I buy a horse from you, now the property in the horse is in me, and for this you shall have a writ of Debt for the money and I shall have Detinue for the horse on this bargain.'

¹¹ *Tailbois v. Sherman* (1443) 21 Hen. VI, East., fol. 55, pl. 22.

¹² In *Tailbois v. Sherman*, *supra*, T brought trespass on the case against S, counting that he had bargained with him for two pipes of wine for ten marks and that the defendant had promised to deliver the wine to the plaintiff before a certain feast which he had not done. The report does not actually say that the buyer had paid, but payment must be inferred from the fact that seller did not even attempt to plead non-payment as well as the fact that Danby's remark about property passing ('*par le bargain fait*') comes in reply to Bingham whose first objection was that the plaintiff should have sued in debt (for the price paid), not trespass, to which Danby rejoins detinue rather than debt simply because property in the goods had already passed.

¹³ *Anon.* (1458) Y.B. 37 Hen. VI, Mich., fol. 8, pl. 18. This is the marriage case referred to in chap. 1, note 39.

quid pro quo, it was said, must materialise at once,¹⁴ thus reaffirming, if any such reaffirmation was necessary, that a 'mere bargain' could give a buyer no contractual rights.

The same point had already been made in a more celebrated case.¹⁵ The defendant, having bought but not paid for grain growing on the plaintiff's land, then entered the land and cut and took possession of the grain. In trespass for this taking, the defendant pleaded that the taking was lawful as property had passed to him and, further, that there was no mischief as the plaintiff had an action for the money as soon as the defendant took or 'received' the grain.¹⁶ However the judges dismissed this argument. Littleton J. did not agree that property passes without payment, 'for it is not a clear bargain, but is subject to a condition in law, that is to say, if he pays me it shall be good, and if not it shall be void'. Unless this were so, added Choke J., 'I shall be compelled to keep my horse forever against my will, if the property is in you, and you would be able to take him when you pleased, which would be against reason.' Brian C.J. plainly concurred with this result, as he too stressed that the defendant had no right to take the things without the plaintiff's leave. However Brian also remarked that property could pass immediately even without the buyer having paid, so that, on the face of it, he differed from his brethren in that they believed there was no sale at all, whereas he apparently thought there was a sale but subject to a lien or condition subsequent. From this, legal historians have frequently inferred that Brian was already contending for the possibility of a consensual contract, while his brethren were (conservatively) adhering to the need for a contract *re*.

But this inference misses several important points. For one thing, the actual difference between Brian and his colleagues is, on closer inspection, not very significant. The crucial question was not so much

¹⁴ *Anon.* (1523) Y.B. 14 Hen. VIII, Hil., fol. 17b, per Carel.

¹⁵ *Anon.* (1478) Y.B. 17 Edw. IV, fol. 1, pl. 2.

¹⁶ The defendant made a further, and more daring, suggestion that the plaintiff had authorised him to decide whether to take the goods or not: 'because he [the plaintiff] has put his will into our will, that is to say, that if they pleased us on our view of them, then we should have them'. But the court would have none of this: the final grant had to be left to the seller as it would be too hazardous to leave this decision to the buyer alone; for, as Brian now said, 'it is common learning that the intent of a man cannot be tried, for the Devil himself knows not the intent of a man'. For all their subsequent fame, these words were not strictly relevant in this context, if only because the buyer had declared or 'certified' his present intentions so that there was in fact no doubt about them.

whether there was, or was not, a sale, but rather whether the so-called 'sale' also passed 'property' to the buyer without the seller's leave: the buyer's whole case centred on his alleged right to take physical possession of the goods without payment, and just this right was denied by Brian as well. For another thing, Brian's remarks about the possibility of an immediate sale were more concerned with quite another difficulty, namely, how to hold the seller to a bargain for just enough time to give the buyer an opportunity to make tender of the price. This difficulty came up again in the following year,¹⁷ when Brian C.J. observed that if a buyer of a horse tenders the money immediately he can seize it, or sue in detinue or in trespass: the seller, as a 1523 case more specifically explained, cannot actually withdraw while the buyer is counting out the money as the former *doit tarier reasonable temps*.¹⁸

Thus Brian's notion of an immediate sale was perhaps only another way of suggesting the need for a reasonable opportunity for payment to be made. For, as Brian continued, if the buyer does not tender presently, as where he goes away and returns rather later, 'some say' that the seller is no longer bound to go on with the sale, though he may do so if he wishes. 'Indeed not,' Pollard added in the 1523 case, 'for I would have no certainty of my money, nor of your ever coming back.'¹⁹ To Pollard such a transaction amounted to nothing more than a 'communication', whereas Brian had called it a 'sale'. In terms of actual legal consequences, however, this was a distinction without a difference precisely because in either situation the buyer acquired no continuing rights from his bargain other than the brief or temporary right to pay. If the buyer wished 'to bind the bargain' he had, as Lord Holt was later to point out, at least to give earnest, for 'after earnest given the seller cannot sell the goods to another, without a default in the vendee; and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in convenient time, the

¹⁷ *Anon.* (1479) Y.B. 18 Edw. IV, Hil., fol. 21, pl. 1.

¹⁸ *Anon.* (1523) Y.B. 14 Hen. VIII, Hil., fol. 17b.

¹⁹ In a 'Note' in the same Year Book it is further said that, if I sell my horse to you at a price to be determined by a third, then if I sell the horse to another before the price is fixed, the first buyer will not have the horse, for the contract is not perfect, so long as something remains to be done. The 'Note' adds that the first buyer may here have an action on the case, but this only seems to reflect the new availability of assumpsit which in the fifteenth century however was still in the future and which in any case did not affect the present non-availability of detinue: (1523) Y.B. 14 Hen. VIII, Hil., fol. 15, pl. 1.

agreement is dissolved, and he is at liberty to sell them to any other person.²⁰

SALE OF LAND

If the bargain and sale was for land, the seller could sue in debt once he had conveyed the land, again on the principle that a contractual debt arose upon an executed *quid pro quo*. Yet the converse did not also hold, in that the buyer had no detinue for the land, even if he had paid the full price. The reason was that detinue only applied to goods, not to land, from which it also followed that, at common law, property in land could not be transferred constructively but only by 'livery of seisin', the old form of physical transmutation of possession applicable to land. The result was that a seller could sell his land, even take the money for it, and thus make (in Bracton's phrase) a 'perfect sale', yet still remain free to revoke the contract and to sell to somebody else. It is true that already in the fifteenth century chancery might intervene to enforce such a contract specifically, provided the seller still had the land he had undertaken to convey.²¹ But once he had parted with the land, there was nothing that chancery could do. Clearly the situation revealed a striking lack of symmetry between the seller's and buyer's positions in relation to land, even within the modest ambit of the contract *re*.

This anomaly started the great debate in *Doige's Case*.²² The plaintiff declared, in a bill of deceit, that he had bargained for so much land, had paid for it, but that the defendant enfeoffed another, not him, and so he was deceived. What principally divided the Exchequer Chamber was whether upon such a 'firm (*plein, parfait*) bargain', as Newton C.J. called it, the buyer might not bring an action in deceit. Newton, leading the majority, was convinced that he could, whereas Fortescue C.J. (apparently in a minority of one) maintained that the buyer should have secured himself by covenant.²³ Newton was rightly concerned about the 'strange law' (*merveillous ley*) that would ensue if the seller might still renege with impunity so that, notwithstanding the essential similarity of the two situations, a seller of land might withdraw while

²⁰ *Langfort v. Tiler* (1704) 1 Salk. 113.

²¹ See on this Barbour, *The History of Contract in Early English Equity*, in *Oxford Studies in Social and Legal History* (Clarendon Press, Oxford 1909-27), iv, no. 7, 116ff.

²² (1442) Y.B. 20 Hen. VI, Trin., fol. 34, pl. 4.

²³ Fortescue was C.J.K.B., Newton C.J.C.P.: see Fifoot, *History*, 348.

a seller of goods could not. Newton, it will be observed, was not asking for the recognition of a 'mere bargain', as, for example, Prisot had done.²⁴ He was merely asking for the recognition of a bargain and sale so as to allow the buyer a remedy against the vendor.

Unfortunately the financial scope of this decision is not very clear. The declaration states that the buyer had paid £100 and that he was deceived: was he then simply claiming the return of this amount? The judicial discussion proceeds as though this was the only concrete demand. Both Newton and Paston repeatedly suggest that the buyer has only two possible actions against a seller, either covenant (which obviously could not apply) or deceit (which, they said, should), the clear implication being that the buyer cannot bring debt for his pre-paid price.²⁵ It therefore appears as though the judges rather overlooked the availability of debt for a consideration that failed. That debt would or could lie, some of the earliest Year Books had recognised, but the fact remains that its availability had, for reasons never fully explained, been lost sight of for over a century.²⁶ The upshot was that at common law the protection of a buyer of land was now conceived as possible only through an action in deceit.²⁷ Half a century later equity introduced its own version of a detinue-like remedy or of passing of property by implying a trust or use upon a bargain and sale, whereupon the vendor was regarded as seized of the land 'to the use' of the purchaser.²⁸ In this way equity closed a gap that common law detinue had been unable to fill.

²⁴ See at note 13.

²⁵ At one point Newton C.J. indeed contrasts the case where A bails money to B which A can recover in account or in debt with the case (as here) where a buyer has only covenant or deceit.

²⁶ See chap. 1, at note 19. The applicability of debt on a consideration that failed was nevertheless recognised in the *Case of Barley* (1505) Y.B. 20 Hen. VII, Mich., fol. 8, pl. 18, Keilw. 69, 77, fully discussed in chap. 4 below.

²⁷ Though *Doige's Case* was adjourned, judgment was eventually entered for the plaintiff: Kiralfy, *The Action on the Case*, 227-8. This corrects an earlier opinion (cf. Fifoot, *History*, 334) that the case was inconclusively adjourned. According to Kiralfy, moreover, the record shows that the plaintiff (P) recovered damages of £20. We cannot but assume that he also recovered his (pre-paid) £100, which was perhaps returned to him unofficially. Otherwise the decision makes no sense since it would leave P grossly out of pocket to the tune of £80. Perhaps the £20 were to cover P's incidental expenses, including compensation for D's retention of the £100. Perhaps it also included an element of 'punitive' damages for the 'deceit' perpetrated by D.

²⁸ Holdsworth, *H.E.L.*, iii, 436; iv, 424-5.

FUTURE BARGAINS: UNASCERTAINED GOODS

Returning to goods, we see that the debt-detinue system had surrounded the enforceable bargain and sale with strict and narrow requirements which confined it, on the one hand, to specific (excluding unascertained) goods and, on the other, to transactions in which the parties had either delivered or had paid. Only one qualification now obtained, for (as earlier pointed out) the buyer could acquire an immediate right to the goods even without payment, provided the seller expressly extended credit to him. This qualification did not derive from a more sophisticated notion of contract, but from a somewhat extended notion of 'grant'. If, as Brian C.J. put it, the plaintiff had said 'take them [the goods] and pay when you please, or if he had given him one day for payment, then I conceive well that he could take them, and that would be a good bar if so pleaded'.²⁹ Indeed Catesby urged that the vendee should take the goods immediately, for if ('out of his own folly') he does not, the vendor might still sue for the price when the time comes.³⁰ This warning is not free from doubt, if it implied that the seller was somehow bound to keep the goods, even if the buyer did not take them immediately. For this the cases do not really support. What they do support is the much narrower doctrine that, if the seller did extend credit, it would operate as a grant putting the goods at the immediate disposal of the grantee, the grant thus taking effect as a constructive delivery with the grantor or seller converted into a bailee.³¹

This notion of grant must have made it very difficult to extend the bargain and sale to non-specific goods. With the whole debt-detinue system geared to giving the buyer an immediate right to the goods, whether on credit or on payment in full, obviously little room was left for anything but existing and specific goods, for only of these could

²⁹ (1478) Y.B. case, *supra*.

³⁰ (1479) Y.B. 18 Edw. IV, fol. 21, pl. 1. Here a husband seised of certain woods in the right of his wife during coverture, sold some wood to B for a price, B to have two years to take the wood. B did take some, but the husband then died. Did his executors have debt for the whole sum against B? Some said yes, because the whole property passed to B. The case was adjourned.

³¹ 'And this diversity was taken, when the day of payment is limited, and when not: in the first case, the contract is good immediately, and an action lies upon without payment; but in the other case not so: as if a man buy of a draper twenty yards of cloth, the bargain is void, if he do not pay the money at the price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue': *Anon.* (1537) 1 Dy. 26b, 30a.

actual or constructive delivery be had at once.³² The law, it must be carefully noted, did not explicitly exclude non-specific goods from the bargain and sale, however much detinue was in actual operation limited to specific articles. The buyer was of course free to bargain for unascertained goods (say, for the supply of quantities of growing or future grain or wool) in the hope or understanding that the goods would become specific as soon as ready for delivery and thus recoverable in detinue. Perhaps this explains Milsom's discovery that, when at the end of the fifteenth century detinue-actions by buyers claiming goods reappear with surprising frequency, they declare two things: either that the goods were left with the seller *salvo custodienda*, that is, virtually as a bailee, or (this often, but not always, together with the first) that part or all of the price was paid at the time of the contract.³³ The first count entailed that the seller should be held as a bailee, except that he was a bailee who could not be compelled to deliver unless paid, while the second count foreclosed the seller's plea of non-payment just as it carried forward the old Bractonian notion of the 'perfect sale'.

Even so, we do not know how well or ill such declarations fared, so much is still unexplored and obscure in fifteenth century law. What we do know is that very soon detinue was held to be inapplicable to unascertained goods. The *Case of Barley*³⁴ firmly distinguished between specific goods, the property of which might pass immediately, and unascertained goods, in which property would not pass; these latter required a bargain enforced by assumpsit, not a bargain and sale enforced by debt and detinue. In the last mentioned case, in fact, the one alternative to assumpsit seriously canvassed is not detinue, but debt for the pre-paid price. Even debt however did not help the buyer where the seller reneged on the sale, for, though able to recover his pre-payment and thus be put in a position as though no contract had been made, the buyer would still not recover enough in damages to make good his full economic loss.³⁵

³² In *Anon.* (1443) Y.B. 21 Hen. VI, East., fol. 43, pl. 20 (a case concerned with the allegedly wrongful taking of tithes) the point is made that a 'perfect sale' depends on there being a present grant of property to the purchaser and on title thus passing immediately, a point which was not really controverted, though it was said that a 'profit' must always lie in grant.

³³ 77 *L.Q.R.*, 257, 276, 278.

³⁴ (1505) Y.B. 20 Hen. VII, Mich., fol. 8, pl. 18.

³⁵ For the different measure of damages in debt and assumpsit, see more fully chap. 4, at notes 13-18.

SOME CONCLUSIONS

The preceding analysis has shown that, just as the debt-detinue system was completely geared to bargain and sale, so the latter contained the notion of 'passing of property' in sale of goods. This notion was in fact nothing more than a rationalisation of the old Bractonian doctrine of the 'perfect sale' which, by dint of cutting off the seller's right to revoke, entailed a right for the buyer to have or take immediate delivery of the goods, which implied that property had to pass to him, which in turn entailed the availability of detinue.

This interpretation differs greatly from the commonly held view, which sees the 'passing of property' as part of the 'consensual (or executory) contract'. Some legal historians also believe that the consensual contract emerged by the middle of the fifteenth century—broadly, by the time of *Doige's Case*³⁶—but in any case long before the introduction of contractual assumpsit in the sixteenth century.³⁷ This view seems scarcely defensible. In the first place, as the preceding analysis may have shown, the property did not pass to the buyer upon the mere bargain, but only upon the bargain and sale, which latter was not a 'consensual' contract but a 'real' one. It is this 'real' element that common lawyers sometimes tried to catch by describing the contractual relationship as depending upon a 'duty' or upon 'mutual grants'.³⁸

³⁶ (1442) Y.B. 20 Hen. VI, fol. 34, pl. 4.

³⁷ See Holdsworth, *H.E.L.*, iii, 356, 457; Fifoot, *History*, 228–9. Brian's judgment, it has been said, 'might have been delivered yesterday, as it is precisely what the law has been after the lapse of three centuries and a half': Blackburn, *Contract of Sale* (London 1910), 288. It is of course true, as Blackburn suggested, that the rule of *res perit domino* originated at that time, though this, too, does not point to a consensual contract but rather reaffirms the contract *re*, precisely because property and risk would not pass to the buyer unless he had an immediate right to the goods *via* detinue. In fact, not until the nineteenth century was this rule given wider scope by extending the meaning of an immediate as distinct from a future sale: see, in particular, *Tarling v. Baxter* (1827) 6 B. & C. 360. More recently Professor Milsom has advanced the still bolder theory that a consensual contract was current much earlier but was 'retrenched' and that 'what happened in the case of sale of goods did not happen because of the passing of property idea, but was only rationalised by it in real terms', which latter was by no means 'a happy invention' since it 'knocked away' the consensual basis of contract that had been emerging up to then: (1961) 77 *L.Q.R.*, 257, 272, 275, 282–4; similarly (1967) 17 *Univ. of Toronto L.J.*, 1, 5. Milsom seems to infer this mainly from the fact that unless a 'condition' was specially pleaded, non-delivery or non-payment was no defence in an action by the seller or buyer respectively. But the cases cited for this allow of a quite different interpretation: thus see at notes 5–7 above.

³⁸ See Ames, *Lectures*, 78; also *Edgcomb v. Dee* (1670) Vaugh. 89, 101.

Holdsworth in particular was on very infirm ground in maintaining that, by their bare agreement alone, seller and buyer 'granted' each other the right to a specific thing or the right to the price, reciprocal rights which thus created a consensual contract between them.³⁹ To say that mutual rights were 'granted' rather overlooks the fact that these rights were not effective upon the mutual grant but upon either party's execution by payment or delivery.

In the second place, it is in any case impossible to view bargain and sale as a 'consensual' contract precisely because of its limitation to specific as distinct from unascertained goods. Had debt-detinue come near a true consensual or executory agreement, unascertained goods would not have presented the difficulty they did, for either detinue could have been pressed into service, on the ground that even unascertained goods must become specific by the time of delivery, or debt might have been used in some more general form, on the analogy of 'debt in the detinet'. However the courts took neither course. So overpowering, perhaps because of its very simplicity, was the logic of the debt-detinue approach that, unless the seller had actually delivered or the buyer had by payment or express credit acquired an immediate right to a specific thing, there was no 'real' or enforceable contract at all. The consequence was that, without such a contract, either party remained at liberty to withdraw. It is in fact precisely the period, between the formation of a contract and its 'real' execution by one side, that the debt-detinue system was unable to bridge. This gap certainly required a consensual contract, but it also required a new kind of action which *assumpsit* would eventually provide.

³⁹ 'If A agrees to sell B his horse for £10, A can bring debt for the money, because he has a right to it by virtue of B's grant. B can bring detinue for the horse because he has a right to the possession by virtue of A's grant': *H.E.L.*, iii, 356. Elsewhere (*ibid.*, 436) Holdsworth describes the same contract as predicated upon a prior payment or delivery, without apparent awareness of the inconsistency. Perhaps the misunderstanding here began with Ames (*loc. cit.*, 78, 91 and *passim*), who, after warning us against seeing these transactions as mutual promises rather than mutual grants, then suggested (again without real consistency) that a vendor could bring debt without any delivery, since title passed at once. The authorities he cites (cases such as *Groome's Case*, *Doige's Case*, both *supra*) hardly bear him out; nor do his authorities cited (*loc. cit.*, 91n.) for the proposition that even prior to *assumpsit* a sale of unascertained goods gave rise to mutual debts. It may be, as Ames says (*ibid.*, 92-3), that debt was allowed without *quid pro quo* in the custom of London and Bristol, but this was decidedly not the position at common law.

INTRODUCTION

Our medieval story has shown contract moving along very narrow paths. Covenant was confined to formal (sealed) contracts, debt and detinue to contracts executed on one side. Moreover, covenant and debt-detinue were, in a curious way, performing complementary roles. To say, as the law long did, that debt could only be brought for a liquidated sum in return for a *quid pro quo* was almost like saying that the recovery of unliquidated damages on a purely executory agreement necessitated a covenant. As a matter purely of historical possibility, it is by no means inconceivable that covenant might have returned to its pre-formal character, with mutual consent becoming the sole basis of obligation independently of the seal, and in that case (if we may speculate further) English law might well have ended up with a 'will theory' of contract, of the kind the Pandectists were later to evolve.

As it was, English law took a very different turn, led by the new action of assumpsit (to use its shorter and familiar name). Not that assumpsit began as a direct challenge to the law of contract as it existed hitherto. Assumpsit first developed for quite different purposes, as a way of establishing the actionability of a certain kind of negligent injury. Only much later did assumpsit begin contractual work. Initially, indeed, all attempts to press it into contractual service singularly failed.

UNDERTAKING AND NEGLIGENCE

The earlier history of assumpsit is well enough known; we therefore need do no more than bring out its salient points.¹ The earliest actions

¹ The early history was first and fully traced by Ames, *Lectures*, Lect. xiii. See also Fifoot, *History*, 330ff.

are 'on the case' and allege that the defendant undertook (*assumpsit*) to do a job for the plaintiff, but did it so negligently or unskilfully as to cause harm to the plaintiff's person or property. The familiar examples include that of the Humber ferryman who, over-loading his boat, caused the drowning of the plaintiff's mare;² that of the surgeon or smith or farrier laming a horse having undertaken its cure; or the barber for shaving off a beard without appropriate care.³ These and other instances reveal the nature of the complaint to rest on the defendant's carelessness, a carelessness made culpable however only by his undertaking, since without that the plaintiff would not have entrusted his horse or beard to the defendant's care. No other action applied: not covenant, as the plaintiff had no formal contract; not trespass, as this presumed a direct or wilful injury, consonant with the declaration that the defendant had acted *vi et armis*.⁴ The new action thus slipped into the unoccupied middle ground of trespass and covenant, considerably modifying both for its own purposes: trespass became 'case', 'covenant' an informal undertaking: 'for every little thing a man cannot always have a clerk to make a specialty for him'.⁵

Nor did the undertaking to exercise care have always to be express; it could sometimes be implied. If a ferryman received a horse for carriage, this suggested an implicit undertaking to perform with reasonable skill.⁶ Similar undertakings were implied wherever the defendant professed a 'common calling', the calling (for example) of an

²(1348) 22 Lib. Ass. 94, pl. 41.

³*Anon.* (1409) Y.B. 11 Hen. IV, fol. 33, pl. 60.

⁴This, broadly, is the argument by counsel in the 1348 *Humber Ferry Case* (1348), *supra*, and supported by *Waldon v. Marshall* (1370) Y.B. 43 Edw. III, Mich., fol. 33, pl. 38; *The Farrier's Case* (1373) Y.B. 46 Edw. III, Trin., fol. 19, pl. 19, and *The Surgeon's Case* (1375) Y.B. 48 Edw. III, Hil., fol. 6, pl. 11.

⁵*The Surgeon's Case*, *supra*.

⁶Plucknett, *Concise History*, 470, was puzzled by the fact that the record of the *Humber Ferry Case* (*supra*) contains no express undertaking. But Kiralfy rightly explains that such an undertaking was clearly impliable: see 'The Humber Ferryman and the Action on the Case' (1953) 11 *Camb. L.J.*, 421, where it is also pointed out that Fifoot's view of it as a freak cannot be justified, for the case is fully in line with other actions on the case, and again that Plucknett's suggestion that this was a case in trespass cannot be sound. It is true that a *capias* here issued, but *capias* was not yet an invariable characteristic of trespass alone. Only a little later is it said that it would be unjust to use *capias*, since it would be unjust to arrest the defendant where the injury was not directly or wilfully caused: see Kiralfy, 'The Action on the Case' 152. The Humber Case was probably the first real precedent of case for in a similar earlier action the plaintiff had failed: *ibid.*, 138.

innkeeper or a farrier,⁷ whose 'common' or relevant skills were well known. This was not so in other situations where performance involved greater expertise or greater risk, and where therefore a court would be concerned to discover what exactly the defendant had undertaken or what the strength of his undertaking was. So in one case where the defendant 'voluntarily' (*de son bon gré*) undertook a cure, expressly saying that he was applying the same medicines for the plaintiff's horse as for his own, no liability attached to him.⁸ Clearly the defendant undertook to do no more than he could, so that he rather performed a kindness, using such knowledge as he had. Perhaps his expertise was less than it should have been, but he had never pretended to do better than he could: 'mere negligence', Newton C.J. said, 'is not to the point: if I have a malady in my hand and the defendant applies a medicine to my heel, by which negligence my hand is maimed, yet I shall have no action unless he had assumed upon himself to cure me.' By contrast, where a shepherd was given the custody of sheep which he 'negligently suffered' to be drowned, the court rejected the objection that it was a non-feasance for which the only remedy was covenant: the defendant, they said, 'had taken on himself to take charge of the sheep', so that 'his agreement and assumpsit and afterwards the breach on his part together form the cause of the action'.⁹

NON-FEASANCE AND ECONOMIC LOSS

So far, the action of assumpsit extended to typical acts of negligence resulting in physical injury to the plaintiff or his goods. Assumpsit did not go further than this for, as the *Shepherd's Case* also pointed out, 'if a covenant is made with me to keep my horse or to carry my goods and nothing more done, the action of covenant lies and no other action; for in these cases he only fails to execute his promise'. This non-liability for non-feasance became an article of faith. Not because, as is sometimes thought, medieval law found it difficult to move from mis-feasance to non-feasance, but rather because non-feasance did not normally give rise to an injury to person or property but rather to a special (economic or financial) injury, the loss of a promised advantage, for which the remedy still had to be covenant and could not be trespass or case or

⁷ *The Innkeeper's Case* (1369) Y.B. 42 Edw. III, East., fol. 11, pl. 13; *The Farrier's Case* (1373) Y.B. 46 Edw. III, Trin., fol. 19, pl. 19.

⁸ *Marshal's Case* (1441) Y.B. 19 Hen. VI, Hil., fol. 49, pl. 5.

⁹ *The Shepherd's Case* (1486) Y.B. 2 Hen. VII, Hil., fol. 11, pl. 9.

(more broadly) tort. So, in the many actions against builders for failing to complete a house, assumpsit consistently failed on one or two connected grounds: either that the plaintiff was counting on covenant without showing a sealed document, or that if the defendant failed to perform he had still not committed a wrong: if, as Moyle J. said, an 'action be maintainable *sur cette matiere*, for every broken covenant in the world a man shall have an action of Trespass'.¹⁰ In a few non-feasance cases, it is true, case might apply: a servant could not refuse work under the Statute of Labourers;¹¹ a blacksmith could not refuse to shoe a horse.¹² However the labourer was under an independent duty and the smith's non-feasance would typically result in physical injury rather than economic loss.

How, then, was this non-feasance rule overcome? The brief answer is: as yet only partly, and even then through an attack from another direction, that of deceit or (to speak more technically) the action on the case in the nature of deceit. The first successful use of this action was for a breach of an express warranty of quality. This situation was easily amenable to a tortious remedy, since the seller, having expressly undertaken to deliver something of special quality, his delivery of a defective article came very near to deceit, especially if the defect was, actually or probably, known to him.¹³ Deceit did not cover every breach of an undertaking. If, for example, D promised P some land, upon P's marrying D's daughter, but the daughter then married another, the facts hardly supported an allegation of fraud.¹⁴ If, on the other hand, the defendant was a defaulting attorney, deceit could be a very possible plea. Hence where P retained D for the purchase of a manor, paying for D's services in advance, and D later procured the manor for another, P succeeded in case, having been 'basely defrauded' to his

¹⁰ *Watkin's Case* (1425) Y.B. 3 Hen. VI, Hil., fol. 36, pl. 33. For other cases, see Fifoot, *History*, 240.

¹¹ *Watton v. Brinth* (1400) Y.B. 2 Hen. IV, Mich., fol. 3, pl. 9; Holdsworth, *H.E.L.*, ii, 462.

¹² 'Note that it was agreed by the whole Court, that where a Smith refuses to shoe my horse, there lies an action on the case, but not for non-feasance in case of a carpenter': *Anon.*, (1503) Y.B. 18 Hen. VII, pl. 4.

¹³ Accordingly on a sale of wine to a vintner, the seller could reasonably defend that the plaintiff could not complain of having been deceived, since he knew as much as the seller, whether the latter had warranted the wine or not: *Anon.* (1430) Y.B. 9 Hen. VI, Mich., fol. 53, pl. 37.

¹⁴ *Anon.* (1428) Y.B. 7 Hen. VI, Mich., fol. 1, pl. 3, where it was also said that such facts only reveal a mere promise of a gift, nothing in the nature of a bargain.

harm.¹⁵ To the attorney's objection that he had not covenanted, the court replied that 'matter which lies wholly in covenant can by malfeasance *ex post facto* be converted into deceit. For if I warrant to purchase for you a manor, notwithstanding that I fail to do this for you, no action will lie for these bare words without a deed to this effect. [Yet] when he has become counsel for another, that is a deceit and changes all that came before, which was but covenant between the parties, and for this deceit he shall have action *sur son cas*.'¹⁶

Our most important landmark however is *Doige's Case*.¹⁷ The facts earlier described were that P had bought some land, and paid £100 for it on the understanding that he was to be enfeoffed within fourteen days, but D then enfeoffed a stranger, for which breach of contract he was held liable in deceit. One or two peculiarities should be observed. Apparently it was the circumstance that the seller had already taken the price, which made the allegation of fraud more convincing than it would otherwise have been. Yet, as the seller might have been quite prepared to return the price, the allegation of fraud begins to wear a little thin.¹⁸ Again the decision relied heavily on a commissive element, for the defendant was held to be deceitful not so much for failing to fulfil his contract as for enfeoffing a stranger. It was, in short, this particularly deliberate breach of the bargain that was regarded as the deceit.¹⁹ One begins to see that, given these peculiarities, the action of deceit was not a very suitable vehicle for the further

¹⁵ *Somerton's Case* (1433) Y.B. 11 Hen. VI, Hil., fol. 18, pl. 10; East., pl. 1; Trin., pl. 26. The case was entered as a trespass on the case, not as an action in deceit; but this was perhaps a technicality rather than a real difference: see also next note.

¹⁶ Fifoot, *History*, 333, has argued (mainly against Ames) that *Somerton's Case*, being an action of trespass on the case, shows (1) that deceit should not be emphasised as a congener of later *assumpsit* at the expense of the action on the case and (2) that what is important here is the 'constructive misfeasance'. Though (2) is correct, it does not support (1), for it is impossible to disregard *Somerton* as an example of case in the nature of deceit. As Kiralfy points out, some cases began to be entered as Deceit, especially cases of warranty in sale of goods, as was also *Doige's Case* (*infra*) but not *Somerton*: see 'The Action on the Case', 85, 88. But surely nothing turns on this, for substantively the argument was virtually the same, as 'case' now dealt with the same 'misfeasance' whether styled 'trespass on the case' or 'deceit on the case'.

¹⁷ (1442) Y.B. 20 Hen. VI, Trin., fol. 34, pl. 4.

¹⁸ See Ames, *Lectures*, 141-2, where the connection between the fraud and the pre-payment seems rather over-emphasised.

¹⁹ See *Anon.* (1476) Y.B. 16 Edw. IV, fol. 9, pl. 7; *Anon.* (1487) Y.B. 2 Hen. VII, Hil., fol. 12, pl. 15; *Anon.* (1488) Y.B. 3 Hen. VII, Mich., fol. 14, pl. 20, where Brian C.J. indeed calls the enfeoffing of the stranger a 'great misfeasance'.

development of contract law. Indeed deceit now served merely as a sort of bridge between delictual assumpsit and contractual assumpsit. To this point we shall later return.

FROM MEDIEVAL TO MODERN SOCIETY

As assumpsit stirred, so did English society. If the early fifteenth century belongs to the middle ages, its second half begins a transition unmistakably modern in direction and character. The conclusion of the Hundred Years' War, the advent of a strong (Tudor) monarchy, conditions of political and social stability, maritime discoveries and a vastly expanding trade, both foreign and domestic, profoundly changed the medieval economy.

It had so far been a 'natural' economy, in which the goods in circulation, those bargained and sold, were in the main the products of the soil, destined for immediate consumption or for an exchange with other, usually minor, surpluses. People consumed what they produced; even great men travelled with their households to consume locally the produce due to them.²⁰ None of this is to deny that medieval life included a good deal of trading, that high men and low engaged in sometimes considerable transactions in the pursuit of profit or luxury, and that this was much aided (at least as from the fourteenth century) by the ready availability of money. Still these things were but lively glosses upon an otherwise static scene; they compare as nothing with the emerging capitalism of the sixteenth century.

The growth of foreign trade, together with the growing volume of commodity production and coupled with an enormous (almost tenfold) increase in the supply of money, created not only fresh opportunities for financial gain but also a volatile market since prices constantly rose just as profits did. This created great economic risk, especially to the new 'domestic' producer whose position was distinctly more vulnerable than that of the craftsman under the guild system of old, where the master employed two or three men, bought his material, made it up and then sold it, being both shopkeeper and artisan.²¹ Under the domestic system, on the other hand, the master now concentrated on

²⁰ Hence great men do not need more than temporary shelter which they find in or near a manor or in a monastery; the noble mansion offering permanent residence was an innovation of Tudor times: see generally W. Cunningham, *The Growth of English Industry and Commerce* (5th ed., Cambridge 1915), 242ff.

²¹ See Ashley, *Economic History* (London 1894-8), pt. i, 177ff; pt. ii, 223ff.

production and sold the finished product to a merchant for distribution. His goods had therefore to be more competitive; to be more competitive, the producer had to be able to calculate costs; to calculate reliably he must be able to contract for specified supplies at a specified price.²²

Contract thus assumed an entirely new role. It now had to serve as the legal basis for predictable calculations, for economic or commercial planning, instead of being as it had hitherto mainly a vehicle for the exchange on credit of goods or services. We shall see how the law adapted itself to this role.

²²The new spate of detinue actions in the latter fifteenth century (mentioned in chap. 2, at note 33) clearly shows the domestic economy knocking on the door: buyers are trying to ensure future supplies.

Part II

Contractual Assumpsit and the Rise of Consideration

THE ADVANCES OF ASSUMPSIT

The sixteenth century set the stage for the significant advances of assumpsit, which were to transform it from a 'delictual' to a 'contractual' action and gradually to fashion a new contract law. These advances were of two quite distinctive kinds. First there was the advance in relation to sale and, in particular, sale of goods. The buyer especially urgently needed a remedy to protect him against loss if a seller broke his bargain by refusing to supply goods at the specified price, forcing the buyer to procure the same supplies in a rising market at higher cost. No such remedy was possible within the debt-detinue framework because of its 'real' requirements. As things stood, any new remedy could only come through the action on the case, an action which had already done a good deal to show how the breach of an undertaking could cause loss or injury to a promisee. The further adaptation of assumpsit to sale is really a story of enlarging the scope of the actionable injury, of extending injury from physical to economic or financial harm.

In the second place, there was the advance in relation to services or, more precisely, the extension of assumpsit to the doing of certain acts: undertakings broadly of the type called *do ut facias* in Roman law. There the task was to give the promisee a remedy through assumpsit where he had performed the requested act in reliance on the other's promise to pay. Moreover, it is in the course of adapting assumpsit to services that an entirely new doctrine, that of consideration, was to emerge, the original and essential function of which was simply to explain or to justify the motive inducing a promisee to act on the promise made to him. In other words, the basic task of assumpsit was not, as in sale, to transcend the 'real' limitations of debt, but to give redress for an injurious reliance by the promisee. Indeed it was in

developing the scope of this redress that *assumpsit* distinguished between two kinds of promises: between promises ('with consideration') which, inasmuch as they envisaged mutual benefits, could be treated as sufficiently committing or 'reliable' so that their breach would give rise to a right of damages, and promises ('without consideration'), not so mutually beneficial and consequently qualified as merely 'voluntary' or 'gratuitous' so as to make any alleged loss ensuing from the breach of promise non-actionable at law. As we shall see, the essential story of 'consideration' was to adapt to service promises the synallagmatic elements of mutual benefit or bargain, elements always and inevitably contained in a contract of sale.

Nor should this drift of our story occasion much surprise. A synallagmatic element had always been present in the common law. We discerned it in relation to sealed covenants; otherwise the law could not have raised the particular difficulty concerning 'voluntary' deeds which it in fact did.¹ We observed a synallagmatic element still more clearly in relation to debt and its requirements of the *quid pro quo*, a feature long ago perceived by Holmes.² Even where, in the fifteenth century, chancery intervened to enforce certain informal agreements, what was enforced were not gratuitous promises, as Barbour apparently thought, but 'mutual' agreements for certain acts at the special instance or request of the defendant-promisor.³ When early in the sixteenth century St German's Doctor asks the Student to name 'nude' or 'naked' as distinct from enforceable promises, the Student correctly includes among the former those promises which have no 'recompence' as they have 'nothing assigned' why they should be made or why they should

¹ See the discussion in connection with *Sharington v. Strotton* (1566) 1 Plowd. 298 in chap. 1, at note 15.

² See Holmes, *The Common Law* (Boston 1948), 223-5, for this connection between consideration and *quid pro quo*. Salmond (*Select Essays in Anglo-American Legal History*, Boston 1907-9, iii, 336) criticised this on the ground that consideration rests on a 'detriment' while the *quid pro quo* depends on a 'benefit'. But this is a criticism more derived from modern text book distinctions than from perceptive history. In any case 'benefit' and 'detriment' are by no means incompatible as we shall further see below.

³ Barbour, *op. cit.*, 126, 132ff. Barbour's discovery of chancery's early contractual jurisdiction (see *ibid.*, 160ff.) not unnaturally suggests that common lawyers now had a very urgent reason to extend *assumpsit* to cover non-feasance lest the Chancellor take over the whole contractual field. However the historical evidence does not really support any such sense of urgency. In the sixteenth century, as this and later chapters will show, common lawyers were more preoccupied with the competition between the actions of debt and *assumpsit* than with any competition from chancery.

be kept.⁴ Thus, to anticipate a little, the doctrine of consideration did not spring, as Ames maintained, from the technical exigencies of the actions on the case, especially case upon deceit.⁵ It rather represents a new version of our synallagmatic requirement: 'From one source or from another', it has rightly been said, English law had long since 'acquired a very strong prejudice in favour of mutuality'.⁶

SALE: THE FIRST STEP

We begin with sale and with the *Case of Barley*,⁷ a case of the greatest significance. P had bought and paid for twenty quarters of barley which (P declared) he left with D, the seller, for safe keeping, and which D then refused to deliver. In an action on the case, D argued that this could not lie and that P should have sued in debt for the pre-paid price. The court rejected his plea, and it is important to see its exact grounds. To begin with, all the judges agreed that the buyer could bring debt, since without delivery the seller cannot just 'take the money for the thing bought'.⁸ They also agreed that detinue did not lie for the goods themselves, for the buyer 'has no interest in the grain' because, the barley being unascertained, no property passed to him for the seller was at liberty to deliver any parcel of barley, unlike a situation where 'I sell the grain that is in my barn or my house, I cannot deliver other grain, for perchance there is no grain so good in the whole country'.⁹

⁴ St German, *Doctor and Student* (c. 1530), dial. 2, chap. 23.

⁵ Ames, *Lectures*, 143.

⁶ J.L. Barton, 'The Early History of Consideration' (1969) 85 *L.Q.R.*, 372, 386. Barton further suggests, admittedly very tentatively (*ibid.*, 390), that common lawyers may here have been influenced by canonist or civilian ideas of *causa*, even though he admits a fundamental divergence as to detail, as English law betrays no outside influences in the manner in which the doctrine of consideration was worked out. Yet if we admit the latter, do we have to look for canonist inspiration on the broader point of 'mutuality'? Did not earlier English contract history prepare a synallagmatic direction also for the sixteenth century?

⁷ (1505) Y.B. 20 Hen. VII, Mich., fol. 8, pl. 18, Keilw. 69, 77.

⁸ A ruling, incidentally, which explicitly confirmed that debt would lie as on a consideration that failed. As Frowicke C.J. further pointed out, 'if I bail money to one to bail over and he converts it to his own use, I can have debt or account or an action on the case'. Newton C.J. had said something very similar in *Doige's Case* (1442) Y.B. 20 Hen. VI, Trin., fol. 34, pl. 4, without however mentioning the possibility of recovery by the action on the case.

⁹ Or as other judges pointed out: 'For there is a diversity where the thing bought is certain and where it is uncertain. Where it is uncertain, the buyer cannot take without the delivery of the other; but where it is certain, he can.' For as regards uncertain goods, as a later case added, 'one quarter cannot be known from another quarter': *Core's Case* (1537) 1 Dy. 20a, 22b.

Yet if detinue was not available, case might be. According to Frowicke C.J., the 'defendant has done an act against my bargain and to my deceit, whereby I am put to loss, and so it is right that he should be punished for this misdemeanour by the action *sur le cas*.' This put the emphasis on the defendant's deliberate wrong, consisting of 'deception' as well as his 'conversion' of the goods, a wrong the more manifest by the fact that money had already been paid to him.¹⁰ Yet it is also clear that the allegation of 'misdemeanour' was legal hyperbole. There was no 'conversion' in any technical sense, because the buyer neither had nor acquired any title to the goods, so the seller had nothing to convert, unless one admits that the buyer acquired some right to the goods by the contract alone, in which case 'conversion' became a superfluous charge, for the buyer could have sued on the contract rather than on the tort. Nor was there, properly speaking, a 'deception'; the seller was probably happy enough to return the purchase price and so could not be accused of trying to obtain something for nothing, or trying to keep money for something he knew all along to be worthless.

We see then that what the decision really did was apply case to the sale of unascertained goods, just as *Doige's Case*¹¹ had extended it to the sale of land. Nor did it matter very much whether the present action on the case was identified as assumpsit or deceit, however much they might otherwise be kept apart.¹² It did not matter because neither assumpsit nor deceit could arise without an undertaking and its deliberate breach; the operative constituents of either action were thus exactly the same.

It will be noticed that the present decision took a significant step beyond *Doige's Case*, where deceit was invoked to allow the buyer to get his money back. In the *Case of Barley* it was recognised that the buyer could recover his pre-payment, but that was not now seen to be enough. Indeed the delictual element of case now helped to underscore

¹⁰In Keilw. 77, 78, both the misfeasance and the payment are particularly emphasised: *Et si jeo covenant ove un Carpenter de faire un meason par le jour, ore jeo averai bon action sur mon case per cause de payment de ma money, et uncore il ne sound forsque en covenant, et sans payment de money en cest case nul remedie et auxy pur le nonfeasans si le money soit paye. Et issint moy semble en le case al barre le payment del money est le cause del action sur le case sans ascun alteration dascun propertie.*

¹¹(1442) Y.B. 20 Hen. VI, fol. 34, pl. 4.

¹²The Keilway Report seems to stress the former, whereas in the Y.B. version the element of deceit is the more prominent. Cp. also Kiralfy, 'The Action on the Case', 111, 161, where the *Case of Barley* is specifically distinguished from the (Keilway) *Case of Malt*.

the particular injury in the plaintiff's complaint: the 'wrong' to him was the special loss he could show he had sustained, an economic or 'commercial' loss arising from not getting the advantage he had bargained for, that is, not getting the goods at the agreed price, which was lower than the rising market price. This is surely why P sued in case rather than debt. An action on the case enabled him to recover his new loss in damages, while debt did not give him more than the purchase price. Debt, in other words, merely restored the buyer to his pre-contract position, whereas case put him in position as though the contract had been performed. This interpretation is fully supported by a contemporary source which tells us that the buyer was here allowed an action on the case because, the seller having failed to deliver twenty quarters of barley as agreed, he 'was driven to buy barley for his business, being a brewer, at a much greater price'.¹³

To this interpretation of the decision the following objection can be raised. In a note to the *Barley Case*, the Year Book reporter represents it as Fineux's view that, since in debt a buyer could recover damages for a seller's 'misdemeanour', there was no need to bring an action on the case.¹⁴ Now it is true that debt did allow damages to be recovered together with the principal sum; indeed, as Maitland reminds us, a creditor might recover very high damages for not paying a debt when due.¹⁵ Still these were damages incidental to the actual debt rather than damages for a new profit-loss.¹⁶ If, for example, the seller had already

¹³ *Core's Case* (1537) 1 Dy. 20a, 22b. The above interpretation is supported by other manuscript sources, only recently unearthed, which make assumpsit specifically applicable to profit-loss: see J.H. Baker, 'New Light on Slade's Case' [1971] *Camb. L.J.*, 51, 56, 58, 220.

¹⁴ The view attributed to Fineux does seem surprising, since as C.J.K.B. one would have expected him to have no less enthusiasm for the action on the case than that shown by Frowicke C.J.C.P. (cf. Fifoot, *History*, 353n.), if only because, as one is so often told, the Common Pleas was the great upholder of the traditional action of debt. However this may be, Fineux shortly changed his mind for only a little later he too admitted that case would lie where a carpenter fails to build a house with damage resulting from this or where a seller of land fails to convey price being paid: see *Anon.* (1506) Y.B. 21 Hen. VII, Mich., fol. 41, pl. 66, Keilw. 50.

¹⁵ Pollock and Maitland, *H.E.L.*, ii, 215-16. See also Washington, 'Damages in Contract at Common Law', (1931) 47 *Law Q. Rev.*, 345, 352.

¹⁶ See Henry, *op. cit.*, 219-20. Incidental damages were also recoverable in equity, as expenses incurred by a buyer where a seller deliberately refused to convey: Holdsworth, *H.E.L.*, iii, 436. Incidental damages were further possible in the action of account as this could include increases and profits of the basic sum: see *Core's Case* (1537) 1 Dy. 20a, where it seems to be assumed that in debt nothing more was recoverable than the naked debt.

returned the buyer's price, the latter would presumably have been unable to claim anything, since his basic course of action would have been gone. Nor, it seems, would he have fared better as regards his new loss by suing in detinue, assuming (for the sake of argument) that the goods were specific. Here the difficulty would have been that, as a notional bailor, the buyer had to state the reasonable value of the goods,¹⁷ which value however could in the circumstances hardly be greater than the agreed price, so that detinue, too, would have been confined to the recovery of this amount rather than of wider or consequential damages. Our conclusion must thus be the same as before: a different action was needed, one that only assumpsit could provide, by which a plaintiff might recover all his actual damages, that is, damages 'not upon a theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised'.¹⁸

SALE: FURTHER STEPS

Though the *Case of Barley* was a major breakthrough, the development of case was by no means complete. The action was still too dependent on the seller's alleged deception, which in turn depended on the buyer having pre-paid. To turn assumpsit into a more general contractual remedy the law had to take, and soon did, two further steps: one to put the emphasis on the breach of promise rather than on deceit and a second, which could not have been taken without the first, to dispense with the buyer's pre-payment of the price. These steps were perhaps made easier by a parallel development (we will shortly discuss) extending the action of assumpsit to the doing of certain acts. It is important to point out, however, that the sources do not reveal a mutual borrowing; they suggest rather that assumpsit took an independent course in sale.

For the first step we turn to *Pickering v. Thoroughgood*,¹⁹ where D 'bargained and sold' forty quarters of malt, for which P partly paid, and which D then failed to deliver. Again the court dismissed the

¹⁷ Since Bracton, fol. 102b, a bailor had to define the price if his 'vindicatio' for movables was to succeed.

¹⁸ Ames, *Lectures*, 144-5. The same reasoning applies, *mutatis mutandis*, to the seller who, if the buyer refused to take the goods, would obviously lose his profit if the market fell: see at note 25 below.

¹⁹ (1533) 'Spelman's Reports' (M.S.), on which see further A.W.B. Simpson, 'Slade's Case in the History of Contract' (1958) 74 *L.Q.R.*, 381, 383.

objection that the proper action was debt, not assumpsit, but on the more interesting ground, given by Spelman J., that the present action by the buyer did not need to be based on debt or detinue precisely because it 'is based on the other's tort, that is, on the breach of promise'.²⁰ The breach of promise was now recognised as an independent 'wrong', one independent of 'deceit'. The wrong, in other words, denoted a right to damages compensating for a particular financial loss; the delictual element thus extended to and merged with contractual liability. Moreover, with the emphasis now on breach of promise and financial loss, the second step could be taken with relative ease, and it was in *Pecke v. Redman*,²¹ another landmark case. The parties 'bargained together' that the seller deliver twenty quarters of barley every year during their joint lives on certain days, for which the buyer was to pay four shillings per quarter. The complaint was that the seller did not deliver for three years, whereby the buyer was 'damned in his credit and profit'. The buyer sought damages of thirty pounds, though he recovered no more than four, besides costs etc.

Significantly the case no longer questions the seller's liability for breach of promise; all that is questioned is whether a jury can assess damages for the whole bargain, taking into account 'the time to come together with the time past'. Some judges thought that even future damages were recoverable, others thought not, 'for they [the jury] cannot have knowledge of what that will be', so that 'an action upon the case is given for a special loss, but no loss is in that which is to come'.²² This view re-echoed the action's delictual origins. Suing in tort for loss to person or property, one obviously had to show the actual damages already done. In a contractual action for financial loss, on the other hand, some guessing about possible future damages was inevitable, especially when the actual breach of a contract much preceded the date of delivery. In any case, the jury's competence to assess all such financial loss was apparently taken for granted in the no less famous case of *Norwood v. Read*.²³ Again the seller had promised, and failed, to deliver

²⁰ Fitzjames C.J. and Coningsby J. agreed, but Portman J. dissented: 'the promise is part of the covenant, and all one, and no act done by the defendant, but solely the non-delivery, for which detinue [or debt] lies'.

²¹ (1552) 2 Dy. 113a.

²² In *Mervyn v. Lyds* (1555) 1 Dy. 90a, 91a, it was very similarly said that the 'consideration' must be certain, so that a bargain to give you for your land 'as much as it is worth' must be 'void for default of certainty'.

²³ (1558) 1 Plowd. 180.

quantities of wheat, in two instalments, for which the buyer was then to pay: the jury was commanded to assess the plaintiff's total, including future, loss.²⁴

This development with regard to damages had much to do with the fact that the above two contracts were intended to operate over a long period. In *Pecke v. Redman* the agreement was to operate during the whole of the parties' joint lives. In *Norwood v. Read* the seller promised delivery not only on his own behalf but on that of his executors and assigns, the object of the contract plainly being to ensure the buyer's getting all his future instalments whatever happened to the seller himself. This case of course also raised the broader question of the executor's liability, a question with which we deal separately in chapter 8. The point presently of importance however is this: that either decision fully assumes that the recovery of damages caused by a seller is something for which the action of assumpsit was specifically intended. With *Norwood v. Read*, indeed, the transition from delictual to contractual assumpsit is technically complete, not in the sense that assumpsit abandoned the idea of a wrong; rather in the sense that it offered compensation for financial injury on a scale far in excess of that which purely delictual notions could sustain.

A CONSENSUAL CONTRACT OF SALE

It will be observed that, in making a seller liable for non-delivery or more generally in holding him to his promise, provided the buyer suffered financial loss from its breach, the law had come to enforce an executory or consensual contract, something that had not previously happened in sale. Not that the courts had at long last become aware of the sophisticated notion of consensual contracts, or become prepared to uphold contracts *consensu* in preference to contracts *re*; nor were

²⁴ Accordingly the Sheriffs of London were commanded to enquire by the oaths of twelve good and lawful men 'what damages the aforesaid Richard [Norwood] has sustained, as well as by reason of the promises, as for his costs and charges by him about his suit in this behalf laid out'. The immediate recoverability of all damages was soon further confirmed: *Beckwith v. Nott* (1617) Cro. Jac. 504, Jenk. 333; *Peck v. Ambler* (1634) Cro. Car. 349; all this apparently on a new theory, that of *res judicata*, namely that P deserves to get his entire damages at once as he cannot sue again on the same facts because of *res judicata*. See on all this, *Rudder v. Price* (1791) 1 H. Bl. 547, which also establishes the qualification that a debt, repayable by instalments, cannot be sued on until the last day of payment be past. And for this and other aspects of contract damages see further Washington, op. cit., 371 and *passim*, and for the later period, (1932) 48 *L.Q.R.*, 90.

they consciously legislating for new commercial transactions, even if their practical importance was fully perceived. The point is that the emergence of the consensual contract was essentially a by-product of the recognition of an actionable injury, for assumpsit was not so much enforcing a promise *quâ* promise as giving a remedy for financial loss, and in particular, a profit-loss. In giving such a remedy, moreover, the parties' mutual consent was to be presumed, not so much because the parties had clearly arrived at an agreement between themselves as because (and this is a crucial point) the relevant financial injury could not have arisen unless the parties had agreed to exchange certain things at a certain price, for the injury lay in the loss of an advantage which did not exist apart from the agreement: there could be no loss of an advantage unless somebody promised it.

We have been considering the damages a seller might cause. But what applied to him applied to the buyer as well. A seller could sue a buyer if he could establish a corresponding injury, and, in particular, if he lost his profit by the buyer's failure to take the goods.²⁵ What, however, was not yet possible was the recovery by the seller of the price yet unpaid. Nor is this surprising, since assumpsit was still only concerned with protection against loss or damages, while the non-payment of the buyer's price was not so much an instance of loss as of indebtedness, for which only debt would lie.²⁶ Not for another half century, until *Slade's Case*,²⁷ would assumpsit obtain as a matter of course for the recovery of the price.

Legal historians usually regard the *Pecke* and *Norwood* cases as early examples of 'mutual promises'.²⁸ Nor is this incorrect, since every executory or consensual contract of sale must begin with mutual promises, whether the parties when making their agreement use the

²⁵ Such actions, though perhaps less frequent, were certainly known in the middle of the sixteenth century. See the cases mentioned by Baker, *op. cit.*, 58, 220, and the statement of claim in Milsom, *Historical Foundations*, 299.

²⁶ This distinction between the recovery of debt and damages seems the proper interpretation of *Anon.* (1586) Godb. 98. Here, in a bargain for twenty loads of wood which the seller failed to deliver, assumpsit clearly obtained: 'if by failer of performance the plaintiff be damnified, to such a sum; this action lieth.' But Perriam J. then added that 'upon a simple contract for wood upon implicative promise, an action on the case does not lie'; but this 'simple contract', seemingly distinguished from 'bargain', seems to refer to the contract *re* under which a seller had already delivered and now claimed the price for wood.

²⁷ (1602) 4 Co. Rep. 91a, 92b. The case is fully discussed in chap. 7.

²⁸ Ames, *Lectures*, 143 and *passim*; Fifoot, *History*, 399.

word 'promise' or equivalent words. Even so, it is essential to note that in neither of the above cases is there any mention of mutual promises and that, more importantly, the expression 'mutual promises' does not appear until rather later, and then in a different context, not at all connected with sale but with mutually promised acts or services.

ASSUMPSIT FOR SERVICES

From sale we turn to service, where assumpsit followed a distinctly different course. Take a situation where D promises some money to P if P does something for D. The latter might want P to perform a special service for him or to extend some credit to, or to do something else for, a third. Now if P does what D asks and D has agreed to pay a fixed amount, D would of course be liable in debt as having received a *quid pro quo*. But take the situation in which one might doubt whether D has actually received a benefit: suppose that the services are requested for, and given to, a third person, so that the latter could be said to have received the benefit, rather than D personally. It is in this situation that assumpsit was first brought and allowed, for the simple reason that it did not compete, at least not too openly, with the action of debt. In thus allowing assumpsit, the law was in for a very profound change, the full significance of which was as yet concealed. Whereas before, a parol contract for services was not enforceable outside the action of debt, under the new dispensation assumpsit applied to situations in which debt did not obtain. Debt, in other words, ceased to have an exclusionary role; in time this undermined its whole position in contract law.

That assumpsit would lie in non-debt situations was clear as early as *Jordan's Case*.²⁹ Here D undertook to pay the debt owed to P by T, a third party, if P released T from the debtor's prison and if T did not discharge his own debt within a certain time. T was released but did not pay, whereupon P proceeded against D *sur son cas*. The King's Bench had no difficulty about the objection that debt should lie: 'here there is no contract and the defendant has had no *quid pro quo*'. It may be that they took a somewhat narrow view of *quid pro quo*, having regard to some earlier suggestions that it might include third party benefits.³⁰ But this narrow view greatly suited them, since it enabled

²⁹ (1528) Y.B. 19 Hen. VIII, Mich., fol. 24, pl. 3.

³⁰ See, in particular, the suggestions of Moyle J. in *Anon.* (1458) Y.B. 37 Hen. VI, Mich., fol. 8, pl. 18, discussed in chap. 1. Moyle's views were not universally shared: see H.K. Lücke, 'Slade's Case and the Origin of the Common Counts' (1965) 81

the court to make a new start with assumpsit and, quite apart from the added advantage of excluding wager of law (which did not apply to case), also cut through any residual doubts about the proper scope of the *quid pro quo*. Nor were the judges too impressed by the argument that P should have sued in covenant for, since there was in fact no covenant, the plaintiff would be remediless without an action on the case. Suppose, to give an example that now proved especially persuasive, a baker is asked by one stranger to give to another stranger as much bread as he wants, and that the former stranger promises to pay the baker if the receiving stranger will not: surely the baker has and should have an action for his loss.

If this gave effect to a simple (non-formal) guarantee, the more interesting development of assumpsit was towards securing a wider promissory liability, enabling a promisee to sue for a loss incurred as a result of a promise to him, the loss consisting of the 'value' of his services, a value measured by the amount promised to him. It will be seen that as P's whole claim depended on his damages resulting from D's breach of promise, P had to show a nexus between D's promise and his own loss. In many cases (as in the Jordan example above) this nexus was obvious, but other cases might not be so clear, especially where the services requested were not ordinary employment or labour services (indicative, for example, of a gainful master and servant relationship), but were services of a kind that might be rendered quite gratuitously, without expected payment in return. This was a difficulty peculiar to services rather than sale. In sale, the synallagmatic element was always apparent on the face of the transaction, as this represented a bargained exchange of (always presumable) profit or benefit to both sides. In services, on the other hand, this synallagmatic element might be disputed, often on grounds which might appear disingenuous but were technically not untenable, and therefore called for a reasoned response.

So, in determining whether P had in fact suffered a loss, the courts could not simply ask whether D, through his broken promise, had 'caused' P's damages; the relevant question became whether D's promise was one upon which P could justifiably act: or, putting it a little differently, whether P could say that he had acted in motivation of, or was moved by, D's promise of reward. For unless P could show

L.Q.R., 422, 430-1. In any case *Core's Case* (1537), *supra*, specifically denied the applicability of debt to guarantees.

this, he could not properly complain of a breach, either because the promise to him was not sufficiently reliable, or because D's promise could not be regarded as the determining motive for P's act. Indeed it was in the course of thus assessing these breaches that the action of *assumpsit* began not only to emphasise the synallagmatic element in the transaction but also to describe the plaintiff's motivation or reliance by the phrase 'consideration': that 'in consideration of' the defendant's promise to pay him, he (P) did what he was invited to do.

Not that 'consideration' was a new word.³¹ Its earlier use had been to describe the immediate 'causes' of a statute or conveyance, what was later done in a preamble or by introducing the word 'whereas'. Again, 'consideration' was used to refer to the 'price' to be paid by one side, or to the 'performance' to be given by the other.³² In the present context, however, 'consideration', without shedding its earlier meanings, acquired a further and more specialised sense, that of identifying the special nexus between a particular promisor and promisee. Perhaps no other word would do quite as well: not the word 'cause', for it did not include the sense of 'motive', nor even the word 'reason' for it was, as it were, too objective, going beyond the very personal motives of a particular promisee.³³

Without this synallagmatic element, many cases become impossible to explain. In *Brown v. Garbrey*,³⁴ D promised a woman £100 should her (future) husband fail to get land upon his marriage as the latter's father had promised him. D argued that he could not be held to his promise, since he was a 'mere stranger' to the plaintiff, so that his promise was 'not consideration'. Nevertheless his argument failed, since he turned out to be not a total stranger but a cousin german, so that 'it is to be intended, that by reason of these words [the promise by the defendant] she was induced to marry [the son], which otherwise she would not have done'.³⁵ This explains why the difference between a

³¹ See the valuable discussion on this in Simpson, 'The Equitable Doctrine of Consideration and the Law of Uses' (1965) 16 *Univ. of Toronto L.J.*, 1, 4, 5.

³² This seems the meaning of consideration in some of its earliest instances: see *Norwood v. Read* (1558) 1 Plowd. 180, and see also the cases traced by Kiralfy, 'The Action on the Case', 176.

³³ This need for a personal motive or justification becomes also apparent in relation to promises for past services: see on this chap. 5, at note 3.

³⁴ (1588) Gould. 94, sub. nom. *Browne v. Garborough*, Cro. Eliz. 63.

³⁵ The Cro. Eliz. report puts even greater stress on the family connection, and so does in a similar way *Rippon v. Norton* (1601) Cro. Eliz. 849, 881, and *Levett v. Hawes* (1599) Cro. Eliz. 619, 652, Moo. K.B. 550.

stranger and a cousin was regarded as crucial: not to establish the cousin's (what came to be called) 'moral consideration' to pay, but rather as a way of separating reliable from unreliable promises, the cousin's promise being thought more reliable in such circumstances than a stranger's promise would be. A similar idea appears in *Mead v. Bigott*,³⁶ where the plaintiff, the bailiff of a manor, declared that, having been directed to levy execution upon a debtor, he had attached the latter by two quarters of wheat, but that thereupon the defendant 'in consideration thereof' promised to save the plaintiff harmless, thus apparently procuring the release of the wheat. However this was held not to be 'any consideration', for 'it is against the law for such an officer in such a case to deliver a thing attached, *ut supra*, to the plaintiff or to his wife'. The court shrewdly recognised the promise not as part of a bargain but more as a bribe.

BENEFIT AND DETRIMENT

Consider next a line of cases in which D requested certain acts of direct benefit to himself and for which he promised to pay. In particular, consider cases where D promised P a specified reward if P would procure a power of attorney for him,³⁷ or if P would let him see some document, such as the indenture of a lease of land which D intended to buy,³⁸ or the deed under which arrears were due,³⁹ or a bond which D wished to have for inspection for six days.⁴⁰

Clearly the defendant would not have promised, as he did, often considerable amounts had the specified acts not been beneficial to him. But if so beneficial, was there no *quid pro quo* for which debt rather than assumpsit should lie? In one case precisely this objection

³⁶ (1590) 3 Leon. 236.

³⁷ *Webb's Case* (1578) 4 Leon. 110. D promised P £10 for a power of attorney; he wanted to have a debt assigned to him by his debtor. D was owed money by A, A was owed a debt by B. P's service consisted of promising a letter of attorney from A for D to sue B.

³⁸ *Banks v. Thwaites* (1578) 3 Leon. 73, where however judgment went against P because he had never requested the defendant to pay.

³⁹ *Sturlyn v. Albany* (1587) Cro. Eliz. 67. D, an under-lessee, promised to pay all the arrears if the deed showed that the head-lessor was entitled to the arrears.

⁴⁰ *Preston v. Tooley* (1587) Cro. Eliz. 74. D promised to pay P £1000 should he fail to return the bond within the six days. D did not do so, though he returned the bond later. This raised a question as to the amount of damages. Had D never returned the bond, P's damages would have been obvious, namely his loss of the nominal value of the bond. Upon a writ of enquiry it was found that the plaintiff had sustained damages of £200, apart from costs.

was raised, but was rejected by the court: 'for there is not any contract, for the thing is not sold, but it is a collateral promise grounded in the delivery'.⁴¹ If this merely restated the objection rather than answering it, the decision shows the growing desire to uphold assumpsit wherever possible: a desire certainly inspired by the convenience of case, but perhaps also by the logic of recent developments. For, once assumpsit was allowed in situations such as *Brown v. Garbrey* or *Jordan's Case*, where the benefit to the defendant was indirect, it no longer seemed too difficult an extension to allow assumpsit where the benefit was direct. The development beginning with *Jordan*, we earlier pointed out, had not challenged the traditional supremacy of debt for situations in which the *quid pro quo* was beyond doubt. Yet the fact remains that this development had, in a curious way, also outflanked debt's supremacy; if 'indirect' acts could be said to cause loss or injury, then 'direct' acts obviously could too.

A defendant might still contend that the plaintiff had no justification to act on his promise, in expectation of a reward, because his promise was more a request for a favour than part of a regular bargain or exchange. Only this can explain the many objections that the defendant obtained no real benefit from the plaintiff's act for, in denying a benefit, the defendant denied, or tried to deny, the existence of a bargain in a usual or conventional sense. So in one case,⁴² the defendant maintained there was no consideration since by the letter of attorney the defendant got 'nothing but labour and travail', but the objection was dismissed: 'not so much the profit which rebounds to the defendant, as the labour of the plaintiff in procuring of the letter of attorney is to be respected'. In *Preston v. Tooley*,⁴³ it is again objected, no more successfully, that P showed no sufficient consideration for the promise as the defendant had no benefit 'by the showing [of the indenture] to him, but rather charge and trouble to keep it, and to look on it'. In *Sturlyn v. Albany*,⁴⁴ the defendant similarly objected that the mere showing of a lease would not be a sufficient consideration, but the court replied that 'when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action'. The mere inadequacy of the consideration or of the benefit could not give the

⁴¹ *Banks v. Thwaites*, *supra*.

⁴² *Webb's Case*, *supra*.

⁴³ (1587) Cro. Eliz. 74.

⁴⁴ (1588) Cro. Eliz. 67.

promisor any defence since it only showed that he made a bad bargain, not that he had not bargained at all.

So far, it mattered nothing whether the argument proceeded in terms of 'consideration' or of 'benefit'; in either case the actual point, *pro* or *contra*, was exactly the same. However some distinction between these terms is introduced in the following case.⁴⁵ D promised to convey land to P 'in consideration of being released from a debt'. D pleaded that this was no benefit to him, but the court held otherwise: 'it was a good consideration, for by reason of the promise the plaintiff was drawn to make the release; and it was not material that the defendant took no benefit by it'. But this and similar statements must not be allowed to mislead. Of course D had a benefit, namely, the release from a debt. What is true is that it was not always possible to identify the 'cash value' of such a benefit except by looking at what the plaintiff had been induced to do. It is this feature of benefit that the King's Bench shortly adverted to: 'every consideration must be for the benefit of the defendant, or some other at his request, or a thing done by the plaintiff, for which he laboureth or hath prejudice'.⁴⁶ In other words, the 'detriment' was merely the other side of the beneficial coin: benefit and detriment were to be understood conjunctively, for this conjunction made it clear that the parties had (contrary to the defendant's objection) in fact bargained together by agreeing to do things one for the other to their mutual benefit. In assumpsit, in short, the element of benefit was no less relevant than it was in debt.

MUTUAL PROMISES

This element of benefit throws unexpected light upon the whole notion of 'mutual promises'. Take, to begin with, *Kirby v. Coles*,⁴⁷ where D undertook to mast hogs for a price but then failed to redeliver a number of hogs. Sued in assumpsit, he objected that there was no consideration for his promise to redeliver, as this gave him no benefit. His ploy did not succeed, for the promise, the court said, 'was the cause of the contract, and being made at the time of the contract it shall charge him; otherwise perhaps if it were made at another time'. Or to use the

⁴⁵ *Foster v. Scarlett* (1588) Cro. Eliz. 70, also an example of arbitration.

⁴⁶ *Greenleaf v. Barker* (1590) Cro. Eliz. 193, 194, where however the defendant's no-benefit objection was upheld since the plaintiff had in fact only promised to repay the same money he already owed. For other cases connected with releases and discharge, see chap. 10 at note 19.

⁴⁷ (1589) Cro. Eliz. 137, sub. nom. *Kirby v. Eccles*, 1 Leon. 186.

headnote's more succinct ground: 'Where mutual promises are made at the same time, an assumpsit will lie.' The court was therefore saying that, even if a single or lone promise to redeliver things may indeed not be beneficial to the promisor, a similar promise seen in the context of a mutual bargain cannot but be beneficial, because the mutual bargain or mutual promises indicate an agreement with mutual benefits. The same idea can again be found in *Wichals v. Johns*.⁴⁸ D promised to pay, or rather repay, P if P would pay off D's creditors, but then refused to repay on the ground that the promise to repay was of no benefit to him. At first this argument seemed to be succeeding, for as Gawdy J. said: 'If one be indebted unto me, and another comes unto me, and promises that he will pay it, this is void, and nothing to the purpose.' On another day, however, when the argument was resumed, D's promise was held 'well enough', for 'there is a mutual promise, the one to the other' and 'a promise against a promise is a good consideration'. And, again, the proper explanation of the decision can only be that the mutual promises were taken to denote a mutual bargain with mutual benefits.⁴⁹

Another thing should now be plain. In giving effect to such a bargain based on mutual promises, the law implicitly recognised the existence of a purely consensual or executory contract between the two sides. Not, to be sure, because (as some modern scholars here thought) the mere 'mouthing' of mutual promises constitutes good consideration each for the other. But rather because the mutual promises reveal mutual benefits and detriments, and so reveal the synallagmatic character of the agreement; that it was intended as a bargain, not as a future exchange of mutual favours. It is, in fact, this synallagmatic element which seems to explain the very appearance of the phrase 'mutual promises'. For, as was observed in *Sydenham v. Worlington*,⁵⁰ the two promises have to 'go' together, in the sense of having to 'concur' at

⁴⁸ (1599) Cro. Eliz. 703, sub. nom. *Whitcalfe v. Jones*, Moo. K.B. 574.

⁴⁹ Normally the benefits envisaged were actual benefits, but they could be aleatory provided the agreement gave each party an even chance. This emerges from *West v. Stowell* (1577) 2 Leon. 154, where D promised to pay P £10 if he were to lose a certain match with another, and P promised D the same amount were the latter to win. D lost, whereupon P sued for the £10. The objection was that 'there is not any consideration upon which it is conceived, but it is only *nudum pactum*'. Yet the consideration was held sufficient, 'for here this counter promise is a reciprocal promise'. A cast at dice, it was added, 'alters the property, if the dice be not fake; wherefore then is there not here a reciprocal action'.

⁵⁰ (1585) Godb. 31, 2 Leon. 224, further considered in chap. 5.

the same moment, because if one promise comes after the other, or after some prior and unrequested performance, it would be given for a past, not for a present, consideration. In other words, non-mutual promises are incapable of designating a bargain, while mutual promises normally designate nothing else.

Even if the mutual promises thus formed a bargain, it did not follow that each (mutual) promise became immediately enforceable as such. For often enough one side might have to perform his promise *before* the other side would have to perform his. Just this lies behind the statement that an executory, unlike an executed, consideration is traversable or is 'entire',⁵¹ which however did not affect the existence of the bargain itself, for, as Perriam J. remarked, 'considerations in actions upon the case, and conditions, are not all one'.⁵² Hence the admitted existence of a bargain also meant this: that, after their mutual promises, the parties could no longer simply withdraw and that, in particular, the two sides now owed each other some (reasonable) opportunity to perform. And this may be the simple import of the famous note of *Strangborough v. Warner*⁵³ according to which 'if you promise to give me £10 on such a day in consideration of my promising to give you £10 on such a day after', this will 'be a promise against a promise and so maintain an action upon the case'. For assuming that this verbal exchange betokened not just a gratuitous loan for one day, but a mutual bargain from which the lender would also profit (e.g. from interest charged), the note can (subject to another interpretation we presently discuss) be read as saying that a bargain becomes irrevocable from the very moment the (beneficial) mutual promises are exchanged.

Thus to speak of mutual promises was essentially to say that the parties had arrived at a bargain, provided one promise was 'in consideration' of the other, for this 'consideration' referred to, just as it underscored, the existence of mutual benefits. It follows, to repeat, that the phrase 'mutual promises' did not mean that the mere giving or 'mouthing' of a promise was 'good consideration' for another, for had a mere mouthing been enough the two promises could never have meant that a mutual bargain was involved. Yet, occasionally, it is in this latter non-bargain sense that the phrase 'mutual promises' is also

⁵¹ *Brown v. Garbrey* (1588) Gould. 94; *Joscelin v. Shelton* (1557) 3 Leon. 4, Moo. K.B. 13.

⁵² *Brown v. Garbrey, supra*, at 95.

⁵³ (1589) 4 Leon. 3.

used. There are two very special reasons for this. One has to do with the long struggle, before it was resolved by *Slade's Case*, between debt and assumpsit, a struggle often accompanied by attempts to conceal a transaction falling within debt as an action on the case. The above-mentioned note of *Strangborough v. Warner* may then indicate just such an attempt, for by presenting the transaction not as a mutual loan but as mutual promises, the lender would then be able to sue in assumpsit instead of having to resort to debt for the money lent.⁵⁴

The other reason relates more specifically to a problem of pleading, namely, how a plaintiff was to declare if he had already performed. In *Gower v. Capper*⁵⁵ the facts were that D had assumed to produce two sureties if P would surrender to him a bill of £20 by which he was indebted. When D later produced sureties of no value, P sued for breach of promise. D virtually admitted that his sureties were worthless, but he denied that P had delivered to him the said bill. P had alleged his delivery of the bill *in fact*, but apparently not in the declaration, and it is to this deficiency that D demurred. However the court held that the allegation of delivery was 'but surplusage' for 'the consideration was the promise to deliver it, and therefore he need not have alleged that he delivered it. But a promise against a promise is a sufficient ground for an action.' These words strongly convey the impression that the two promises, standing by themselves, constitute consideration one for the other, by virtue of the sole fact that the promises were mouthed. But, surely, the truer explanation must be that the decision was more concerned with overcoming D's demurrer relating to the delivery of the bill: the court was trying to let the issue go to a jury instead of seeing the writ abate for the alleged deficiency, namely, that no cause of action had been revealed.⁵⁶

In sum, the decision does not support the view that mutual promises were enforceable *quâ* promises without more, that is *quâ* mutual promises irrespective of a mutual bargain, for there was in fact a sufficient bargain between the two sides. Nor does the decision mean that one promisor could sue the other without showing any performance

⁵⁴ A similar such attempt perhaps was *Colson v. Cotton* (1596) discovered by Baker [1971] *Camb. L.J.*, 213, 221. After *Slade's Case* these attempts became of course unnecessary as the recovery of a loan was covered by assumpsit: see, e.g. *Game v. Harvie* (1604) *Yelv.* 50.

⁵⁵ (1597) *Cro. Eliz.* 543, another well known affirmation that (to quote the headnote) 'assumpsit will lie on mutual promises'.

⁵⁶ That deficient writs would abate is shown in *Joscelin v. Shelton*, *supra*.

at all. The decision rather means that the mutual promises could be regarded as 'independent', within the doctrine of 'independency', so as to enable one side to sue for the outstanding performance where the contract was already executed or at least allegedly so. With 'independency' we shall deal in detail in chapter 12.

BAILMENT AND CONTRACT

The action on the case in assumpsit did not stop at bargain, but was extended to bailment as well, for reasons which are not far to seek. Since a person would not bail goods to another, especially if the bailment was gratuitous, without some undertaking by the bailee that the goods would be returned to the bailor, it is of course this undertaking, or rather its non-performance, that opened the way for the action on the case. It is important to see however that case or assumpsit did not suit the gratuitous bailment at all; it did not suit it because the bailee's promise could not show any consideration, not being of any benefit to him. This circumstance made the bailor's declaration in assumpsit artificial in the extreme: as where (to give an amusing example) P declared that 'in consideration' that he had lost a dog and that D had found it, D then promised to return the dog.⁵⁷ Indeed when shortly afterwards, the applicability of assumpsit is again challenged, the action is held not to lie for lack of benefit and consideration: P having entrusted to D some cloths which D promised to redeliver to P on demand, it was held there was 'no consideration . . . to draw a promise from the defendant, for the defendant had no benefit by the cloths etc but *nuda custodia*, which is rather a charge than a benefit; for the defendant could not use them'.⁵⁸

The latter result is yet another vivid demonstration of how consideration was then conceived. Consideration simply meant that a promise was given as part of a bargain, for only then would the promise be given 'in consideration of' something which could be described as a benefit to him. Precisely this element was missing where the promisor, as a gratuitous bailee, was doing the bailor a favour, nothing more. It is true that the law was shortly to change, when assumpsit was held to lie even against a gratuitous bailee, although the reason for this had little to do with consideration but rather with the fact that the

⁵⁷ *Ireland v. Higgins* (1593) Cro. Eliz. 125.

⁵⁸ *Pickas v. Guile* (1608) Yelv. 128. And similarly *Riches v. Bridges* (1602) Cro. Eliz. 883, Yelv. 4.

bailor needed a convenient remedy which, as a matter of urgency, only assumpsit could provide.⁵⁹ As a result of this, however, it began to be thought that promises would be enforceable provided there was a detriment to the promisee, irrespective of any benefit to the promisor. This view, perhaps justified for bailment, had unfortunate effects for contract as a whole. For it tended to falsify the historical significance of consideration which had evolved with reference to the position of the promisor rather than to that of the promisee. What is more, the stark and lucid simplicity of the law relating to bargain was overshadowed by a more comprehensive law of contracts which, rather amorphously, now included bailments of every kind. This created a peculiar paradox as it was never made clear how contract law could insist, on the one hand, on the need for 'consideration' sometimes defined as the 'price' for a promise, while, on the other, still make room for the gratuitous bailee. But these are questions which need not occupy us here.

⁵⁹ The major change came with *Loe's Case* (1624) Palm. 281, sub. nom. *Wheatley v. Low*, Cro. Jac. 668, where P gave to D money which D promised to give to C, to whom P was indebted, which however he did not do. Though again argued that assumpsit did not lie for the lack of any benefit to D, the King's Bench held for P. The court more or less conceded that there was here no real consideration, yet the detention of the money had caused damage to P, so that assumpsit should lie. Alternatively, they thought that it should lie because D was anyhow accountable to the plaintiff which was now recoverable in assumpsit by the action of money had and received.

THE GENERAL PROBLEM

To introduce our next set of problems, suppose that D promised P a sum in reward not as part of an original bargain but after P had already completed certain services for D. There were then, as there are now, many kinds of jobs or services whose price could not be determined beforehand but only after the event. Suppose next that D later broke this promise to pay: how could P be said to have suffered a loss? Obviously P sustained no loss from D's breach of promise alone, however much he might be disappointed at not getting the money promised to him. On the other hand, P might certainly be said to suffer a loss, a loss of the value of the work done for D, if this work could be shown to have been done not gratuitously, but at D's behest, hence with the clear understanding that the services were to be appropriately rewarded in due course. On this assumption P's work clearly constituted a *quid pro quo*, except (and that is where the difficulty began) that this was a *quid pro quo* for which P had no action in debt simply because the amount to be paid was not originally fixed.¹

How was this problem resolved? In the seventeenth century the law could 'imply' an appropriate contract, the well known *quantum meruit*, in ways we shall later describe. In the sixteenth century, however, the only possible approach was through express *assumpsit*, to make the defendant liable on his promise to pay. But if so, how was such a promise to be legally supported, for taken by itself it lacked consideration precisely because the single promise showed no benefit to the promisor. The solution was to treat the promise as part of a wider

¹ *Anon.* (1473) Y.B. 12 Edw. IV, East., fol. 9, pl. 22, where Brian C.J. pointed out that, unless the price for a job was determined beforehand, no debt would lie: see chap. 1, at note 36.

bargain with mutual benefits. Still to construct such a bargain two related conditions had to be met: first, that D's promise to pay for certain services was preceded by an appropriate request, and, second, that both request and promise showed an intention to make a bargain, not an intention of a gift. How these conditions arose and developed we will now try to explain.

REQUESTED AND NON-REQUESTED SERVICES

The need for a request was first fully stated in *Hunt v. Bate*.² D's servant, being arrested and imprisoned, was bailed out by P. The latter, though well acquainted with D, had not been requested to intervene: he only did so 'in consideration that the business of the master should not go undone'. Afterwards, D 'upon the said friendly consideration' promised P to reimburse him for the costs incurred. This promise was held to be unenforceable, partly because there was 'no consideration wherefore the defendant should be charged for the debt of his servant', more importantly because 'the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head'. It follows that, had there been an initial request, the subsequent promise would have been good, since P's exertions could not then have been suspected of being purely 'voluntary'. So, in a later case where P promised D twenty pounds 'in consideration' that P at the 'special instance' of D had married D's cousin, the promise was enforced, for though the marriage preceded the promise, it 'ensued' upon D's request.³

These cases neatly exhibit the original sense of 'consideration'. The word clearly refers to the personal motive why P did what he did or why D made a later promise to pay: P 'considered' that D's business should not go unattended, while D promised 'because' or 'in consideration of' this attending by P. The courts were fully aware that the real question they had to decide was whether or not D's reason or consideration for his promise was a 'good' or 'sufficient' one. In one sense, a person always has a good enough reason for promising: he may happen to like the promisee, who may be his friend or his future son-in-law. But this is not the reason the cases here sought to identify. What they were after was whether the reason for D's promise was, or was not, connected with a prior bargain for the services of P, and clearly the best

² (1568) 3 Dy. 272a, pl. 31.

³ *Anon.* (c. 1568) 3 Dy. 272b, pl. 32.

way, in these circumstances, of showing such a bargain was to begin by showing a prior request from D.

This close connection between request and bargain was much discussed in a famous case.⁴ L brought *assumpsit* against B for having laboured at B's request to procure a pardon from the King, for which B later promised him £100. A 'mere voluntary courtesy', the court insisted, cannot uphold an *assumpsit*, which *assumpsit* must therefore be 'moved' by a prior request, for then 'the promise, though it follows, yet is not naked, but couples itself with the suit [or request] before'. The request was then no mere technicality, but had to be strictly proved as the plaintiff had to show both that there was request and that he acted on it.⁵ On the other hand, the plaintiff did not have to declare giving strict proof of his services. For one thing, because the defendant was not allowed to traverse the consideration, so that if the issue was that P had not performed as requested, this was to be pleaded at the trial, not to the writ. For another, it was not always possible to show how (say) a pardon was actually obtained: all P could show was that he did 'endeavour to obtain it', for 'the one [the pardon] is his end and the other [the endeavour] his office'.

PAST AND PRESENT CONSIDERATION

The fact remains that a prior request, though always a necessary, was not a sufficient condition to construct a bargain between P and D. Suppose that P had rendered, at D's request, a service some time before D made his (subsequent) promise to pay. Could one not say that, despite the earlier request, D's later promise was given out of gratitude for a past act rather than as part of a continuing or present bargain relationship?

This very point was strongly pressed in *Sydenham v. Worlington*,⁶ the case that indeed inaugurated the distinction between past and present consideration. P, an attorney, had become surety for another at D's request. Somewhat later D promised to reimburse him but then refused to pay, on the interesting ground that, since the consideration and the promise 'did not concur and go together', the consideration

⁴ *Lampleigh v. Braithwait* (1616) Hob. 105.

⁵ '[The] execution of the act must pursue the request, for it is like a case of commission for this purpose', and if not, 'it is *nudum pactum*': Hob. 105, 106. For an apparently different view see however Lücke, *op. cit.*, 440.

⁶ (1585) Godb. 32, 2 Leon. 224, Cro. Eliz. 42, 3 Dy. 272b, pl. 32n.

having been long before executed, it could not have been 'intended that the promise was for the same consideration'; hence if some one gives me a horse, and a month later I promise him £10, this gives him neither debt nor assumpsit, 'for it is neither a contract nor a sufficient consideration, because it is executed'. The court agreed that in a contract of sale the promise and the 'consideration' must go together,⁷ but not so in contracts for services, since here 'it is not necessary that they contract at the same instant, but it suffices if there be inducement enough [or any moving cause or consideration precedent] to the promise, and although it is precedent it is not material'.

The court described various other situations in which the 'consideration', though precedent, would still be treated not as a 'past' but as a 'present' one, thus supporting the defendant's subsequent promise to pay. So where D requests P to marry one of his cousins and rather later promises a reward, this would be a 'present' consideration, because P 'continues' to be married. Again where P serves D for a year, at D's request, receiving no wages, but at the end of the year D promises P £10 for his service, P may maintain an assumpsit 'for it is good consideration'. On the other hand, if D does pay wages and the subsequent promise 'is purely *ex abundantia*', assumpsit will not lie.

These examples nicely reveal the purpose of the whole exercise, namely, to separate gratuitous from non-gratuitous promises. One therefore wonders why in *Sydenham* any difficulty at all should have been felt about P's claim, since his services, as the facts clearly showed, had not been gratuitous. The answer perhaps has to do with then recent developments. These with their new talk of mutual promises did lay stress on the idea that only mutual promises could form a bargain as only they were inevitably about 'present' (or future) and never 'past' benefits. What apparently was not seen, or at least not clearly expressed, was that a subsequent promise to pay did not really depart from this, because a bargain can also arise where a promise is preceded by a prior request, provided it is a request for a bilateral exchange and not merely a request for a favour or courtesy.

This simple synallagmatic rationale was too obvious to be missed. In *Harford v. Gardiner*,⁸ D promised to pay P a sum of £100, 'in consideration' of P's father having faithfully served D's father, as well

⁷ Because, as Perriam J. somewhat irrelevantly added, 'contract is derived from *con* and *trahere* which is drawing together'.

⁸ (1588) 2 Leon. 30.

as 'in consideration of the love and affection that [D's father] bore to the plaintiff'. Without difficulty the King's Bench held the consideration to be executed and past and in any case given by the father, not the son: love, said the court, 'is not a consideration, upon which an action can be grounded; the like of friendship'. On the other hand, where P paid money to a stranger at D's request, and then a year later D promised to repay P, the argument that the consideration was 'past' was dismissed: 'when the payment is laid to be at his request, the consideration does continue, and so is the common course'.⁹ Similarly, where D requested a grant for which he 'divers years' later undertook to pay £100, the court did not think that the consideration was 'past', for 'being to the defendant himself, the consideration shall be taken to continue'.¹⁰ Finally in *Bosden v. Thinne*,¹¹ D requested P to procure a credit for him, and then promised to reimburse P. D's objection that the consideration was past now included the further point that the prior request must not be 'bare' but must be such as to 'imply' a promise ('I will see you paid' or the like), for unless the request was promissory in this sense the plaintiff would still be acting 'of his own head' rather than in expectation of a later promise to pay. However the court thought it sufficient if the request, though 'bare', was followed by a promise, provided the whole circumstances belied a gratuitous intent. In brief, it was the request coupled with the promise 'which is the difference' between a bargain-transaction and a 'voluntary courtesy'.¹²

REQUEST-CUM-PROMISE: LATER DEVELOPMENT

The above principle was later expanded when the law began to imply a subsequent promise to pay for services rendered, as part of the development of *quantum meruit*.¹³ But the basic distinction between

⁹ *Beaucamp v. Neggin* (1592) Cro. Eliz. 282.

¹⁰ *Riggs v. Bullingham* (1599) Cro. Eliz. 715, 3 Dy. 272b, pl. 32n.

¹¹ (1603) Yelv. 40, Cro. Jac. 18.

¹² *Lampleigh v. Braithwait* (1616) Hob. 105, 106; *Townsend v. Hunt* (1636) Cro. Car. 408; *Hardres v. Prowd* (1655) Sty. 465; and see also *Wilkinson v. Oliveira* (1835) 1 Bing. (N.C.) 490. 'The whole point of *Lampleigh v. Braithwait* is, that the subsequent promise, coupled with the previous request, gives a right of action, notwithstanding that the service itself is not one from which the law would imply a promise of reward': *Kennedy v. Broun* (1863) 13 C.B. (N.S.) 677, 688 (in argument), where however a request-cum-promise was held unenforceable because of a special rule relating to barristers.

¹³ With which we deal in greater detail, in connection with the common counts, in chap. 9.

bargain and courtesy was, despite some appearances to the contrary, never really departed from. A subsequent promise was never implied if the prior services were given gratuitously or only in the expectation of a gift: 'a man who expects to be made amends by a legacy' cannot afterwards ask for wages.¹⁴ Nevertheless the subsequent promise, even if in fact made, lost its original importance. For, once it was clear that the services given were both requested and remunerative, it no longer mattered whether or not there was a subsequent promise.¹⁵ Indeed the subsequent promise became merely an admission of the price the plaintiff deserved: it was the best evidence of the value of the services.¹⁶

Though the law might dispense with a subsequent promise, it was not prepared, however, at least not in the normal situation, to dispense with the initial request. In *Hayes v. Warren*,¹⁷ the declaration omitted to state a request, though there can be little doubt that the services were non-gratuitous as well as initiated by the defendant. The court refused to countenance the omission, for the reason that, without a formally declared request, the subsequent promise technically rested on a past consideration. A request might be impliable in sale from a buyer's acceptance of the goods, but no such implication, said the court, was possible in relation to services, since 'the defendant might be no ways privy to the work done at the time of doing it'. Accordingly a request had to be specifically averred not only in claims for work, but also in claims for money laid out and expended.¹⁸ Nevertheless the averment ceased to be necessary for goods sold and delivered or for money lent,¹⁹ or (a later concession) for services of a continuing kind, that is, services that could be rejected for, as Serjeant Manning remarked, it is 'unnecessary to allege a request, if the act stated as the

¹⁴ *Osbond v. Governors of Guy's Hospital* (1727) 2 Stra. 728, with which compare *Osborne v. Rogers* (1667) 1 Wms. Saund. 264.

¹⁵ In *Larkin v. Turner* (1713) Gilb. Cas. 53, P declared he had done extra work for D, at his request, for which D later promised him additional remuneration, without specifying the exact amount payable. The court had little doubt that P had a good action, either on the 'proper promise' or on a *quantum meruit*, for 'the fees are for the work and labour, so that it is [a] promise to pay his fees and also his extraordinary labour over and above, and this is a reason also why a *quantum meruit* will lie in this case.'

¹⁶ See *Stewart v. Casey* [1892] 1 Ch. 104, 115-16.

¹⁷ (1731) 2 Barn. K.B. 55, 71, 140, 2 Stra. 933.

¹⁸ *Durnford v. Messiter* (1816) 5 M. & S. 446.

¹⁹ 'If the money is accepted, it is immaterial whether or not it is asked for. The same doctrine will not apply to money paid: because no man can be debtor for money paid, unless it was paid at his request': *Victors v. Davies* (1844) 12 M. & W. 758, 760.

consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se*'.²⁰

Herein, then, lies both the origin and the justification for distinguishing between an 'executed' consideration and one that is 'past'. Both expressions refer to promises made after performance. But whereas a promise upon an executed consideration does suggest the existence of a prior bargain, in which performance has been given in clear expectation of payment, the promise upon a past consideration merely offers evidence of a favour or the promise of a gratuity. Modern scholars have sometimes found great difficulty with this past executed distinction, suggesting it is nothing more than an historical accident. However, once the distinction is seen in correct perspective, its rational and indeed simple purpose is quickly self-evident.

PAST CONSIDERATION AS A SPECIAL PLEA

Our rule about past consideration, then, had taken a simple and logical course, but this was not the whole of it. In the sixteenth century there occurred two developments, which left a long trail of confusion: one development purported to treat past consideration as a sort of special plea, while the second (with which we deal later) appeared to uphold past consideration if based on natural affection.

To understand the first development, consider two decisions in the Common Pleas. In the first, P had, at D's request, paid off a debt which D then promised to repay, a promise held to be unenforceable because it was supported by no more than 'past consideration'.²¹ The result makes little sense unless one assumes that the court was opposing (as throughout the sixteenth century the Common Pleas was wont to oppose) too free a use of *assumpsit* in lieu of the action of debt. In the second, P declared that, in consideration *quod deliberasset et dedisset* to D twenty sheep, D promised to pay him £5; judgment for P was stayed, again on the ground that the consideration for D's promise was past 'for it is in the preter tense *deliberasset* and therefore no cause of action'.²² Only a little reflection shows that this past tense was a purely grammatical peculiarity which did not alter the fact that the parties' original contract must have been as 'present' as any other

²⁰ *Fisher v. Pyne* (1840) 1 Man. & G. 265n. And see to the same effect *Hopkins v. Logan* (1839) 5 M. & W. 241, 249; *Kaye v. Dutton* (1844) 7 Man. & G. 807, 815.

²¹ *Barker v. Halifax* (1600) Cro. Eliz. 741.

²² *Jeremy v. Goochman* (1594) Cro. Eliz. 442.

contract of sale. So again the rational explanation can only be that the court rejected the attempt to replace debt by *assumpsit*.²³

These decisions were shortly to be superseded by *Slade's Case*,²⁴ which (as we shall see in chapter 7) extended *assumpsit* to all claims of debt. However the idea that past consideration constituted a special plea did survive, and was often raised, even where there could be no doubt about the existence of a 'present' bargain, with the sole purpose of technically avoiding a promise to pay. Fortunately the courts usually saw through this subterfuge. In *Hodge v. Vavisoar*,²⁵ for example, P delivered goods to D at his request and D later promised to pay for them, but then pleaded that the consideration for his promise was past (apparently because the promise was made about a year after the original delivery). The court had no difficulty in upholding D's promise which, they said, was given for good consideration since the promisor, having received the goods, was 'clogged with a debt continually'. In *Tipper v. Bicknell*,²⁶ perhaps the most ingenious instance of all, D promised to surrender some mortgage deeds 'in consideration' of P's accepting certain bills, but demurred that the consideration was past, on the ground that in the declaration D's promise happened to come after P's recital of his own performance (acceptance of the bills), so that P's performance appeared as made without a request. The demurrer was however easily dismissed, being obviously too clever by half. Where, said the court, the parties make their promises at the same time, 'the law does not require, as in the case of a by-gone transaction, that, in order to make the promise binding, the plaintiff should have acted at the request of the defendant'.²⁷

²³ See similarly *Docket v. Voyel* (1602) Cro. Eliz. 885.

²⁴ (1602) 4 Co. Rep. 91a.

²⁵ (1613) 3 Bulst. 222.

²⁶ (1837) 3 Bing. (N.C.) 710.

²⁷ See similarly *Thornton v. Jenyns* (1840) 1 Man. & G. 166; *Jackson v. Cobbin* (1841) 8 M. & W. 790; *Tanner v. Moore* (1846) 9 Q.B. 1; *Elderton v. Emmens* (1848) 6 C.B. 160, (1853) 4 H.L.C. 624, perhaps the most prolonged discussion of all. Other attempts to establish past consideration as a separate plea appear more successful, but can still be explained on other grounds. Thus in *Lattimore v. Garrard* (1848) 1 Ex. 809, D promised to appoint, at P's request, an arbitrator to value certain improvements at the termination of the tenancy. P sued D for not appointing the valuer, but the action failed. The ground was that no new promise could arise upon the executed consideration, but the more substantial point surely was that P failed even to ask for the appointment of a valuer before commencing suit against D. Again in *Kennedy v. Broun* (1863) 13 C.B. (N.S.) 677, a grateful client subsequently promised to pay a barrister for his services. The promise was held of no effect,

Only in *Roscorla v. Thomas*²⁸ did the plea of past consideration rest on more respectable grounds. There too it was raised as a special or technical exception but the plea also fell within its classical scope. The facts were that P had bought a horse from D 'in consideration' of which D subsequently warranted the horse sound. The horse was unsound: could P sue on the warranty? The answer was no, the consideration being past. Obviously it was past because the warranty was not, as it had to be, *sur le bargain*, to use the old phrase.²⁹ For unless so 'co-extensive' with the contract, the warranty could have been no more than a generous afterthought rather than a term in the original sale. Thus 'past consideration' simply reaffirmed a basic distinction with which the law had begun, that between gratuitous and non-gratuitous promises.

LOVE AND AFFECTION AS CONSIDERATION

With this latter distinction our second development was almost openly at odds. It was a very curious development which however did not disturb the evolving principles as it remained at the margin of things. Suppose, to begin at the root situation, a father promised another to pay so much for services rendered to his child. If the services were rendered at the father's explicit request, the position was obvious enough. But suppose that the prior request was itself in doubt. Our story starts with just such a case. In *Marsh v. Rainsford*,³⁰ the father promised Marsh £200 if his daughter were to become his wife. The couple eloped, after which the father made another promise of £100. Could Marsh recover the latter sum? The father's contention was he could not, for the second promise lacked a specific request, while the first promise had been nullified by conduct of which the father disapproved. However the second promise (of £100) was held good because, as the Leonard report puts it, 'natural affection of the father to his daughter is sufficient matter of consideration'.

What is surprising about this is that 'love and friendship' had been specifically rejected as consideration in *Harford v. Gardiner*,³¹ in fact

amongst other things because the promise was for a past consideration, although the truer ground simply was that a barrister could not enforce promises for fees, in whatever form the claim was put.

²⁸ (1842) 3 Q.B. 234.

²⁹ *Andrew v. Boughey* (1555) 1 Dy. 75a.

³⁰ (1588) 2 Leon. 111, sub. nom. *Marsh v. Kavensford*, Cro. Eliz. 59.

³¹ (1588) 2 Leon. 30, on which see at note 8 above.

decided by the same court in the same year. Nor can the decision derive support from a theory of 'moral consideration' adumbrated in the famous case of *Sharlington v. Strotton*,³² because the latter was concerned to uphold an executed gift of land, by deed of grant to the use of the grantor's brother, a situation obviously wholly different from simple promises which did not even pretend to operate as gifts. One way of justifying *Marsh v. Rainsford* might be to say that the original request to the son-in-law 'continued' in spite of the elopement, and that the 'continuing' benefit of the daughter's marriage now constituted consideration for the subsequent promise as well. Alternatively, one might say, rather more convincingly, that merely permitting the daughter to marry Marsh was a sort of implied request, just as (in the court's analogy) a promise to pay a lawyer for advice given is good since one cannot get such advice without in some way requesting it.³³

Unfortunately neither interpretation is of help with regard to another, and more crucial, aspect of the case. The court further said that if 'a physician, who is my friend, hearing that my son is sick, goes to him in my absence, and helps and recovers him, and I being informed thereof, promise him in consideration etc . . . to give him £20, an action will lie for the money'. But this is precisely what *Hunt v. Bate*³⁴ decided would not support a promise, for it was a friendly gesture, of the doctor's own head, an act thus quite unrelated to any prior request however loosely interpreted. Nor was this latter principle ever abandoned, even if it sometimes did appear to be. In *Bret v. J.S.*,³⁵ for example, a father promised to pay £8 a year for his son's board, but then died, whereupon his widow promised to pay £6 for the board already given and £8 a year for future board. The court allowed the plaintiff to recover both amounts ('as well for the money due before, as for what should afterwards become due'), though they also insisted that natural affection was not sufficient to ground an *assumpsit*.³⁶ This left an inconsistency between what they held and what they said, but

³² (1566) 1 Plowd. 298.

³³ Cro. Eliz. 59.

³⁴ (1568) 3 Dy. 272a, and see at note 2 above.

³⁵ (1600) Cro. Eliz. 756.

³⁶ This was also to meet D's objection that debt should have been brought. The court said that debt would have lain for the future board once completely supplied, but here the action was conjoined with a claim for the past board, for which debt would not have succeeded since the widow might have defended with *wager of law*. The action of *assumpsit* thus neatly enabled recovery for the past debt together with that of the future board.

the inconsistency may be more apparent than real, in the sense that the widow's promise to pay the 'past' debt could be regarded as analogous to an executor's promise to pay his testator's liabilities. As we shall see in chapter 8, assumpsit was just then being extended to facilitate the 'survival' of debts.

Thereafter, to trace the whole story here and now to its nineteenth-century end, the doctrine of natural affection was for a long time hardly heard of at all, not surprisingly, since there was never very much room for it: a stranger would not normally give board or other assistance to a child, in expectation of payment, unless the parents had requested it. But in the eighteenth century we again hear voices, though always few and isolated, claiming love and affection (or what is now called 'moral obligation') to be a sufficient basis or consideration for a promise to pay. These voices sounded two major themes. One theme, beginning with *Hayes v. Warren*,³⁷ asserted that some acts by themselves virtually support a subsequent promise, notwithstanding its being 'founded upon a past consideration', such as curing another's child of a sudden sickness or being bail for another. In *Hayes* this assertion was largely *obiter* but certainly not without influence. For shortly afterwards quite a few cases appeared, mainly at *nisi prius*, holding a parent or master liable for medicines supplied, without prior request, to a servant or child.³⁸ However their validity was categorically denied in *Wennall v. Adney*,³⁹ where a master was held not liable precisely because liability to pay for attendance to a servant must rest on contract; indeed previous cases suggesting the contrary were now described as instances where courts were 'misled by their humanity'. Later even strict necessities supplied to a child were held not to make the father liable, for though undoubtedly under a moral duty to support his child, 'the mere moral obligation to do so cannot impose upon him any legal liability'.⁴⁰

The second theme of moral obligation served mainly to overcome the effects of contractual incapacity, that of a married woman or a child in minority. Where a person of small means had supported the children of his wife's former marriage, the children's subsequent promise, after

³⁷ (1731) 2 Barn. K.B., 140, 141, though what was here said was not all necessary for the decision itself.

³⁸ See, e.g., *Watson v. Turner* (1767) Bull. N.P. 147, cited 3 B. & P. 247, 250n.; *Scarman v. Castell* (1795) 1 Esp. 270; *Atkins v. Banwell* (1802) 2 East 505.

³⁹ (1802) 3 B. & P. 247.

⁴⁰ *Mortimore v. Wright* (1840) 6 M. & W. 482, 488; and cp. *Nichole v. Allen* (1827) 3 C. & P. 36.

their majority, to repay their stepfather was held good as in accordance with their moral duty.⁴¹ Again, where a married woman undertook (under bond) to repay a loan to her son-in-law, and after her husband's death again promised to repay, her first undertaking failed because she was then *feme covert*, but her second promise was held binding, there being no 'stronger or clearer case' of moral obligation.⁴² These decisions were perhaps justified as a matter of practical result as they qualified some quite obsolete rules of incapacity. Still the theoretical ground on which they rested was not tenable as a matter of general contractual principle. In any case the whole doctrine of moral obligation was soon decisively dismissed, never again to be revived. So, where a ward, after she came of age, promised to pay her guardian for educational expenses earlier incurred on her behalf, the notion of moral obligation was rejected since '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'.⁴³

⁴¹ *Cooper v. Martin* (1803) 4 East 76.

⁴² *Lee v. Muggeridge* (1813) 5 Taunt. 36, 47. And see also *Barnes v. Hedley* (1809) 2 Taunt. 184; *Wells v. Horton* (1826) 2 C. & P. 383, 4 Bing. (N.C.) 40.

⁴³ *Eastwood v. Kenyon* (1840) 11 Ad. & E. 438, 450-2, per Lord Denman.

FORBEARANCE AND ASSUMPSIT

We return to the sixteenth century, to another development that assumpsit had engineered. It is well to remember that, spectacular though its advances in relation to sale and services had been, assumpsit had kept outside the traditional realm of the action of debt, at least as a matter of principle. Debt thus continued to be the only appropriate action for all claims of indebtedness, particularly those of a liquidated kind. Even in those claims, however, assumpsit could play a sort of complementary role, yet one which made the distinction between debt and assumpsit perilously thin. Take the situation where a debtor specially promised to pay his debt provided the creditor would forbear to claim the debt for a while; now if the creditor, having forborne, sued on this promise, he did not come into direct conflict with debt, still his declaration would, in one way or another, have to include an admission that the defendant was indebted to him since it was precisely because he was indebted that he promised to pay.

Of course merely declaring on this assumpsit was not enough. Since the assumpsit had, so to speak, to stand on its own feet, one or two things had to be specially shown. One, that the defendant had *subsequently* promised (*postea assumpsit*), for if the promise were made at the time of the contract, not assumpsit but debt would lie.¹ Another, that the subsequent promise to pay was supported by a special or 'collateral' consideration consisting of a special benefit to the promisor. This requirement the courts took particularly seriously, for though they were prepared to allow a creditor who had specially forborne to

¹ 'If he promises at the time of the contract, then debt lies and not assumpsit, but if he promises after the contract, then but not otherwise action lies on the promise': *Anon.* (1572) Dal. 84, pl. 35 (King's Bench).

sue in *assumpsit* and so avoid wager of law, they were not prepared to permit any transparent attempt to sidestep the action of debt.

Forbearance-*assumpsit*, as it may be called, was not confined to one creditor-debtor relationship. Forbearance played an important role in relation to the contractual liability of the executor as well as the contract of guarantee. It also played a crucial part in establishing agreements by which existing liabilities could be discharged, agreements such as account stated or the compromise. The common factor in all these applications of forbearance was the assumed existence of a legal liability, whether liquidated or unliquidated, which the plaintiff could either defer or totally abandon for a price. Forbearance-*assumpsit*, in other words, was not creative of a new or original bargain, but was a secondary agreement, dependent and parasitic on an existing liability which it modified. This existing liability was typically one between a creditor and debtor; it is with this prototype that the chapter deals, leaving other applications of forbearance to other chapters (mainly chapters 8, 9 and 10).

CONSIDERATION AND BENEFIT

A creditor, it should be obvious, would not normally agree to forbear except for a relatively short time, for the simple reason that, since the debtor paid no extra money for the deferment, he could hardly insist on more than a short delay. Still, even a short, but not too short, delay could be of some benefit to the debtor. In *Lutwich v. Hussey*,² D promised to pay both his and his father's debts, if P would suspend his demand for a little while (*paululum cessaret*). D objected, successfully, that 'there was no consideration of the promise', for it was not said how long P would forbear: P might forbear for a quarter of an hour or even less, and doing so 'he has performed the word, *quod paululum cessaret*'. In this case the forbearance had actually continued for six months, but this could not help the creditor, since what mattered was not how long he had in fact forborne, but whether he *might* have forborne for too short a time.

Hence for forbearance to be of 'any commodity to the defendant', it had as a necessary condition to go beyond a mere *punctum temporis*, which could be 'three or four hours, or days, which is no consideration'.³ Conversely if a deferment was not for an 'hour or less' it tended to be

² (1583) Cro. Eliz. 19.

³ *Whorwood v. Gybbons* (1587) Gould. 48.

upheld. Moreover if the forbearance, however short, was the period asked by the debtor, that was good as the latter had defined his own benefit;⁴ similarly if the delay was to continue for a time certain, for then the creditor could not request payment before that time.⁵ In sum, any forbearance constituted a sufficient consideration for a promise to pay unless for an uncertain period or for one ludicrously brief.⁶

The whole argument about time was not then concerned with the creditor suffering a new detriment (for, in fact, any forbearance constituted a detriment to him), but with the debtor-promisor deriving some benefit or new advantage he had not before. Thus if what was forborne was not a proper or enforceable debt, the defendant's subsequent promise to pay would not be good: as where the debtor was an infant, or where liability had died with the tortfeasor, or where there was otherwise no cause of action,⁷ or where the forbearance was given not to the debtor but to his father even if the latter had undertaken to pay off the son's debt.⁸

The need for a benefit also explains the requirement that the creditor-plaintiff had to show that he had forborne for the exact period agreed on, for the benefit to the defendant did not lie in a mere promise to forbear but in the actual deferment.⁹ Usually this was all obvious enough; but occasionally, as in *Thornton v. Kemp*,¹⁰ the facts could be more difficult. P agreed to forbear for a specified time yet caused D to be arrested before the specified day of payment. The court was divided as to whether or not it was a proper forbearance. The majority apparently thought that the debt was forborne since the money had not been received, while the minority asked to what purpose a new day of payment was fixed if the debtor could be sued at any time. It is obvious

⁴ *Gill v. Harewood* (1587) 1 Leon. 61; *May v. Alvares* (1594) Cro. Eliz. 387.

⁵ *Philips v. Sackford* (1595) Cro. Eliz. 455.

⁶ Or one merely facilitating usury: see *Pollard v. Scholy* (1595) Cro. Eliz. 455.

⁷ See, respectively, *Stone v. Wythipol* (1593) Cro. Eliz. 126, sub. nom. *Stone v. Withipool Latch*. 21; *Tooley v. Windham* (1590) Cro. Eliz. 206; *Morgan's Case* (1630) Sty. 304, 305; *Beven v. Cowling* (1626) Poph. 183.

⁸ *Pyers v. Turner* (1592) Cro. Eliz. 283. Similarly where defendant promised to repay certain debt after debtor had been released, but where the debtor had already been released, so that no consideration was held to be proved: *Rampston v. Bowmer* (1588) 3 Leon. 98. In *Sturges v. Beecher* (1596), cited by Baker, op. cit., 219, the remark is made that the debtor's promise to repay a smaller sum than the original debt would ground the assumpsit against him. But this is utterly at odds with the accepted notions concerning accord and satisfaction for which see further chap. 10.

⁹ *Rogers v. Snow* (1573) Dal. 94.

¹⁰ (1602) Gould. 146.

that the court was prepared to go a long way to allow *assumpsit*. What is no less important, however, is that the court did try to reconcile the facts with forbearance, that it was profoundly concerned with the debtor's actual benefit, and that it would still not accept any forbearance as sufficient for the purpose of excluding the action of debt.

THE PRECEDENT DEBT AND PLEADING

To sue on the promise the plaintiff could declare in one of two ways: that 'in consideration' of his postponing the day of payment, the latter promised to pay; or, secondly, that whereas the defendant was indebted he promised to pay (*quod cum indebitatus fuit assumpsit solvere*).¹¹ The latter declaration not only reveals the early appearance of 'indebitatus assumpsit' as a technical phrase; it was even said that to declare in this manner, that is 'to declare without any words in consideration', had become the 'common course'.¹²

The *indebitatus* declaration was a striking procedural innovation which, like so much else in the sixteenth-century law of *assumpsit*, shows the courts far more flexible in their approach to pleading than is often believed.¹³ How was this innovation technically justified? One answer was that, by obtaining a deferment from the creditor, the defendant had confessed the prior indebtedness or had waived his objections concerning any imperfections in the declaration.¹⁴ A second answer was that such a claim was more like an action of debt than an action in case for an injury. In the latter, the plaintiff always had to explain exactly what the injury was, for his 'case' was virtually co-extensive with the actual damages he sustained. In the former, a court was not really concerned with such details: what it here needed to know was whether or not there was a legitimate indebtedness and its amount. However the courts did not as yet put the matter quite in this way. What they did say was that an 'executory consideration' was traversable, whereas an 'executed consideration' was not.

Two instances will suffice. In *Estrigge v. Owles*,¹⁵ the debtor's widow had taken out letters of administration but had then married the defendant. The latter promised to pay the dead husband's debt in consideration of the plaintiff's forbearance, but when later sued he

¹¹ *Anon.* (1584) Godb. 13, pl. 20.

¹² *Whorwood v. Gibbons* (1587) Gould. 48.

¹³ See, e.g. Lücke, *op. cit.*, 422; but cp. Baker, *op. cit.*, 215.

¹⁴ *Manwood v. Burston* (1587) 2 Leon. 203, 204-5.

¹⁵ (1588) 3 Leon. 200, (1589) 4 Leon. 3.

objected that he had not been requested to pay. The King's Bench held (on error) that no request was necessary, 'for the debt was before the promise, so the request is not any cause of action'. Had D's promise been 'to do a collateral thing upon request' (such as to deliver goods), the request would have been traversable, but it ceased to be traversable where the consideration was already executed. In *Smith v. Hitchcock*,¹⁶ D, being indebted to P, in consideration that P would forbear to sue for a while, promised to pay on the new date. He then wished to traverse with this important plea, that he had given P a bond for £200 which sum P had already recovered. P demurred that this traverse was not admissible, since it might relate to quite a different debt; hence the facts alleged in the traverse belong to the general issue, that is, they can be given in evidence to be left to the jury, but are facts which cannot stop the action. With this contention the court agreed, again on the ground that the consideration, being executed, was no longer traversable.¹⁷

This pleading simplification was bound to enlarge the scope of jury trial, just as it sharpened the distinction between questions of law remaining issuable in court and questions of fact or evidence to be decided by a jury. Yet however profound, the procedural innovation did not affect the legal basis of forbearance-assumpsit which was still meant to function as an independent form of liability, one admittedly bypassing debt but not, at least not candidly or directly, in conflict with it. The debt here, as Fenner said, 'is no cause of action but only the assumpsit'.¹⁸

THE INDEBITATUS COUNT

But something very strange had meanwhile been happening, something almost paradoxical. Although the indebitatus count was introduced to simplify pleading in a forbearance-assumpsit, it was soon extended to become a sort of separate cause of action, making it possible to sue on an executed contract in assumpsit rather than debt. How this came about is still not without mystery, but perhaps the essential stages were these.¹⁹ To begin with, the indebitatus count must have made

¹⁶ (1591) Cro. Eliz. 201, 1 Leon. 252.

¹⁷ See *Anon.* (1592) Cro. Eliz. 250, which makes the reverse point that an executory consideration is traversable, though in this case the claim was for services fully rendered so that the consideration was in fact executed rather than executory.

¹⁸ *Smith v. Hitchcock*, 1 Leon. 252, 253.

¹⁹ See also A.W.B. Simpson, 'Slade's Case in the History of Contract' (1958) 74 *L.Q.R.*, 371, 385ff.; and Lücke, *op. cit.*, 548ff., where the relevant case law is fully discussed. The present interpretation however differs considerably from theirs.

it very clear, the more 'common' it became, that the substance of the present assumpsit claim lay less in the forbearance than in the prior indebtedness. The forbearance was often more apparent than real since it was easily, almost too easily, satisfied: the creditor had to defer the debt but a short time for a forbearance to exist. On that basis it could well be said that what supported the subsequent promise was not the forbearance but the prior debt, and a debt which could therefore be regarded as 'a consideration in itself'.²⁰ Or, similarly, it could be said that there are three types of consideration upon which an assumpsit can rest, one being 'a debt precedent'.²¹ Indeed, going a step further, it could even be said that the subsequent promise was not really essential: hence if the plaintiff 'prove the debt, it is not material to prove the [subsequent] promise, for every contract executory implies a promise'.²² Obviously a seller would not extend credit by delivering goods unless the buyer had agreed or promised to pay the price. In this way indebitatus assumpsit could be, and was, used to enforce debt-like claims either without a significant forbearance²³ or, in the King's Bench, without a subsequent promise as well.²⁴ 'A common action upon the case', it was revealingly remarked, can be brought 'where a duty is due, . . . and it is in the nature of an action of debt'.²⁵

²⁰ *Anon.* (1584) Godb. 13 in the King's Bench; and similarly *Gill v. Harewood* (1587), 1 Leon. 61, in the Common Pleas.

²¹ *Manwood v. Burston* (1587) 2 Leon. 203, 204, the other two there being specified as (1) where a promisee is damnified by doing a thing or spends his labour at the instance of the promisor and (2) where there is 'a present consideration', this obviously referring to mutual promises.

²² *Estrigge v. Owles* (1588) 3 Leon. 200, 201; see also *Edwards v. Burre* (1573) Dal. 104, on which see further below.

²³ As in *Gill v. Harewood* (*supra*), where the objection that the deferment was only for *parvum tempus* was overruled.

²⁴ As apparently in *Edwards v. Burre* (*supra*) where it is already remarked that the 'debt est assumption en ley' and the new King's Bench 'custom' or practice is contrasted with that in the Common Pleas. Both Ames (*Lectures*, 146) and Plucknett (*Concise History*, 644-5) took this as evidence of a daring device by the King's Bench to capture new business at the expense of the Common Pleas, still too rigidly wedded to debt. This may be true, but overlooks the fact that the latter court had also been active in the development of forbearance-assumpsit, thus greatly contributing to the growing challenge to debt. Admittedly, the Common Pleas still insisted on the averment of a promise by the debtor in consideration of forbearance by the creditor. But this may only show that this court saw a greater technical difficulty in doing away with debt, which does not necessarily depend on any rivalry between courts.

²⁵ *Morris v. Kirke* (1587) Cro. Eliz. 73 where, as it happened, the indebitatus count was not allowed, but only because the debt was not yet due, being only due upon

Thus *indebitatus assumpsit* had gone a long way, but its position was still far from secure. The Common Pleas had kept alive the earlier principle that debt could not be displaced without a consideration of forbearance together with a subsequent promise to pay. What is more, several decisions by the new (statutory) Exchequer Chamber soon reaffirmed the continuing priority of the action of debt. In *Turges v. Beacher*,²⁶ for example, P declared that D, being indebted to him for the price of one hundred quarters of wheat, had subsequently promised to pay that price. Though the King's Bench was prepared to allow *assumpsit*, the (statutory) Exchequer Chamber was not: in their view only debt could apply, since in the absence of a subsequent promise supported by a 'collateral' consideration of forbearance, the declaration revealed no more than a debt.²⁷ This, to be sure, was not the end of the *indebitatus* count, for it was shortly to be revived and given a broader base. But to understand how that happened, we must first understand *Slade's Case*.

a request; hence a failure to allege the day and place of this request was a fatal deficiency because D's *assumpsit* depended on it. The same result was reached in *Devently v. Welbore* (1588) Cro. Eliz. 85, and *Osbaston v. Garton* (1588) Cro. Eliz. 91, though again only because of a lack of proper request. But cp. *De Bavoy v. Hassal* (1589) Cro. Eliz. 132, where it was held that 'this general form will serve', for 'the contention is not the cause of the action' but is only an 'inducement' or 'conveyance'.

²⁶(1595) Moo. K.B. 694. For this and following cases, see the additions from manuscripts reports in Baker, *op. cit.*, 223ff. For the statutory Exchequer Chamber, see Simpson, *op. cit.*, 389.

²⁷'Le matter provant un perfect sale and contract': *Maylard v. Kester* (1595) Moo. K.B. 711. See also *Paramour v. Paine* (1595) Moo. K.B. 979; *Wade v. Branche* (1596) 2 And. 53.

THE TURNING POINT

The great advances of assumpsit had not yet conquered the main citadel. The action of debt had been by-passed but not over-run, while assumpsit still appeared as an outsider dealing with new or marginal situations rather than offering a central contractual action or remedy. Indeed, not until assumpsit became a complete, instead of (as it had been hitherto) merely a partial or doubtful, alternative to debt, could the various strands of assumpsit combine and rationalise to form a more uniform basis for a more general contract law.

The old citadel, as everyone knows, was taken by *Slade's Case*,¹ rightly considered as of absolutely first significance. The facts are simple enough. Slade, the seller, brought assumpsit against Morley, the buyer. S had 'bargained and sold' a standing crop of wheat to M, who promised to pay the price of £16 at midsummer, but then did not pay. There is no indication that the seller later cut or delivered the wheat. Probably the wheat was to be cut or garnered by the buyer, at his convenience, though perhaps not before having paid. The words 'bargained and sold' clearly imply that a specific parcel of wheat was to be at the buyer's disposal, though it is not completely clear whether or not the property in the goods had actually passed. It seems as though the phrase 'bargain and sale' was used a little ambiguously, referring neither to an executed contract nor to an executory one, but rather to one hovering between the two. This ambiguity we shall have to mention again; for the present we are more concerned with certain broader aspects of the case. The buyer did not dispute his liability for the price:

¹ (1602) 4 Co. Rep. 91a; sub. nom. *Slade v. Morley*, Yelv. 21, Moo. K.B. 608, 667. And see also Baker, 'New Light on Slade's Case' [1971] *Camb. L.J.*, 51, 213, 224, which indeed sheds much new light.

what he did dispute was his liability in *assumpsit*. His crucial contention was that debt, not *assumpsit*, was the only action applicable.

On this point judgment went against him both in the King's Bench and (apparently) in the Exchequer Chamber, not the statutory court but the older informal one consisting of all the judges of the common law courts. Accordingly the seller recovered the price, but recovered it (according to the fourth resolution in Coke's reports) in damages, not as a debt-like amount due to him. This was a somewhat superficial difference, since the measure of recovery included, as well as the special loss occasioned by the buyer's breach, the whole price for the wheat, and since, furthermore, recovery in *assumpsit* now constituted a bar to any further action in debt.²

THE ARGUMENTS

How justified was the decision for Slade? Was it 'indefensible' as some historians have thought?³ We need not stress the familiar story of the rivalry between the courts: between the 'conservative' (pro-debt) position of the Common Pleas and the more 'progressive' (pro-*assumpsit*) line of the King's Bench. This rivalry certainly existed, just as it may also be true that it was at least partly inspired by a competition for fees. Still, rivalry does not adequately explain the impasse at which the law had arrived. For it is important to remember that the King's Bench, too, had acquired some jurisdiction in debt (through the bills of Middlesex) and that, above all, the Common Pleas had not entirely kept apart from the advance of *assumpsit*, including forbearance-*assumpsit*, thus making its own contribution to the decline of debt. Indeed for all its pro-debt bias, even the new Exchequer Chamber was prepared to displace the older action if (in its view) this was technically feasible at all: so it upheld *assumpsit* in lieu of debt where goods had been bought through an agent, on the pretext that debt could not apply as the property did not pass to the defendant, although in truth debt had long been held to lie against such a principal.⁴

We have then to consider the principal arguments if we are to assess the real strength of the case. Take first a contention advanced by Bacon,

² 4 Co. Rep. at 94b.

³ See, e.g., Plucknett, *Concise History*, 647; also Simpson, *op. cit.*, 393; Baker, *op. cit.*, 227, 235.

⁴ *Hinson v. Burridge* (1594) Moo. K. B. 701. For debt in agency, see Holdsworth, *H.E.L.*, iii, 472.

of counsel, on the buyer's side. Once the Register appoints debt as the proper action, he maintained, one cannot sue by another writ.⁵ But this was only true in a general way, nor did it really meet the present difficulty. For, surely, the Register could, at this point of development, no longer be taken as completely excluding other remedies even on the same facts. Indeed the real bone of contention was not so much the Register as the present application of assumpsit to provide an action determinable by a jury instead of wager of law. But for wager, it should be obvious, debt and assumpsit would never have remained so long starkly opposed, but would probably have earlier and easily merged.

This brings us to the specific arguments for and against wager of law. Coke remarked that it was better 'in these days' to try a case by jury, not by oath-helpers who are 'the occasion of much perjury'.⁶ It may be that he exaggerated the danger of perjury, just as one cannot deny that wager was an appropriate method of proof for the honest debtor, especially in relation to debts privately discharged without acquittance or witnesses.⁷ Even so, it cannot be any the less true that there were other, and more basic, disadvantages of wager which must have been fully recognised, in Coke's time as well as before; unless this can be assumed, the whole thrust of forbearance-assumpsit would make little or no sense. Also, the example of the debtor in jeopardy cuts both ways: for every honest debtor we have to presume an honest creditor waiting to be paid who deserved better than a brazen denial on oath. Contemporary lawyers, to be sure, had no illusions about the jury and its often erratic ways; but they probably did perceive that, as a method of proof, the jury possessed a rational potentiality which a sworn denial (aided by perfunctory oath-helpers) certainly did not have.

There is a yet larger argument in favour of the decision for Slade. Once assumpsit had gone as far as it had, now surrounding the action of debt on all sides,⁸ the specific area still occupied by debt was hardly worth preserving for the sole purpose of maintaining wager of law. Bacon valiantly attempted to distinguish assumpsit from debt by saying that the former was a 'contract mixed with collateral matter,' as

⁵ Baker, *op. cit.*, 63.

⁶ *Slade's Case*, *supra*, 94b.

⁷ See Baker, *op. cit.*, 228-30.

⁸ Not even to mention yet another, and more direct, alternative to debt, the so-called *concessit solvere*, employed in the courts of London, Bristol and the Great Sessions of Wales, on which see G.D.G. Hall, 'An Assize Book of the Seventeenth Century' (1963) 7 *Am. J. of Legal History*, 228, 236.

where payment was to be made at a special place or the contract was 'distracted and divided into several days'.⁹ But this was a distinction without a real difference for, if a jury could be entrusted with such 'collateral' contracts, including many involving complicated facts, why could it not be entrusted with a relatively straightforward claim, such as the claim for a price as in the present case, particularly since Bacon had also spoken of the 'great reason' there is that the issues tried by a jury should be upon 'plain and clear matter'.¹⁰

What was far worse, however, was the growing disarray among the various contract principles existing then. It was not just a matter of one line of contracts pursuing and expanding assumpsit while a residual group of debt-claims refused to follow the mainstream. It was also a matter of the many distinctions, both peculiar and wasteful, to which this bifurcation was giving rise. There were then powerful arguments of technique and overall simplicity in favour of removing the remaining exception relating to debt, an exception which in view of the total picture had, logically and practically, become almost absurd. Sooner or later no other solution was possible unless the courts were to continue with a very confusing mixture of old and new law. An awareness of this alone may explain why the Common Pleas, in spite of its long opposition, now acquiesced, apparently quite readily, in the present result.

TWO PROBLEMS OF PLEADING

In allowing and extending the action of assumpsit the decision brought forth some problems as to how the action was to be pleaded or framed. The declaration stated that 'in consideration' that the parties 'had then and there bargained and sold', the buyer assumed, and 'then and there faithfully promised', to pay the price for the goods.¹¹ In fact, and as the jury expressly found, there was no express subsequent promise but only the bargain and sale. The precise difficulty therefore was to identify some element in the situation indicative of a promise, for unless there was a promise the action of assumpsit would have nothing to attach to.

The first solution was simplicity itself. Every contract executory, says

⁹ Baker, *op. cit.*, 62. Bacon's instance of a 'distracted' contract was *Norwood v. Read* (1558) 1 Plowd. 180, the long term instalment contract we considered in chap. 4 above.

¹⁰ See Baker, *op. cit.*, 64.

¹¹ See Simpson, *op. cit.*, 386n.

the famous third resolution in Coke's report, 'imports in itself an assumpsit', for 'the mutual executory agreement of both parties imports in itself reciprocal actions upon the case'.¹² This was said to 'agree' with *Norwood v. Read*, an entirely apposite comparison since, as we explained in chapter 4, the transaction there amounted to an executory and consensual contract as did the present bargain. The one difference of course was that in *Norwood* the defendant had, while in *Slade* he had not, given an express promise, but this was insignificant, in view of the fact that the parties' agreement implicitly carried reciprocal promises, one promising to deliver, the other to pay.

It follows that the statement that an executory contract 'imports' or 'implies' an assumpsit did not give rise to an 'implied' or 'fictitious' contract; it simply meant that, where two parties make a contract to buy and sell, their agreement cannot but be that they give undertakings or promises to each other, whether or not they use those words. Coke put this very well: 'When the plaintiff said "You shall have my corn" and the other said "You shall have so much money for your corn", these are express promises. And these words *assumpsit*, *promisit* and *agreeavit* are all synonymous and of one signification. Would you have every plain man use the proper words "I assume" and "I take upon myself"? It is not necessary. If he said "I promise" or "I agree" it is as much and all one.'¹³ A bargain and sale, in short, like any other reciprocal bargain, could not arise without mutual promises, express or implied.

The second pleading problem was considerably more complex. The declaration, we saw, stated that, 'in consideration' that the parties 'there and then had bargained and sold', the buyer 'there and then promised' to pay. At first sight this wording looks peculiar in the extreme, but it was both daring and shrewd.¹⁴ Trying to cope with the absence of an express promise to pay (an absence the jury confirmed), the pleader apparently tried to combine the notion of an executory contract, adumbrated in *Norwood v. Read*, with that of an implied subsequent promise which *indebitatus assumpsit* had pioneered. The pleader, in other words, was now using the *indebitatus* count, not in

¹² 4 Co. Rep. at 94a-b. Or as this is put in another report: 'every contract executory implies an assumpsit to pay the money at the day agreed, or to pay immediately if no time is fixed': Moo. 667, 668.

¹³ For this passage, see Baker, *op. cit.*, 56n.

¹⁴ The peculiarities of this count have been much discussed. See, e.g., Lücke, *op. cit.*, 81ff.

order to plead 'generally' (for the declaration was specific enough), but rather to identify at least an implied promise to which assumpsit might attach. However, the pleader's difficulty was that he could not too openly copy an earlier indebitatus count so recently thrown out by the Exchequer Chamber.¹⁵ Fortunately he seemed to detect a possible loophole in the ambiguity of 'bargain and sale', for this term as pleaded on the present facts pointed to both executory and executed elements, so that the assumpsit might now pretend to be brought on an executory contract, not on an executed or purely debt-like claim. Perhaps this loophole could be filled by a hybrid count that was neither fully a count in assumpsit nor strictly an indebitatus one. It was a chance worth trying, though had the pleader known that the court would accept the present contract as an enforceable executory assumpsit, he could have saved himself the trouble of, so to speak, half-declaring on an indebitatus; he would have no longer needed a subsequent implied promise, as there already was available a more genuine (implied) promise arising from the bargain itself.

The fact remains that, since the action was for the price for goods sold, on what therefore might appear as an executed consideration, it could easily be taken as an action on an indebitatus count; moreover, as an indebitatus count that was no longer controversial but now accepted by all courts. 'An action on the case of an indebitatus assumpsit lies well', Yelverton remarked,¹⁶ 'for every debt implies a promise and is a good consideration *in facto* to found an action upon.' Whether this was the dominant view of the result of *Slade* is difficult to say. Coke's report stresses not the indebitatus but the executory aspect, while Moore denies that it was a true instance of an indebitatus count as it did not disclose a proper 'cause'.¹⁷ Nevertheless Yelverton's view must have been widely shared, as the effect, if perhaps not the actual intention, of the decision was certainly to vindicate indebitatus assump-

¹⁵ See, e.g., *Turges v. Beacher* (1595) Moo. K.B. 694, referred to in chap. 6 at note 26.

¹⁶ Yelv. 21.

¹⁷ '*Mais n'est issint d'un indebitatus assumpsit solvere quia la le cause n'appiert*': Moo. K.B. 667, 668, surely referring to the lack of a 'collateral' consideration such as forbearance. The suggestion in Lücke, *op. cit.*, 85, that Moore was objecting to the generality of the declaration is not easy to support: first because the plaintiff had in any case not declared generally but rather specially; and second, because this particular criticism against overdue generality began only later to prevent assumpsit being brought for a debt on a speciality: on which see further at notes 20-23 below.

sit once and for all. How else can one explain the enormous increase of the action in the early seventeenth century? And how else can one explain the particular origin of the indebitatus count for goods bargained and sold, which is not the same count, it will be remembered, as the one for goods sold and delivered. The later opinion which equated the origin of the indebitatus counts with the decision in *Slade* was admittedly not strictly correct; but as a broad generalisation it was very far from wrong.

INDEBITATUS AND CONSIDERATION

The revived indebitatus count led to a particular difficulty in relation to consideration and its own conceptual role. An indebitatus assumpsit, we saw in chapter 6, required that the defendant's subsequent promise be supported by a forbearance for, unless supported by such a 'collateral' consideration, the creditor could not have sued the debtor in assumpsit in lieu of debt. As we also saw, where a subsequent promise to pay was given 'in consideration of' a creditor's forbearance, this reference to 'consideration' was a way of legitimising the assumpsit by showing that the debtor's promise to pay was not given gratuitously but as part of a new and (to him) beneficial agreement under which his debt was deferred. The word 'consideration' thus referred to the reason or motive for the promise, thereby pointing to the synallagmatic connection between P's act and D's promise for, unless there was this 'consideration' or connection, the promise would not be grounded in a bargain but in a gift.

The whole point of *Slade's Case* was to dispense with this need for forbearance-assumpsit since indebitatus assumpsit was now made available for the recovery of any precedent debt. This also meant that the indebitatus count could have dispensed with any reference to consideration; the assumpsit now rested less on the subsequent promise than on the prior indebtedness, on an executed sale. Indeed the reference to consideration was now entirely misplaced. In particular, it was redundant to say that 'in consideration' that P 'sold' D some goods D 'promised' to pay, for there could be no sale to begin with without such a promise express or implied. Admittedly one could say that 'in consideration' of a previous sale, D later promised again to pay, but this only meant D repeated his earlier promise when requested, or when he remembered his debt. In this situation, therefore, the term 'consideration' did not explain the bargain context of D's promise, for no such explanation was in fact necessary; 'consideration' rather

gave a sort of chronological account of why D later promised again.

This twofold meaning of consideration was scarcely perceived, then or for that matter later. Indeed, given the wording of the indebitatus count (the basic formula of which hardly changed) it was not surprising that 'consideration' should come to be thought of as constituting a special kind of requirement for all assumpsits alike. An almost perfect illustration is *Hodge v. Vavisour*.¹⁸ The buyer promised to pay for goods a year after their delivery. Sued in indebitatus for the price, he objected that the consideration for this promise was past. The court rejected this objection, but nevertheless had some difficulty with it, a difficulty it tried to overcome by saying 'if a man owes another so much for certain goods, and he demands of him when he will pay for them, who assumes at such a time, and the other agreed to it, this is good; and the law will here imply a tacite consideration, by the law annexed to it'.¹⁹ But surely, no such implication was here necessary. The law did not have to imply a consideration, tacit or otherwise. As the original sale was a bargain (indeed was a bargain by definition since it could not be a gift), the buyer was anyhow liable in assumpsit, that is, on his (express or implied) promise to pay the price: the buyer, in short, was (in the court's own phrase) 'clogged with a debt continually'. Hence the objection about consideration was not only wrong, it was irrelevant.

It is true that this problem did not often arise, for the simple reason that in an indebitatus assumpsit for the price the seller (as we shall further see in chapter 9) could declare generally without having to rely on the buyer's subsequent promise to pay, even if such a promise were made. Nevertheless the idea that consideration was a special requirement which, on principle, must be shown even in sale has lingered on; it has remained part of the ideas of modern contract law.

THE WIDER SIGNIFICANCE OF SLADE'S CASE

Whatever the problems in, or as a result of, *Slade's Case*, nothing can deny its profound significance. Hitherto the action of assumpsit had worked in two separate ways. On the one hand, it had concerned itself with promises given as part of a sale or to procure or pay for certain services. On the other, assumpsit had served to circumvent the action

¹⁸ (1613) 3 Bulst. 222, 1 Rolle 413.

¹⁹ The court also said, apparently as an after-thought, that there was here a sufficient consideration of forbearance since the seller had waited for his price such a long time. The Rolle report correctly questions this on the ground that there was nothing to show that the creditor had actually undertaken to forbear.

of debt by way either of a forbearance-assumpsit or of an indebitatus assumpsit. What *Slade's Case* did was to eliminate this bifurcation. So, where before the difficulties caused by the rivalry with debt and its dethronement had left contract in a confusing state, after *Slade* assumpsit was set for a more uniform development, to become the general basis of simple contract law.

The triumph of assumpsit was complete except in one respect, namely, that debt remained the only action for claims on a specialty. This, of course, had been the rule before *Slade*,²⁰ and was carried forward even after it, by a number of cases beginning with *Green v. Harrington*.²¹ This is at first sight surprising, since claims on a specialty had always been outside wager of law; one might therefore have expected assumpsit to apply as an optional or elective alternative to debt. In *Green* the retention of debt was explained by saying that 'assumpsit is of less nature' than a debt 'due upon the obligation', while another case added that 'damages recovered in an assumpsit cannot be a bar to a debt upon a record or a specialty'.²² These remarks obscured more than they revealed, for there was a much simpler reason why debt here survived. Once the parties had agreed on a fixed payment in covenant, neither they nor the jury ought to go behind the document: the jury could not be allowed to replace the defendant's formal 'obligation' by its own discretionary estimate of the appropriate damages.²³

²⁰ *Reade v. Johnson* (1591) Cro. Eliz. 242 (C.P.); *Anon.* (1592) Moo. K.B. 340. In *Symcock v. Payn* (1600) Cro. Eliz. 786, an attempt was made to allow assumpsit by saying that the promise was not for a rent but a sum in gross, 'in consideration of the lease', but the attempt failed for it was 'but a mere debt, for which the action of debt lies', or as the headnote states: 'Assumpsit will not lie for rent, nor for a mere debt on a contract.'

²¹ (1619) Hutt. 34, 1 Brownl. 14; *Holme v. Lucas* (1625) Cro. Car. 6; and see further *Browne v. Hancocke* (1628) Het. 110; *Chawnor v. Bowes* (1613) Godb. 217; *Cooke v. Samburne* (1664) 1 Sid. 182; *Wise v. Wise* (1675) 2 Lev. 152. And see also *Rables v. Sikes* (1670) 2 Keb. 711, cited Selw. N.P. (6th ed., 1884), 70.

²² *Holme v. Lucas*, *supra*.

²³ This compensatory discretion of the jury left the impression that actions in assumpsit were, as Vaughan C.J. remarked, all *injuriarum*, not designed to recover a 'debt certain', but only damages which cannot be certain 'until a jury ascertain what the damage is', and 'though juries now give damages for money promised to be paid, yet that changeth not the reason of the law . . . , for still it is recovered by way of damage, and not as a debt is recovered': *Edgcomb v. Dee* (1670) Vaugh. 89, 101. This was not exactly true, for as Blackstone said more appropriately: 'originally all actions on the case were for torts, till the introduction of assumpsits on *mutatus* and other debts, in the time of Queen Elizabeth (*Slade's Case*): *Mast v. Goodson* (1772) 2 W. Bl. 848, 850; 3 Wils. K.B. 348.

What this shows is that, though assumpsit had made contract amenable to trial by jury and though the latter was superior to wager of law, the jury was not yet regarded as fully prepared for its new tasks because, as Holdsworth pointed out, the jury was still too independent a body and was often capable of deciding a case according to its own discretion or knowledge of the facts.²⁴ Gradually the judges obtained greater control through a firmer law of evidence; but this took considerable time. A more immediate palliative was the requirement of writing at least for contracts of longer duration or of some financial consequence. In this sense it is indeed true to say that *Slade's Case* directly led to the Statute of Frauds.²⁵

²⁴ *H.E.L.*, vi, 388.

²⁵ Plucknett, *Concise History*, 648.

Part III

The Settlement of Simple Contracts

THE EXECUTOR'S LIABILITY

The principal foundations of simple contract had been laid by the sixteenth century, even though the resulting picture would perhaps have been clearer but for the complicating struggle between assumpsit and debt. Nevertheless several things earlier begun still needed a great deal of attention, things such as the executor's liability, the position of the guarantor, how a simple claim was to be pleaded, how a contract was discharged or modified, and whether, or how, contractual rights could enure to third party beneficiaries.

We begin with the executor's liability, often treated as a somewhat marginal problem but in fact one of more central significance since on it depended the very duration of a contract, whether it would endure only for the lifetime of the contracting parties or could continue beyond it until their respective obligations were fulfilled. The early rule was that an executor incurred no liability for the debts of his testator where the latter could have waged his law. The executor was liable if the debt arose in a writing obligatory, as here wager was excluded.¹ He was also liable on a simple debt if he chose not to resort to wager, but pleaded some other plea, thus apparently opting for jury trial, for the court did not *ex officio* abate an action unless abatement was specifically pleaded.²

The latter qualification was perhaps something of a reminder that a conscientious executor would not avoid his liability; and if so, was not

¹ So in *Core's Case* (1536) 1 Dy. 20a, debt was held to lie against an administrator, the testator having given a bill acknowledging receipt. The bill was not in the form of a bond but was regarded as sufficiently 'obligatory' to oust the debtor from his law.

² *Fish v. Richardson* (1604) Yelv. 55, 56, sub. nom. *Fisher v. Richardson*, Cro. Jac. 47.

an executor to be liable *a fortiori* if sued in assumpsit where wager did not apply? In assumpsit, however, another difficulty existed, namely, that its delictual associations had put it within the maxim of *actio moritur cum persona*. In 1521, Fineux C.J. thought that this maxim, though certainly applying to physical injury, did not obtain in an action against the testator's assets, for these survived even if the wrongdoer did not.³ This view was angrily denounced by Fitzherbert,⁴ and in *Pecke v. Redman*⁵ the parties seemingly heeded the warning and expressly limited their (long term) contract to their joint lives.

But in *Norwood v. Read*,⁶ a fundamental change took place. There the seller promised deliveries on his own behalf and on that of his executors and assigns. The question (indeed the main question) was whether the executor would be liable for the seller's breach of contract. The executor demurred that it was not to the point to say that the action against him was in assumpsit rather than in debt, for the former was no less of a contract.⁷ However judgment went against him, on the ground not only that he had sufficient assets to pay all debts and legacies but that he was in the possession of money which he could not be allowed to retain for his own purposes instead of paying the damages due from the testator.⁸

The decision then proceeded on a surprisingly general principle, not so much of contract as of trust or accountability; a principle moreover wide enough to justify an executor's liability both in debt and damages. The fact remains that the decision could as yet only apply to the recovery of damages, since before *Slade's Case* the testator

³ *Anon.* (1521) Y.B. 12 Hen. VIII, fol. 11, pl. 3.

⁴ 'Mettez cest cas hors de vostre livres car il nest ley sans douter': (1536) Y.B. 35 Hen. VIII, 23, 21. But the action here was in debt, not assumpsit, the testator having left sufficient assets.

⁵ (1552) 2 Dy. 113a; and see chap. 4 above.

⁶ (1558) 1 Plowd. 180.

⁷ '[This] assumption was no other than a simple contract, and if the executors should be charged by such a contract, by the same reason they should be charged by every contract executory, as well for debt as for other things. For every contract executory is an assumpsit in itself, and it would be inconvenient to charge [the executors] as well as by contracts made by parol *in pais*, as by specialities, for of the former they cannot have knowledge': *ibid.*, at 182.

⁸ 'And to pay this is no way prejudicial, but charitable and beneficial for the soul of the testator, but to leave it unpaid is good to none but the executors, and they ought not to have benefit of it, for that was not the intent of the testator, and they are no more than ministers and distributors of the goods of the deceased, and by applying the benefit of his debts to themselves they are guilty of a breach of that trust which the deceased reposed in them': *ibid.*, 182.

himself was not yet amenable to assumpsit in respect of a debt-like claim. Nor could an executor be liable on his own promise to pay the testator's debt, unless that promise was supported by special consideration such as the creditor's forbearance for unless so supported, his promise would not be given as part of a new bargain between himself and the creditor. In *Trewinian v. Howell*,⁹ it is true, an executor was held liable on his promise to pay a posthumous debt when he found himself with sufficient assets. The King's Bench accepted the creditor's argument, which obviously echoed *Norwood v. Read*, that an executor is bound by his promise, being 'in duty to pay it', since his promise 'is good without any other consideration, if he has assets of the testator in his hands, otherwise not'. This result was at odds with the current views both of the Common Pleas and the (statutory) Exchequer Chamber, which courts as we have seen still opposed all evasion of debt by assumpsit. Not surprisingly, the Exchequer Chamber soon reaffirmed that the consideration for an executor's promise must rest on a 'collateral thing' and could not merely be 'found in a duty of a thing payable'.¹⁰

The law had thus landed in an antinomy. On the one hand, it clearly recognised the desirability of holding an executor contractually liable both because it saw that a fiduciary should not retain another's assets for his own purposes and because it perceived the incompleteness of a law of contract that cut off promissory liability at the promisor's death. On the other hand, existing doctrine so far only permitted the enforcement of bargain promises but not of mere promises to pay debts. Nor was the antinomy resolved by *Slade's Case*, for this only permitted assumpsit against a defendant whose indebtedness arose from a prior bargain. In short, it was still not determined whether assumpsit would lie against an executor, though after *Slade* the chances were that sooner or later it would.

Which brings us to *Pinchon's Case*.¹¹ An executor, sued on his

⁹ (1588) Cro. Eliz. 91.

¹⁰ *Hughes v. Robotham* (1593) Poph. 30, 32. Here the question was whether an executor would be liable for a debt for a surrender of land which the plaintiff had surrendered to the testator. The King's Bench held that he was, as this had become 'common course', but the Exchequer Chamber thought differently. The case also admirably illustrates the great confusion that had arisen on account of the inconsistency of saying that the 'consideration' for a promise could consist not just of something given in exchange but also of a fiduciary duty to pay. This inconsistency was also to cause trouble later on.

¹¹ (1612) 9 Co. Rep. 86b, Cro. Jac. 294, 2 Brownl. 137.

testator's promise to repay a debt, opposed assumpsit because this would violate the rules relating to debt and wager of law as well as because, being a personal action, the claim died with the debtor. Both arguments the Exchequer Chamber now over-ruled. The first it regarded as obsolete for, though the testator might have waged his law in debt, he could not wage it in an assumpsit; in any case, to exclude wager was not to deny anyone's 'birthright' but on the contrary 'justice and right is advanced, for as much as the creditor shall be paid his just and true debt'. As for the second plea, the court said that, though the action be termed trespass, assumpsit 'is no more personal' than 'a covenant by specialty to do the same thing'. The court did not even think it necessary that the plaintiff should aver the existence of sufficient assets, since the executor could plead any insufficiency of funds to discharge him. In other words, the court reaffirmed the executor's fiduciary duty to pay off the testator's creditors, even though the action against him now was assumpsit and thus classifiable as contractual.¹²

The one remaining question was whether assumpsit would also lie for other of the testator's liabilities. If, for example, a father promised money to a man if he should marry his daughter, was the promise enforceable after the father's death? Though at first the courts seemed hesitant,¹³ the survivability of the promise was soon affirmed without much difficulty.¹⁴ In *Fawcet v. Charter*¹⁵ it was finally resolved that there was no difference between the testator's promise to pay a fixed sum of money or his promise to do any other ('collateral') act. The broad fiduciary principle of *Norwood v. Read* had fully won through: the testator's liability in debt or damages 'survived' against his personal representative: the executor became liable in contract though liable *quâ* executor *de bonis testatoris*.

THE EXECUTOR'S FORBEARANCE-ASSUMPSIT

An executor was of course also liable if his promise to pay the creditor was supported by sufficient consideration, such as the creditor's forbearance to sue for a time. Indeed, as pointed out in *Estrigge v.*

¹² Coke C.J. 'willed the students to observe, that this is now adjudged by all the Judges and Barons of all the Courts': Cro. Jac. 294. For an earlier such rule, confined to the K.B., see *Cottingham v. Hullett* (1587) Cro. Eliz. 59.

¹³ See the unreported cases cited in Cro. Jac. 404, 405.

¹⁴ *Sanders v. Esterby* (1615) Cro. Jac. 417; *Berisford v. Woodroff* (1616) Cro. Jac. 404; *Clark v. Thomson* (1619) Cro. Jac. 571.

¹⁵ (1623) Cro. Jac. 662.

Owles,¹⁶ he now became liable to pay the debt out of his own goods and was thus liable in his personal, not representative, capacity, whether he had sufficient assets or not. For his promise to pay could be seen as an admission that he had sufficient assets, if not for all purposes at least for those of the particular creditor.

After *Slade's Case*, however, the latter rule changed. As the executor was now anyhow liable in a representative capacity, it was apparently thought that, unless the executor derived a purely personal benefit from the creditor's forbearance,¹⁷ he should always be liable *quâ* executor, that is, *de bonis testatoris* rather than *de bonis propriis*. Accordingly the newer rule was that the executor should not be liable without having sufficient assets, a sufficiency, moreover, which the plaintiff had to aver¹⁸ for, as was said, it is P's 'forbearance of suit and [D's] having of assets [which] are the causes of this action'.¹⁹ *Banes's Case*²⁰ qualified this by dispensing with the special averment, that is, by allowing the plaintiff to declare generally on the ground that the executor could be presumed to have sufficient assets in his hands, for this presumption he could easily rebut by showing in evidence his insufficiency of funds. This dispensation was designed as no more than a procedural simplification, for the court carefully pointed out that, should the executor not have sufficient assets, his promise to pay would be without consideration since the creditor would then merely forbear a debt with which the executor is 'not chargeable anyhow'. In short, a forbearance-assumpsit would only lie against an executor with assets, never against an executor without funds.

This pleading relaxation encouraged two further steps. As the plaintiff could declare generally, he could sue in *indebitatus assumpsit*, that is, sue the executor without showing how the testator's debt had accrued, for it was to be 'intended' that the testator was truly indebted as otherwise the executor would not have undertaken to pay the

¹⁶(1588) 3 Leon. 200, (1589) 4 Leon. 3.

¹⁷As, for example, in *Hatch and Capel's Case* (1613) Godb. 202, where a widow promised the plaintiff to pay her (deceased) husband's debt for beer, if she would continue to get further supplies. She paid neither for her husband's nor her own beer, and the Common Pleas agreed that assumpsit would lie, first because of the forbearance by the plaintiff (giving her time to pay the old debt) and secondly because of the distinct benefit to her in receiving new supplies.

¹⁸*Fisher v. Richardson* (1604) Cro. Jac. 47, which took this as already established by *Norwood v. Read*.

¹⁹*Bond v. Payne* (1611) Cro. Jac. 273.

²⁰(1612) 9 Co. Rep. 91a, 93b.

debt.²¹ From which it seemed but a small step to hold it unnecessary for the plaintiff to prove sufficient assets in the executor's hands either because having assets was immaterial, the executor being charged on his own promise,²² or because the executor's promise might even have 'caused the plaintiff to desist, who peradventure at that time was prepared to prove assets'.²³ Thus, by a curious twist, what had begun as a procedural simplification hardened into substantive rule: in forbearance-assumpsit an executor's lack of assets became altogether irrelevant since he was now charged personally or *de bonis propriis*.²⁴ The rule of *Banes's Case*, nominally still the same, had been completely overturned.

It is difficult to see why the law should have come to such a result, unless the reasoning was this: that, since an executor *with* assets was anyhow liable *de bonis testatoris*, whether he had made a special promise or not, his forbearance-assumpsit would have no separate effect unless he were chargeable in a personal as distinct from a representative capacity. Whatever the reason, this new version of forbearance was to create great difficulties. What was now the consideration on which the executor's promise was supposed to rest? If the executor had no assets, of what benefit was the forbearance to him? One case suggested that the benefit lay in the corresponding prejudice to the creditor: 'as if one says to such a schoolmaster, teach such a one, and I will give you so much for your pains; this is a good promise, and shall bind him, though he has no benefit at all by it'.²⁵ But surely this was not so: first, because the promisor did get the benefit of the schoolmaster's performance and, secondly, because the very nature of forbearance-assumpsit presumed *some* benefit to the executor; unless one could identify some benefit, albeit indirect or remote, there was no forbearance as the creditor had nothing to forbear.

Indeed in other, and very cognate, situations, the need for some benefit was constantly insisted upon. So, where the husband of an executrix promised after her death to pay the first husband's legacy in

²¹ *Davies v. Warner* (1613) Cro. Jac. 593; *Papworth v. Johnson* (1614) 2 Bulst. 91. The connection between the general declaration and the indebitatus counts is further considered in chap. 9.

²² *Bothe v. Crampton* (1615) Cro. Jac. 613; see also *Chapman v. Barnaby* (1614) 2 Bulst. 278.

²³ *Davis v. Wright* (1671) 1 Vent. 120, 121, sub. nom. *Davis v. Reyner*, 2 Lev. 3.

²⁴ *Hawes v. Smith* (1675) 2 Lev. 122; *Scot v. Stephenson* (1662) 1 Lev. 71; *Davis v. Reyner*, *supra*; *Porter v. Bille* (1673) 1 Freem. 125.

²⁵ *Chapman v. Barnaby*, *supra*, at 278-9.

consideration that the legatee would forbear to sue, his promise was regarded as unsupported by consideration since it was of no conceivable benefit to the promisor; not being, strictly speaking, an executor, even the admittedly sufficient assets in his hands gave him no more than 'bare custody'.²⁶ Again, an administrator's promise was held unenforceable if made before letters of administration were taken out.²⁷ Nor could a husband be sued on his promise to pay his wife's debt before coverture.²⁸ Nor could a widow be sued on her promise to pay her husband's debts if the creditor would forbear for a specified time for, as Lord Ellenborough said, 'what forbearance is shown? It must be forbearance of a right which may be enforced with effect.'²⁹

The fact remains that these cases all assumed that the executor was governed by a different rule, in that he, though only he, would be liable *de bonis propriis*, if he promised to pay for a forbearance from the promisee.³⁰ Apparently it was not seen, or if seen not remarked, that an executor without assets had nothing in respect of which he could be forborne. In one case, it is true, it was admitted that, if it 'appeared upon the declaration that there were no assets, the plaintiff by showing that would have destroyed his action'.³¹ But this was an admission of little practical consequence, for a plaintiff would rarely declare to his own disadvantage. The upshot is that a very curious form of 'forbearance' now furnished an equally curious 'consideration' for a promise by an executor.

THE CONFUSION OF PRINCIPLES

By the end of the seventeenth century the executor had become liable on two quite separate principles: one to the effect that a testator's promise or assumpsit would 'survive' against the executor, provided he had sufficient assets; another making the executor liable on his promise to pay in consideration of the creditor's 'forbearance',

²⁶ *Smith v. Jones* (1610) Yelv. 184, Cro. Jac. 257.

²⁷ *Rosyer v. Langdale* (1650) Sty. 248.

²⁸ *Robinson v. Hardy* (1662) 1 Keb. 281, 440; *Drue v. Thorne* (1672) Aleyn 72. In *Mitchinson v. Hewson* (1797) 7 T.R. 348 it was argued, though unsuccessfully, that the husband should still be liable either because of his equitable obligation to pay or because he himself might sue for a debt either alone or in conjunction with his wife.

²⁹ *Jones v. Ashburnham* (1804) 4 East 455, 463.

³⁰ *Reynolds v. Prosser* (1656) Hard. 71; *Russel v. Haddock* (1666) 1 Lev. 188, 1 Sid. 294; *Forth v. Stanton* (1669) 1 Wms. Saund. 210.

³¹ *Davis v. Wright* (1671) 1 Vent. 120, 121.

even if he did not have sufficient assets, since forbearance now operated against him as a virtually irrebuttable presumption.³² Indeed these two principles, if taken together, suggested yet a further potential liability. Could it not be said that, whether the executor promised to pay *quâ* executor or promised in consideration of forbearance, the presumption of sufficient assets should equally apply in either case, especially if the executor had made that promise in writing. And this either because a written promise could be regarded as a special promise or as a specially deliberate one, since it might, like a forbearance-assumpsit, have 'caused the plaintiff to desist who peradventure was prepared to prove assets'.³³ Or because the wording of the Statute of Frauds, referring as it did to an executor's (or administrator's) 'special promise to answer damages out of his own estate', implied that such a promise would be good provided it was in writing and signed by the party to be charged.³⁴

This was the very contention pressed in the famous case of *Rann v. Hughes*.³⁵ P declared that D, an administrator, had promised in writing to pay a debt of some £900 incurred by the intestate, who at the time of his death had sufficient assets to pay it. D pleaded that there were not sufficient assets, on which issue the verdict went for him. Thereupon P maintained that D was nonetheless liable to pay because his promise was a written one. Indeed this argument succeeded in the King's Bench, which held D liable *de bonis propriis*. But the decision was reversed by the Exchequer Chamber and the House of Lords. Their reason, stated by Skynner L.C.B., was very briefly this: that, given the lack of assets, the administrator's promise was not 'co-extensive with the consideration', nor was there any other consideration, such as forbearance, to support the administrator's promise in his personal capacity: 'if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient

³² At law, as Lord Hardwicke summed it up, 'if an executor promises to pay a debt of his testator, a consideration must be alleged; as of assets come to his hands, or of forbearance; or if admission of assets is implied by the promise: otherwise it will be but *nudum pactum*, and not personally binding upon the executor': *Reech v. Kennegal* (1748) 1 Ves. S. 123, 126. It will be observed that the sufficiency of assets and forbearance are stated as alternative requirements.

³³ *Davis v. Wright* (1671) 1 Vent. 120, 121.

³⁴ Statute of Frauds, 1677, s. 4.

³⁵ (1764) 7 T.R. 350n.

consideration for it'. More generally it was said (and this part of the judgment is the better known) that the writing did not alter the strength of the promise, there being 'no doctrine in English law which makes a *nudum pactum* enforceable only because it is in writing'.³⁶ Hence the Statute of Frauds, far from abolishing the necessity for consideration, was designed to give some additional protection to personal representatives: its 'words were merely negative'.

But while the decision certainly brought the law back to more classical principles as well as re-establishing the immunity of an executor without sufficient assets to pay debts, it did not come to grips with a more fundamental point implicit in the plaintiff's whole argument. The point was that, if it was granted that the executor was still liable *de bonis propriis* on a forbearance-assumpsit, he should be equally liable on the present facts. For, if the executor's promise to pay was to give rise to a duty to pay out of his own assets, such a promise was not in fact supported by consideration, whether he had some forbearance or not, because such a promise could be of no benefit to him. The decision was a little misleading in a wider respect as well. By insisting that an executor could not be contractually liable without consideration, it obscured an alternative basis of his liability based upon the fiduciary doctrine of *Norwood v. Read* and *Pinchon's Case*, under which a testator's promise would 'survive' against an executor with assets, irrespective of whether he had promised to pay or not. This obscurity was about to start some very peculiar arguments.

In *Atkins v. Hill*,³⁷ the executor having 'full sufficient assets' promised to pay a legacy, yet objected to the plaintiff's action on this promise on the ground that the declaration did not state the available assets with sufficient certainty and so did not reveal a sufficient consideration to support the executor's promise.³⁸ The answer to this should have been (putting aside a further objection that the common law had no jurisdiction in legacies) that the question of consideration was here irrelevant since an executor with assets was as liable for a legacy as he was for the testator's debts. However Lord Mansfield chose another approach. According to this, the executor, having by his demurrer admitted a

³⁶ Skynner L.C.B. strongly denounced the contrary views in *Pillans v. Van Mierop* (1765) 3 Burr. 1663, more fully considered below.

³⁷ (1775) 1 Cowp. 284.

³⁸ The executor, to be sure, did not altogether deny his possible liability in other, especially ecclesiastical, courts, but he did deny liability in contract at common law.

sufficiency of assets, his promise was made 'upon good and valuable consideration' and so was similar to the 'reasonable and conscientious consideration' supporting a promise by an infant, after his minority, to pay a juvenile debt. But clearly, this view meant that the executor was no longer liable *de bonis testatoris*, but was liable on his own promise alone; if so, what was the benefit or 'good and valuable consideration' upon which his personal promise was based?

This very question was to occupy *Hawkes v. Saunders*,³⁹ another action against an executor with sufficient assets who had also promised to pay a legacy. Here the action was directed against the executor in his personal rather than (as in *Atkins*) in his representative capacity. As there was again no forbearance (simply because a legatee, unlike a creditor, could hardly forbear to sue), what else could be the consideration for the executor's promise to pay? All that Lord Mansfield could suggest was that 'an immediate benefit' was not 'the only ground of consideration to raise an assumpsit', while to Buller J. the 'true rule' similarly seemed only that, 'wherever a defendant is under a moral obligation or is liable in conscience or equity to pay, that is a sufficient consideration'.⁴⁰ This was extraordinary, indeed self-contradictory, reasoning. On the one hand, the decision against the executor meant that he was charged strictly personally. On the other, the executor now charged personally was still not liable beyond his assets, since his 'moral' or 'equitable' duty lapsed if, or to the extent to which, sufficient assets did not exist.⁴¹ Above all, if the decision was to be taken literally, how did it square with *Rann v. Hughes*: where was the forbearance for the purely personal promise to pay?

Of course the decision is more simply explained. The executor's duty to pay did not rest so much on his promise as on his position of fiduciary or 'trustee'. His special promise could be regarded as an admission of assets⁴² but, this apart, the promise did no more than reiterate the executor's independent duty to discharge debts and legacies. It follows

³⁹ (1782) 1 Cowp. 289.

⁴⁰ Nevertheless the judge (*ibid.*, at 294) was also trying to reconcile the above result with a possible detriment-benefit: the loss to the plaintiff is his deprivation of the legacy, while the benefit to the defendant is that he continues to retain the assets. But this was a poor after-thought, for this retention was not the benefit for which the executor made the promise to pay.

⁴¹ See on this also *Pearson v. Henry* (1792) 5 T.R. 6, 7-8.

⁴² See *Barry v. Rush* (1787) 1 T.R. 691, and *Cleverly v. Brett* (1773) 5 T.R. 7, 8n. where Lord Mansfield remarked that such an admission would shift the onus of proving insufficiency to the executor.

that to describe the promise as standing (in Lord Mansfield's words) 'on the strongest consideration' was not to speak of consideration in any strict or classical sense but was a peculiar and rather inaccurate way of saying that an executor with sufficient assets had a duty to pay irrespective of any promise on his part.⁴³ This, to be sure, is not to suggest that the executor should not have been held liable to the legatee (the actual result was obviously desirable, given his sufficient assets to pay), nor even to suggest that the common law should not have tried to take jurisdiction in legacies (even if equitable or ecclesiastical courts were perhaps better suited to deal with such claims).⁴⁴ But it is to suggest that what was said about consideration in *Atkins* and *Hawkes* was very much *sui generis* as it arose entirely from the particular difficulty of making an executor answerable at common law as well as 'in contract' for the payment of legacies.

FORBEARANCE AND GUARANTEE

Just as an executor was personally liable to pay his testator's debts where he procured a special forbearance from the creditor (P), so a person (D) might become liable if he procured a forbearance for a debt due from another (X) by promising to pay that debt should X fail to pay after all. Such a promise would constitute a guarantee as it modified an existing liability from X to P, which was of course different from the more typical guarantee in which D caused or initiated P to make *new* advances to X.⁴⁵ In either case, it will be observed, D's promise to pay was not *directly* to his own advantage, but to that of the debtor; however D could still be seen as obtaining an *indirect* albeit not strictly personal benefit, namely, a benefit consisting of an act or performance for which he had asked and which P would not have given or promised but for D's inducement or request.

That assumpsit would lie against a guarantor seems to have been

⁴³This was shortly to be more clearly recognised: see *Powell v. Graham* (1817) Taunt. 580; *Dowse v. Coxe* (1825) 3 Bing. 20. However the substantial issues raised in these and similar cases relate more to the law of succession than contract law.

⁴⁴See, e.g. *Edgcomb v. Dee* (1670) Vaugh. 89, where the court had difficulty in determining whether the executor had sufficient assets where various debts competed for priority. See also *Deeks v. Strutt* (1794) 5 T.R. 690, where the King's Bench adverted to the many inconveniences for dealing with such cases at common law.

⁴⁵This latter guarantee had of course been pioneered by *Jordan's Case* (1528) Y.B. 19 Hen. VIII, Mich., fol. 24, pl. 3, on which see chap. 4 at note 29.

accepted as early as forbearance-assumpsit itself.⁴⁶ Nor were the relevant requirements different from those applying to other forbearances. Thus the plaintiff had to forbear an enforceable liability, not one that was unlawful or infirm.⁴⁷ Nor could the forbearance be for an 'indefinite' period, for this might be too short ('for a quarter of an hour, or other small time'),⁴⁸ since too short a forbearance would not be 'an ease to the vendee', and if the third party obtained no benefit, no benefit could enure to the guarantor himself.⁴⁹ But a forbearance for a 'time certain' would suffice, on the theory that a guarantor could not complain of time being too short if he had himself specified the length of the delay.⁵⁰ Further it was becoming accepted that a forbearance for a 'convenient' or 'reasonable' or 'a long time' or an undertaking to forbear 'generally' would be construed as an 'absolute' forbearance.⁵¹

Without this element of forbearance no new bargain could even be deemed to exist. It was not enough for D to say to P: 'X owes you £1000: I will pay you if and when he does not'. Such an undertaking might make the plaintiff wait longer, amount to a forbearance in fact, but this would not suffice: 'the fallacy [here] is in confounding a hope or expectation of forbearance with a consideration to forbear'.⁵² Without a forbearance, in other words, D's promise would merely be *nudum pactum*, based on a consideration already past. Even so, the courts were quick to detect an appropriate element of bargain wherever they

⁴⁶ *Rogers v. Snow* (1573) Dal. 94, where D undertook to discharge his brother's together with his own debts; *Pyers v. Turner* (1592) Cro. Eliz. 283, where a son, being indebted to P, asked his father to pay the debt for him, and the father then promised P to do so if P would give him, the father, further time. This promise the Exchequer Chamber thought unsupported by consideration, reversing the King's Bench. The King's Bench doctrine was however later confirmed, on the ground that 'it is sufficient consideration that the plaintiff at his [D's] request would forbear': *Harris v. Richards* (1632) Cro. Car. 272, 273. See further *Rolte v. Sharp* (1627) Cro. Car. 77; *Reynolds v. Prosser* (1656) Hard. 71.

⁴⁷ *Stone v. Wythipol* (1593) Cro. Eliz. 126; *Goodwin v. Willoughby* (1625) Poph. 177, 178, sub. nom. *Goodwin v. Willouby*, 3 Dy. 272a n.

⁴⁸ *Philips v. Sackford* (1595) Cro. Eliz. 455; and see also *Tolson v. Clerk* (1636) Cro. Car. 438; *Russel v. Haddock* (1666) 1 Sid. 294; J. Rowlatt, *The Law of Principal and Surety* (London 1926), 13ff.

⁴⁹ *Sherwood v. Woodward* (1599) Cro. Eliz. 700.

⁵⁰ Apparently so held in *Philips v. Sackford*, *supra*, but more definitely in *Best and Jolly's Case* (1661) 1 Sid. 38.

⁵¹ *Mapes v. Sidney* (1624) Cro. Jac. 683; *Cowlin v. Cook* (1625) Latch 151; *Johnson v. Whitchcott* (1639) 1 Rolle Abr. 24, pl. 33; *Tricket v. Mandlee* (1661) 1 Sid. 45; *Anon.* (1672) 1 Freem. K.B. 66.

⁵² *Crofts v. Beale* (1851) 11 C.B. 172, 175; and see *Bell v. Welch* (1850) 9 C.B. 154, 170.

could. So a mother's promise, 'out of piety', to pay her dead son's debt, in exchange for a specified forbearance, was held good because the creditor was 'tied not to sue any person whatsoever' for the period for which he had agreed to forbear.⁵³ Similarly a promise to pay 'out of fear' was upheld, the fear of seeing the arrest or misfortune of the principal debtor.⁵⁴

THE GUARANTOR'S 'COLLATERAL' LIABILITY

The fact that a forbearance had to be part of a 'collateral' bargain had a peculiar influence on the further development of the guarantee. The guarantor's liability began to be seen as 'collateral' in the sense of being secondary rather than primary. This feature received particular emphasis as a result of the interpretation put on a famous section (sec. 4) of the Statute of Frauds (1677), which required a memorandum in writing for a 'special promise to answer for the debt, default or miscarriage of another person', but was held not to apply to all promises, only to special or 'collateral' ones.⁵⁵ Accordingly a distinction was made between a 'collateral' promise, which arose where the guarantor only undertook conditionally ('if he does not pay you, I will'), and a 'non-collateral' promise where the undertaking was unconditional ('let him have the goods, I'll see you paid'). For in the latter case the promisor undertook 'as for himself', virtually substituting himself for the debtor and his liability thus turned into a primary one rather than remaining a conditional, 'ancillary' or 'secondary' liability now regarded as characteristic of a true guarantee.⁵⁶ For the purposes of the statute this distinction was very consistently, often very subtly, carried through, but that story does not concern us here.⁵⁷

What does concern us are some wider and more pervasive effects of the statute. One effect was to view the guarantor's liability as one for which the proper action was special assumpsit, to be declared on specially, not indebitatus assumpsit, to be declared on generally as

⁵³ *Hume v. Hinton* (1651) Sty. 304.

⁵⁴ *Quick v. Coppleton* (1665) 1 Lev. 161; *Hunt v. Swain* (1665) 1 Lev. 165.

⁵⁵ *Birkmyr v. Darnell* (1704) 1 Salk. 27, 2 Ld. Raym. 1085, Holt 606, 6 Mod. 248; *King v. Wilson* (1731) 2 Stra. 873; *Fish v. Hutchinson* (1759) 2 Wils. K.B. 94.

⁵⁶ *Mallett v. Bateman* (1865) L.R. 1 C.P. 163, *Mountstephen v. Lakeman* (1871) L.R. 7 Q.B. 196, 202.

⁵⁷ The story is fully told in *Smith's Leading Cases* (13th ed., London 1929), i, 331, 332ff. A particularly subtle distinction arose from the question whether D's promise to pay was to be absolute before or only after delivery: cf. *Jones v. Cooper* (1774) 1 Cowp. 227, *Anderson v. Hayman* (1789) 1 H. Bl. 120.

had been earlier allowed.⁵⁸ The reason for this given by Holt C.J. was that the amount owed by the principal debtor had to be kept separate from that owed by the guarantor, who is 'only collaterally bound, for the same money cannot be lent to two'.⁵⁹ Another effect, following from the first, was to require the promise and consideration to appear in the memorandum in writing, otherwise the special (written) agreement could not be declared upon.⁶⁰ Concomitantly the stated 'consideration' began to be carefully scrutinised for any possible lack of real forbearance by the creditor. Where, for example, the defendant 'acknowledged' a debt to avoid a claim against his own father, the arrangement was regarded as insufficient to support a forbearance on the other side.⁶¹ Moreover, with attention so much focused on what the creditor forbore, it was his 'detriment' that now determined whether or not there was sufficient consideration.⁶² This, as we saw in chapter 6, was not at all how forbearance had been treated in earlier law, where the whole emphasis had not been upon the detriment to the creditor but upon the actual benefit to the debtor or guarantor. Yet in the nineteenth century these guarantee-cases constituted some of the major decisions agitating the law of consideration; not surprisingly, it was therefore the promisee's 'detriment' rather than the promisor's 'benefit' that began to dominate the contractual scene.

PILLANS V. VAN MIEROP

Against this background it will be easier to assess the significance of *Pillans v. Van Mierop*,⁶³ a case perhaps more famous than understood.

⁵⁸ See *Rozer v. Rozer* (1680) 2 Vent. 36, and for the earlier cases *Therne v. Fuller* (1616) Cro. Car. 396; *Austin v. Bewley* (1619) Cro. Jac. 548; *Kent v. Derby* (1677) 1 Vent. 311.

⁵⁹ *Butcher v. Andrews* (1698) Carth. 446, 1 Salk. 23, Comb. 473, the court adding that if the court had been for money paid at the defendant's request the indebitatus would have been good.

⁶⁰ See *Wain v. Warlters* (1804) 5 East 10, also *Miles v. Sculthorpe* (1809) 2 Camp. 215, excluding parol evidence. And cp. *Holmes v. Mitchell* (1859) 7 C.B.N.S. 361, with *Oldershaw v. King* (1857) 2 H. & N. 399, 517, where parol evidence held admissible as the promise was only ambiguous.

⁶¹ *French v. French* (1841) 2 Man. & G. 644. Similarly *Westhead v. Sproson* (1861) 6 H. & N. 728; *Hoad v. Green* (1861) 7 H. & N. 494, both the more significant as they came after the Mercantile Law Amendment Act, 1856 (s. 3), under which the consideration no longer had to appear on the face of the guarantee. In *Crears v. Hunter* (1887) 19 Q.B.D. 341, which at first sight seems to contrary effect, the whole history of the transaction there shows that a request to forbear was easily implied.

⁶² See, e.g., *Haigh v. Brooks* (1839) 10 Ad. & E. 309.

⁶³ (1765) 3 Burr. 1663.

Broadly, the facts were that White desired to draw upon plaintiffs for £800 to be paid to Clifford. The plaintiffs were prepared to advance the money but wanted a confirmed credit upon a house of rank in London as the condition of accepting the bill. White named the defendants and offered credit on them, whereupon the plaintiffs honoured the draft. The latter then, but only then, wrote to the defendants, desiring to know whether they would accept such bills as they (the plaintiffs) might draw on them in a month's time upon the credit of White. The defendants said they would honour the bills. White later failed, but the defendants refused to pay. Their argument was that their own promise to pay was given on a past consideration, for the plaintiffs had already extended credit to White before the defendants agreed to honour the bills. On the other hand, the plaintiffs maintained that it was not a past but a sufficient consideration, for they had extended the money only after being referred to the defendants by White.

At the first trial the court (Lord Mansfield and Wilmot J.) thought that the action had nothing to do with a promise to pay the debt of another, i.e., it had nothing to do with guarantees, rather implying that, if it had, the guarantee would anyhow be unenforceable because given for a past consideration.⁶⁴ At the second hearing the point about past consideration was brought out more carefully. The defendants argued that until they heard from the plaintiffs nothing had passed between them and White or between them and the plaintiffs and that, moreover, when they heard from the plaintiffs, they were given the impression that they were to underwrite future, not already executed, liabilities. A promise to pay the past debt of another person, they said, is void 'for want of consideration', unless the plaintiffs had promised to forbear to sue White, which was not the case. To that specific argument the court had, in fact, no real answer to give. Lord Mansfield offered the opinion that consideration was for the want of evidence only, a want now supplied by writing and that in commercial transactions, the want of consideration was not an objection. Wilmot J. went further still: the whole question of *nudum pactum* seemed to him 'very curious' for, having traced the matter in 'the old authorities' (indeed in Vinnius, Grotius, Puffendorff as well as in Bracton and the old case of *Sharington v. Strotton*⁶⁵), he could not discover that 'a *nudum pactum* evidenced

⁶⁴ *Ibid.*, 1666.

⁶⁵ (1566) 1 Plowd. 298.

by writing has been ever holden bad'.⁶⁶

Though it would be difficult to find less tenable views in, or about, English contract history, the case permits one or two other interpretations not quite so much at variance with accepted principles. It might be said that the decision represents simply a special exception with regard to negotiable instruments.⁶⁷ Alternatively, and perhaps more elegantly, it might be said that, since 'the answer returned by the defendants [was] an admission of having effects of White's in their hands',⁶⁸ White had every right to assign the money and that, furthermore, the plaintiff's letter to the defendants could be taken as completing the assignment, as the latter were now charged with notice that White's assets were booked for the new assignees. Perhaps this is what Lord Mansfield meant by his somewhat cryptic statement that by their own acceptance, 'the defendants assent to the proposal made by White, and ratify it'.⁶⁹ It is of course true that such an informal assignment or transfer of a debt was not possible at common law. Yet it must be plain that, had such an assignment been possible (as it was to become possible in equity), the case would have found a much simpler solution, nor would it have given rise, then or later, to some of the extravagant pronouncements which it did.

So we come back to the broad principle, or set of principles, worked out through the centuries: that to become contractually liable, a guarantor's promise to pay must, like any other promise for a service, be supported by a consideration which might consist either of a creditor's forbearance to sue or of a guarantor's initiating or requesting a new advance to a principal debtor. Without such a consideration the guarantor would be simply promising a favour, not making a bargain or 'mutual agreement' with the creditor.⁷⁰ Indeed without such a bargain it would be difficult to find any legal justification as to why one should, out of one's own pocket, pay another's debt.

⁶⁶ To Wilmot 'many of the old cases' seemed 'strange and absurd', including *Hayes v. Warren* (1732) 2 Stra. 933, the more so since the old 'strictness has been relaxed' in that promises even on a past consideration (as for curing a son) have been held good.

⁶⁷ See especially the remarks of Yates J., *ibid.*, 1672-4; and J.M. Holden, *History of Negotiable Instruments in English Law* (London 1955), 135-6.

⁶⁸ *Ibid.*, 1675, per Aston J.

⁶⁹ *Ibid.*, at 1669.

⁷⁰ See *Westhead v. Sproson* (1861) 6 H. & N. 728, 731, per Pollock C.B.

9 The Indebitatus and Common Counts

INDEBITATUS AND THE SUBSEQUENT PROMISE

When *indebitatus assumpsit* first emerged in the sixteenth century, it was mainly a pleading simplification permitting the plaintiff to declare generally; it would not lie unless the defendant's promise was supported by 'collateral' consideration, such as promising to pay an existing debt after a temporary forbearance by the creditor.¹ An *indebitatus* count was also used, though at first with little success, for claims still booked for the action of debt. Only after *Slade's Case* did *indebitatus* apply freely to such claims, whether for goods bargained and sold, goods sold and delivered, for money lent, or for work and materials, claims which in due course came to be known as the *indebitatus* or common counts. Indeed the paradox was that, though *Slade's Case* virtually demolished the need for *indebitatus assumpsit*, it gave it a new lease of life.

Furthermore, *indebitatus assumpsit* preserved, at least formally, the old form of pleading. Its declaration began by stating the defendant's prior indebtedness and then averred his subsequent promise to pay; purely technically, there could be no action in *assumpsit* unless a distinct promise or *assumpsit* was laid. Even before *Slade's Case* there were signs that the subsequent promise was not always taken too strictly or seriously;² and still less so after *Slade*, which showed that promises could indeed be implied. Not 'implied', to be sure, to raise a fictitious contract but rather to give effect to the original bargain, it being accepted that an executed transaction concerning goods sold or money lent or work done would ground an actionable indebtedness.

¹ See on all this, chap. 6.

² See *ibid.*, notes 20-2.

It is in this sense that *indebitatus* was so characteristically and profoundly a contractual action: it did not lie on a mere 'duty' to pay without a 'contract express or implied'.³ As everyone knows, *indebitatus* was extended to various non-contractual situations so that it later did lie for the recovery of customary or statutory dues. But this was well enough understood to be an essentially procedural innovation, designed to facilitate recovery by what was now the most convenient money count at common law.⁴ It was, in any case, an entirely separate departure of no real relevance to evolving contract law.

The problem remains as to when or how the subsequent promise came to be implied or (to put the matter more precisely) how declarations without averring a subsequent promise became commonly acceptable, almost as a matter of course. Unfortunately this story is still very obscure. Even Lord Holt was apparently perplexed by the way it all happened: 'he was a bold man that first ventured on them [such declarations], though they are now every day's experience'.⁵ Still one may hazard at least a plausible guess. Perhaps the declarations, far from starting with one bold man or one bold case, arose as a concomitant result of two other developments: the spontaneous appearance or reappearance of a summary or 'general' style of *indebitatus* declaration omitting full particulars, as well as the growing importance of the jury now assessing the whole evidence before it, including the question of whether on the facts the defendant owed what was claimed of him, owed less, or owed nothing.⁶ Obviously the two events were closely related: the 'general' or 'common' counts presumed, as they encouraged,

³ *City of London v. Goree* (1676) 1 Vent. 298.

⁴ As early as *North's Case* (1588) 2 Leon. 179, Gawdy J. had urged the availability of *indebitatus* for the recovery of a fine, but the majority were against him either because *indebitatus* only applied to contract or because debt was the only proper remedy. The breakthrough did not come until *City of London v. Goree*, *supra*, after which *indebitatus* was accepted without much reluctance: see *Barber Surgeons v. Pelson* (1679) 2 Lev. 252 (by laws); *Shuttleworth v. Garnett* (1688) 3 Mod. 239 (fines); *Duppa v. Gerrard* (1689) 1 Show. K.B. 78 (customary dues). In *Arris v. Stukeley* (1677) 2 Mod. 260, *indebitatus* was similarly extended for the recovery of money tortiously procured.

⁵ As reported in *Hayes v. Warren* (1732) 2 Stra. 933.

⁶ *Beckwith v. Nott* (1617) Cro. Jac. 504, nicely illustrates the jury's wide discretion. P recovered damages for £4 for a like debt but one not yet fully due. To D's objection that P should have recovered less, the court replied that it was 'in the discretion of the jury' to allow the entire debt or only so much as had accrued so far. This discretion was to change in that P could not recover nor the jury allow more than the actual indebtedness: see, e.g., Buller's *Law of Nisi Prius* (London 1772), 126-7. But this does not affect the present argument.

the availability of trial by jury. Moreover, given a jury trial, there was no real need to prove more than indebtedness, for this alone proved the contract together with the applicability of assumpsit. As a result, it was superfluous to aver any subsequent promise, because the 'promise follows the debt', assuming the debt existed.⁷

The cases now hardly pay any attention to this promise. When they do ask whether a subsequent promise is to be implied, what they ask is whether the facts shown reveal an actionable indebtedness or perhaps conceal something (such as an illegality) to disqualify the original contract.⁸ Even in the rare situation where there is some question about a subsequent promise the circumstances are very special. In *Holms v. Tostwood*,⁹ for example, P suing for money D had borrowed, did lay a subsequent promise that D had promised to repay the debt when requested. D pleaded he had already repaid the money though, it turned out, only to an agent who was not authorised to receive it. The reason for averring the subsequent promise now becomes more apparent. For P it was a way of saying that, whatever D's story about the agent, D still owed him the money. For, as the court explained, in declaring *quod postea assumpsit*, 'it is to be intended that it was afterwards lent by the plaintiff; which is found by the verdict in finding *quod assumpsit*, for otherwise they may not find the promise according to the declaration'. It was a laboured way of saying that D could not plead repayment through an unauthorised agent or, alternatively, that there were possibly two debts, one still outstanding.

Indeed what the cases were normally concerned with is not the subsequent promise but the 'generality' of the declaration. Even a general declaration, not giving all particulars, still had to indicate that it did not conceal a cause of action arising from a claim upon a covenant or specialty, that is, a claim still reserved for debt, not assumpsit.¹⁰ Thus an *indebitatus* had to show 'for what cause the debt grew, viz. for rent, or by specialty, or by record: for if it is by any of those means, a general assumpsit will not lie', except that an *indebitatus* 'for divers wares sold, or for such-like contract' would be good enough not-

⁷ *Hayward v. Davenport* (1697) Comb. 426, where in an action for goods sold it was found that, since the defendant was truly indebted, the fact that he had not specially or subsequently promised to pay was unimportant.

⁸ As in *Hibbert v. Courthope* (1692) Carth. 276, Skin. 409, further considered later.

⁹ (1624) Cro. Jac. 690. But see another interpretation, Lücke, *op. cit.*, 92 and *passim*.

¹⁰ See on this chap. 7, at notes 20-2.

withstanding 'the generality thereof'.¹¹ Only if 'the debt was by reason of wares sold, or upon loan, or for such like cause', would it 'appear to the Court to be matter whereupon to ground an assumpsit', otherwise it would not.¹² The plaintiff, moreover, had to show that the time for repayment had arrived,¹³ or that the debt had not been discharged, 'for the consideration being taken away, the assumpsit falls'.¹⁴ In short, the plaintiff had always to set forth, however generally or briefly, the existence of facts constituting a contractual indebtedness.¹⁵

WORK AND LABOUR AND QUANTUM MERUIT

As a plaintiff could declare generally for goods sold or money lent, so he could generally declare for work and labour done. There were, in the earlier seventeenth century, no apparent instances of such indebitatus counts, but there is some indirect evidence that they were not unknown. When in 1669 a declaration *pro opere suo facto* was objected to as too general (as it might include 'any neighbourly kindness'), the court replied that this was no different from *pro labore suo*, which was commonly upheld.¹⁶ If any doubts persisted, they did not last long. In *Hibbert v. Courthope*,¹⁷ where D again objected to a general count on the ground that the services rendered might have been unlawful ('for which the law will not imply a promise'), the objection similarly failed. The only reason for insisting on particulars, said the court, is to make sure that it is not a debt on a specialty but a debt on

¹¹ *Woodford v. Deacon* (1608) Cro. Jac. 206.

¹² *Buckingham v. Costendine* (1608) Cro. Jac. 214; and see also *Case of the Court of Marshalsea* (1612) 10 Co. Rep. 68b, 77a; *Gardiner v. Bellingham* (1614) Hob. 5, sub. nom. *Bellinger v. Gardiner* (1614) 1 Rolle 24; *Barker v. Barker* (1621) Pal. 171

¹³ *Rooke v. Rooke* (1610) Cro. Jac. 245, Yelv. 175.

¹⁴ *Holms v. Tostwood* (1624) Cro. Jac. 690.

¹⁵ See also *Potter v. James* (1692) 12 Mod. 16, 1 Show. K.B. 347, Comb. 187; *Reading Corporation v. Clarke* (1821) 4 B. & Ad. 268. The indebitatus was confined to the actual parties creating the indebtedness. In *Marriott v. Lister* (1762) 2 Wils. K.B. 141, a count for money lent was denied because 'lent is a technical term, and no man can be indebted to another for money lent, unless the money be actually lent to that person himself'. But cp. *Harris v. Huntbach* (1757) 1 Burr. 373, where indebitatus did obtain, there being a direct, not a collateral liability. On an indebitatus the defendant could under the general issue plead lack of memorandum: *Buttemere v. Hayes* (1839) 5 M. & W. 456, which also discusses the effects of the new pleading rules; yet one could not raise lack of memorandum in an indebitatus for goods sold and delivered: see *Leaf v. Tuton* (1842) 10 M. & W. 393.

¹⁶ *Russell v. Collins* (1669) 1 Sid. 425, 1 Vent. 44. An earlier instance perhaps pointing in the same direction is *Franklin v. Bradell* (1626) Hutt. 84.

¹⁷ (1692) Carth. 276, Skin. 409.

a simple contract.

In many situations of course a plaintiff declared specially, setting out all the particulars of a contract as well as his performance under it. This he would do where, for example, he had agreed to do specified work at a specified price but had not performed completely, or only with interruptions and so on.¹⁸ Here the question would be whether, as Saunders put it, he might still be entitled to 'a proportionate recompense for so much as he can prove', provided the work was 'in its nature separate and divisible'.¹⁹ If, however, the plaintiff could prove at trial that he had in fact fully performed, this again raised 'a duty' for which a 'general indebitatus' would lie.²⁰ And if, as often happened, the work was undertaken at no specified price, the plaintiff could turn to another count in assumpsit becoming known as the *quantum meruit*, a claim not for a fixed but for a reasonable amount: what the work merited or was worth.

The latter count in fact dates from before *Slade's Case*, resting on a special promise or assumpsit which did not compete with the action of debt since, unlike debt, it did not lie for a fixed or liquidated remuneration. In *De Bavoy v. Hassal*,²¹ P declared that, in consideration of D's retaining him to go from London to Paris on D's business, D had promised him 'to give so much as would content him' and that he was content to take £25 for his services. Significantly, D did not object to the action as such, but rather that the declaration was too general, as it did not specify when and where P gave notice of his 'contentment'. The court regarded 'this general form' as sufficient, for 'the contention is not the cause of the action' but is only the 'inducement' of it. In the seventeenth century these actions were carried forward on a massive scale. So assumpsit was upheld where a carrier was promised to pay 'rationabiliter for the carriage',²² or a 'professor of physick and surgery' was promised *tantum quantum mereret*,²³ or someone was to get a

¹⁸ See, for example, *Osborne v. Rogers* (1667) 1 Wms. Saund. 267.

¹⁹ 1 Wms. Saund. 269, note 2. And see also *Peeters v. Opie* (1671) 2 Wms. Saund. 350, further considered in chap. 12.

²⁰ *Gordon v. Martin* (1731) Fitz-G. 302; *Poulter v. Killingbeck* (1799) 1 B. & P. 397; *Leeds v. Burrows* (1810) 12 East 7.

²¹ (1589) Cro. Eliz. 132.

²² *Rogers v. Head* (1610) Cro. Jac. 262.

²³ *Shepherd v. Edwards* (1616) Cro. Jac. 370. Similarly *Hall v. Hemmings* (1616) 3 Bulst. 85 and *Ive v. Chester* (1620) Cro. Jac. 560, where the principle was accepted though the action failed for other reasons: in *Hall* because of non-compliance with a condition precedent, in *Ive* because defendant was an infant.

reasonable sum for procuring a lease.²⁴ To claim on a *quantum meruit* was soon regarded as 'the common course'²⁵ while, concomitantly, it was accepted that the plaintiff need only declare generally, without specifically stating the day and place where the services were performed,²⁶ how many boats were repaired,²⁷ what board and lodging provided, whether the 'entertainment' was at the defendant's own request,²⁸ or all the particulars concerning 'divers clothes' or 'every point or ribband annexed to them' for, since the services were requested, the defendant must know what he was getting as well as the plaintiff did.²⁹

It will be noticed that *quantum meruit* started out as a species of express assumpsit upon a promise to pay a reasonable amount and that, moreover, its early history was quite separate from that of the indebitatus count. After *Slade's Case* the difference was easily blurred. Not only did *quantum meruit* adopt the general declaration indebitatus had pioneered, but the two counts were often declared together, some cases even adopting a sort of hybrid style.³⁰ But though closely connected, the two counts never merged. For one thing, it was never forgotten that *quantum meruit* was a claim for a reasonable but unliquidated reward, not upon a fixed indebtedness.³¹ For another, it became the practice to declare on an indebitatus and a *quantum meruit* in the alternative. The advantage of this was that, if P failed (as where a contract had to be in writing but was not) to prove an express price

²⁴ *Hall v. Walland* (1621) Cro. Jac. 618, 619, the court pointing out that, should the plaintiff demand too much, the jury will 'abridge' the claim at its discretion.

²⁵ *Rolte v. Sharp* (1627) Cro. Car. 77; *Canwey v. Aldwyn* (1639) Cro. Car. 573. Occasionally old objections are raised, only to be quickly over-ruled: see *Nicholls v. Moore* (1611) 1 Sid. 36.

²⁶ *Hall v. Walland*, *supra*; *Waring v. Perkins* (1621) Cro. Jac. 626; *Hayward v. Davenport* (1697) Comb. 426.

²⁷ *Canwey v. Aldwyn*, *supra*.

²⁸ *Jermy v. Jenny* (1661) T. Raym. 8, 10.

²⁹ *Tate v. Lewen* (1672) 2 Wms. Saund. 373, 374, sub. nom. *Date v. Lewin*, 2 Keb. 810.

³⁰ See *King v. Locke* (1663) 1 Keb. 422, which speaks of 'an indebitatus for wares to pay quantum meruit'. In *Boult v. Harris* (1676) 3 Keb. 469, the court apparently recognises a *quantum valebat* as distinct from a *quantum meruit*.

³¹ Accordingly payment into court was not allowed except in respect of liquidated claims, i.e. amounts capable of being ascertained by mere computation rather than by the discretion of judge and jury: see *Pawlett v. Heatfield* (1696) 12 Mod. 95; *Smith v. Johnson* (1698) 12 Mod. 187; *Hallett v. East India Coy* (1761) 2 Burr. 1120. This rather exaggerated the difference between liquidated and unliquidated claims. Under the modern rule money can of course be paid into court even if the claim is unliquidated: see W. Blake Odgers, *Principles of Pleading* (3rd ed., London 1897), 209.

agreed, he could still recover the reasonable value of work done.³² Or, if the defendant objected that the plaintiff had not fully performed, the plaintiff might still claim for reasonable recompense for work actually done at least where strict performance was not expressly conditional. The best example of this occurred in the building contract, where a builder could recover for his work, subject to any deficiency for which the owner could counter-claim in the same action.³³

FORBEARANCE-ASSUMPSIT AND ACCOUNT STATED

Although *Slade's Case* made forbearance-assumpsit redundant for ordinary debt (the creditor now being able to sue in indebitatus assumpsit whether or not he had deferred the debt), yet as regards debts owed by a third party or arising on a specialty, forbearance continued in a very active role. This simply because, as we saw in chapter 8, a creditor could not bring assumpsit against a guarantor or executor (in his personal capacity) without showing a forbearance on his side, while a collateral forbearance was also necessary to sue a specialty debtor in assumpsit, since otherwise the action against him was debt.³⁴ In all these forbearance-assumpsits, moreover, a defendant's subsequent promise could never be 'implied', for unless the creditor did aver that the executor (say) had subsequently promised, the plaintiff could not make out a case since without a promise there was nothing upon which liability of a guarantor could depend. In this respect forbearance-assumpsit remained very different from other indebitatus counts such as those for goods sold or work done.

Even so, a forbearance-assumpsit could be declared upon still more generally than other indebitatus claims. Whereas an ordinary indebitatus had to show how the original debt 'did grow due', not so an indebitatus assumpsit based on forbearance, 'for the taking of a day certain to pay the same, this proves the verity and certainty of the duty'.³⁵ Accordingly an executor's objection that the declaration

³² '[If] you fail in the proof of an express price agreed, you will recover the value': Thomas Wood, *Institutes of the Laws of England* (London 1722), book 4, chap. 4, sub. tit. 'Assumpsit'; Buller's *Law of Nisi Prius* (London 1772), 136-7. And see Fifoot, *History*, 362, 378.

³³ *Basten v. Butter* (1806) 7 East 479, on which see also chap. 13, at note 13.

³⁴ See, e.g., *Ashbrooke v. Snape* (1591) Cro. Eliz. 240; *Brett v. Read* (1634) W. Jones 329. Forbearance also remained very relevant for purposes of discharging liabilities already accrued; but this is a separate matter more fully discussed in chap. 10.

³⁵ *Dean v. Newby* (1611) 1 Bulst. 153.

did not state how the testator's indebtedness arose was dismissed on the ground that liability rested not so much on the testator's debt as on the 'collateral promise made by the executor'.³⁶ Indeed, as other cases shortly explain, the real 'consideration' now is the forbearance itself, such as the staying of a suit after an arrest,³⁷ because a special promise in consideration of forbearance raises the 'strong presumption' that there was a debt, for it must be 'intended' that the testator was indebted, as 'otherwise he [the executor] would not assume'.³⁸

Forbearance added another instance to the family of indebitatus counts, namely, the action of account stated which, despite its name, had a closer connection with forbearance-assumpsit than with the action of account. Where the latter action, very broadly, was designed to compel a person (bailiff, agent or receiver) to render an account, in account stated the parties came together to state or settle their 'cross demands', after which one of them promised to pay the remaining difference.³⁹ This promise was supported by a new consideration consisting of the other party's assumed forbearance to sue for any other (larger) amount. In short, it was forbearance, not any duty to account, which explains how account stated became a separate action. But it was forbearance of a slightly different sort. A few older cases show why.

In *Whorwood v. Gibbons*,⁴⁰ where D promised to pay a deficit found upon an account stated and which P deferred for but a short time (*per parvum tempus*), the court rejected D's objection that his promise lacked consideration. Though a forbearance for too short a time did not normally support a debtor's promise to pay,⁴¹ the restriction did not here apply, since the forbearance in question was of a (possibly) larger debt and not just a deferment for a time. After *Slade's Case* it

³⁶ *Papworth v. Johnson* (1614) 2 Bulst. 91.

³⁷ *Therne v. Fuller* (1616) Cro. Car. 396, where the defendant promised a creditor to pay both debt and costs in consideration of his desisting from the arrest of the defendant's brother. See similarly *Austin v. Bewley* (1619) Cro. Jac. 548.

³⁸ *Davies v. Warner* (1613) Cro. Jac. 593; *Goodwin v. Willoughby* (1650) Palm. 441, 442, 3 Dy. 272, pl. 32. And see further *Wollaston v. Webb* (1611) Hob. 18; *Tyrwhite v. Kynaston* (1608) Noy. 146; *Limbey v. Hemmurse* (1610) 1 Bulst. 67; *Barker v. Barker* (1621) Pal. 171; *Mayor v. Harre* (1622) Cro. Jac. 642; and compare also *Townsend v. Hunt* (1635) Cro. Car. 408; *Smith v. Smith* (1670) 1 Mod. 284.

³⁹ For its earlier history and its antecedents in local courts, see S.F.C. Milsom, 'Account Stated in the Action of Debt' (1966) 82 *L.Q.R.*, 534.

⁴⁰ (1587) Gould. 48, probably the earliest (reported) case.

⁴¹ See chap. 6.

was no longer necessary to identify a special consideration once a prior indebtedness was shown; the only question was whether an outstanding debt had been found on the mutual accounting as merely agreeing on a balance now sufficed.⁴² But account stated was to be challenged once again. Since (so a very subtle argument ran) the defendant, who is already a debtor, here promises to pay on a future day, his promise thus comes after the contract and so, being past, has no consideration to support it.⁴³ The court's answer was that the debtor's promise was given at the same instant as the arrears were found, quite apart from the fact that, under *Slade's Case*, every executory debt includes an *assumpsit*.⁴⁴ Last but not least, account stated could be declared on generally, that is, without showing how the earlier debt arose, for just those particulars are '*in pede compoti* reduced to a sum certain', and in any case 'the law avoids prolixity of the declaration, which would be infinite, if all petit debts were named'.⁴⁵

Account stated was nevertheless bound to remain somewhat rare, because most contractual claims were not preceded by prior accounting. Later it did acquire greater notoriety when resorted to for other purposes. It was used as a way of qualifying the rule in *Pinnel's Case*, since account stated might be regarded as a compromise rather than as the discharge of a larger by a smaller debt.⁴⁶ Then it was employed to enable the recovery of a number of money claims, such as claims between partners, or against executors and trustees,⁴⁷ or more interestingly where a contract was unenforceable because of technical impediments, such as lack of writing or expiration of the period of limitation.⁴⁸ But here the basis of the action was never made very clear. According to one suggestion, the defendant in effect admitted his liability solely by relying on a purely technical impediment; which however begged

⁴² *Egles v. Vale* (1606) Cro. Jac. 69. See also *Dalby v. Cooke* (1609) Cro. Jac. 234, where it is again held that the accounting is the ground of the promise and therefore traversable.

⁴³ *Janson v. Colomore* (1616) 1 Rolle 396, sub. nom. *Colomore v. Jenson*, Moo. K.B. 854.

⁴⁴ See also *Benson v. Sankeridge* (1628) Het. 84; *Bard v. Bard* (1620) Cro. Jac. 602. In *Hawes v. Smith* (1675) 2 Lev. 122, it was said that a 'bare account' will not oblige an executor to pay *de bonis propriis*, unless forbearance for his promise is shown. This was the only exception.

⁴⁵ *Homes v. Savill* (1628) Cro. Car. 116, sub. nom. *Holmes v. Chenie*, Het. 106, 113.

⁴⁶ See on this chap. 10, at notes 35-9.

⁴⁷ *Foster v. Allanson* (1788) 2 T.R. 479; *Hart v. Minors* (1834) 2 Cr. & M. 700.

⁴⁸ *Seago v. Deane* (1828) 4 Bing. 459; *Cocking v. Ward* (1845) 1 C.B. 858; *Laycock v. Pickles* (1863) 4 B. & S. 497.

the question which was precisely whether the liability, even when admitted, would or should be enforceable. According to another view, the 'acknowledgement' was merely evidence of a debt, for the accounting is but a 'transaction between the parties, out of which a new consideration arises for the promise to pay the balance'.⁴⁹ This was true but hardly relevant, since the question was still whether one could strike a balance of claims which were statute-barred.

However, account stated did important and even desirable work, functioning as a sort of unofficial gloss on over-wide statutory requirements that obstructed otherwise meritorious claims. How meritorious can be seen from the fact that account stated lay only on executed, not executory, claims, and not on claims where the consideration had failed, nor on illegal claims;⁵⁰ in short, all claims where the defendant had already been supplied with satisfactory goods or services, and refused to pay on purely technical grounds. Not surprisingly, account stated became a popular pleading device: it was an elementary precaution to add account stated, to the other money counts, to pick up claims that might otherwise founder on an unworthy obstacle.

MONEY PAID AND MONEY HAD AND RECEIVED

Our two remaining counts, money paid and money had and received, raise partly related but also very different points. Money paid was an indebitatus to recover money laid out on the defendant's behalf and at his instigation or request. After *Jordan's Case*,⁵¹ there was no question but that a defendant was liable to pay (or rather reimburse) a plaintiff for money so spent, since the latter had suffered an injury by expending the money in reliance on the former's promise to pay. Only after *Slade's Case* did it become clear that there too an indebitatus count would lie, in that, it was conceded, a plaintiff could plead generally and 'needed not to shew every particular', notwithstanding the objection that in so pleading he would not show on what items the money had been spent.⁵²

⁴⁹ *Ashby v. James* (1843) 11 M. & W. 542, 544; and *Laycock v. Pickles*, *supra*, 507.

⁵⁰ See, e.g., *Falmouth v. Thomas* (1832) 1 Cr. & M. 89; *Hopkins v. Logan* (1839) 5 M. & W. 241; *Wilson v. Wilson* (1854) 14 C.B. 616; *Kennedy v. Broun* (1863) 13 C.B. (N.S.) 672, 690, where these claims are described as 'imperfect obligations'.

⁵¹ (1528) Y.B. Hen. VIII, fol. 24, and see chap. 4 above.

⁵² *Rooke v. Rooke* (1610) Cro. Jac. 245, Yelv. 175. The court did uphold D's objection that his time for repayment had not yet come, which the court held to be a 'material exception', for, as the Yelverton report points out, 'as the defendant is bound by his promise, so likewise is the plaintiff bound to shew the precise consideration agreed, or of his part also to be performed'.

What however had to be shown was that the plaintiff had laid out the money entirely at D's request and for his use; not that P had to show how the money actually enured to D's 'use' or benefit. For, to give Yelverton's example, 'if I do request one to buy such a gelding for me, and I do promise that I will repay him for this, the other has an assumpsit for this promise', even if the thing goes not to the defendant but to another person or place as the defendant requests.⁵³ Or, to take another example, suppose that P and D are joint debtors and that P repays D's moiety at the latter's request: here D could not object that there was no consideration for his promise to repay, because P was already bound, *quâ* surety, to pay the whole amount to the obligee. 'I have never seen it otherwise,' said Coke C.J., 'but when one draws money from another, that this should be a good consideration to raise a promise.'⁵⁴ The promise to repay thus was enforceable because there was sufficient consideration or benefit to the promisor, thus betokening a synallagmatic relationship which made the transaction contractual. Nor was it any the less contractual where the defendant had not made an express promise to pay, since a promise was easily impliable from his request to have money laid out for his own purposes. For a long time, indeed, money paid did not lie unless the plaintiff could point to an initial request by the defendant.⁵⁵ Not before *Exall v. Partridge*⁵⁶ was money paid extended to situations where P expended money without any request but under some compulsion, though still for D's use. This started a new (quasi-contractual) chapter of money paid which however does not now concern us.

To turn to the obverse case of D receiving money from a third person to give to P. That D was bound to hand over the money to P was long recognised, since both account and debt would lie, indeed whether or not D had promised to hand over the money to P.⁵⁷ In the

⁵³ *Moore v. Moore* (1611) 1 Bulst. 169.

⁵⁴ *Bagge v. Slade* (1616) 3 Bulst. 162, 1 Rolle 354.

⁵⁵ In *Payne v. Bacomb* (1781) 2 Doug. 651, Lord Mansfield was still against non-suiting the plaintiff, preferring to allow him to go into evidence, even where no request was shown; but the circumstances were peculiar, P and D having jointly incurred expenses in a common suit. In less favourable circumstances the cases continued to insist on D's actual authority to pay: *Child v. Morley* (1800) 8 T.R. 610, sometimes rigidly so: *Lightfoot v. Creed* (1818) 8 Taunt. 268; *Spencer v. Parry* (1835) 3 Ad. & E. 331.

⁵⁶ (1799) 8 T.R. 308; and see Stoljar, *The Law of Quasi-Contract* (Sydney 1964), 128ff.

⁵⁷ See *Doige's Case* (1442) Y.B. 20 Hen. VI, Trin., fol. 34, pl. 4.

Case of Barley,⁵⁸ it was further admitted that the action on the case would obtain, on the more general ground that D could not 'convert' the money to his own use. Did this mean that assumpsit would lie as well? The question was fully argued in the *Beckingham Case*.⁵⁹ P's declaration was: '*quod cum le defendant fuit indebitatus pro diversis summis receive per les mains de divers persons, al use le plaintiff, il assume de payer ceo al plaintiff tiel jour*'.⁶⁰ The defendant had three objections to this. First that assumpsit would not lie because even debt did not, but only account, to which the court correctly replied that P had an election between account and debt. Second, that P was a 'stranger' to the promise, a point which the court first tended to accept, but then changed its mind, being persuaded by the argument that, if D was liable in debt for the money received by him, that was good enough to let in assumpsit simply because assumpsit had now superseded debt. Finally D objected, no more successfully, that the declaration was too general as it did not show from whom the money was received, to which the answer was that this was an 'executed consideration and thus non-traversable', though of course P would have to show in evidence from whom it was that D had received money for him.

It will quickly be seen that the so-called 'executed consideration' was utterly different from the 'consideration' we encountered in the other *indebitatus* counts. Clearly D's 'indebtedness' did not arise from a bargain with P or a *quid pro quo* received by him; it rather arose from D's independent duty to account. His 'debt' was thus non-syllagmatic, being fiduciary in character, so that a person like D would be bound to disgorge money had and received to its rightful claimant, whether there was a contract or not. This wider scope of the action is vividly revealed in *Cavendish v. Middleton*.⁶¹ Here D 'unduly received' money from P, apparently by fraud. *Indebitatus assumpsit* was held to lie, even though D had made no promise to pay; nor could such a promise be 'implied' if only because, far from promising anything, D had acted fraudulently.⁶² It is clear that the extension of *indebitatus assumpsit* to quasi-contract-

⁵⁸ (1505) Y.B. 20 Hen. VII, Mich., fol. 8, pl. 18.

⁵⁹ *Beckingham & Lambert v. Vaughan* (1616) 1 Rolle 391, sub. nom. *Babington v. Lambert*, Moo. K.B. 1168.

⁶⁰ This declaration combines the various fragments to be found in the two reports.

⁶¹ (1628) Cro. Car. 141, W. Jones 196.

⁶² Thus in *Dewbery v. Chapman* (1695) Holt 35, Comb. 341, an *indebitatus* was refused precisely because the defendant was held to have cheated the plaintiff of a certain amount.

tual situations was, like its extension to statutory or customary dues, essentially a procedural move designed to simplify the means of recovery by replacing the old actions of debt and account with a more convenient or more summary remedy.⁶³ In fact, it is only when money had and received was employed, as it was extensively in the eighteenth century in connection with failure of consideration and the transfer of credits, that it did begin to do real contractual work. With these matters we deal later.⁶⁴

⁶³ 'Wherever the plaintiff may have an account, an indebitatus will lie': *Arris v. Stukeley* (1677) 2 Mod. 260, 262.

⁶⁴ For failure of consideration, see chap. 14; for transfer of credits, chap. 11, at notes 26ff.

10 The Discharge of Contractual Liabilities

VARIOUS KINDS OF DISCHARGE

Parties may wish to terminate a contract or to modify or discharge the liabilities arising from it. We shall discuss afterwards the modification of a contract. For the present our concern is with the total discharge of contractual liabilities, the history of which has been particularly confused.

To simplify matters, two other kinds of discharge may first be put aside. One kind relates to a totally executory contract under which no liability has as yet arisen or matured, a contract which can be simply rescinded by mutual consent, a solution already established in early law through the plea of exoneration before breach, that is, the plea that the plaintiff had 'absolved, exonerated and discharged the defendant'.¹ A second kind relates specifically to a contract under seal, which could not be altered by parol but only by deed for, as was said, only a deed could dissolve a deed.² Such a discharge by deed, known as a release, could further be used to extinguish a debt or any other liability under a covenant. The only other way of discharging such a liability was the cancellation or destruction of the covenant, since

¹ *Coniers v. Holland* (1588) 2 Leon. 214; *Langden v. Stokes* (1634) Cro. Car. 383.

² *Unumquodque dissolvitur eodem legamine quo ligatur: Countess of Rutland's Case* (1604) 5 Co. Rep. 25b, 42a. See also *Hayford v. Andrews* (1598) Cro. Eliz. 697, Moo. K.B. 573; *Blemerhasset v. Pierson* (1685) 3 Lev. 234. In the nineteenth century this rule, for long rigidly applied, partly changed in that the parol modification of a covenant was upheld provided the parol agreement was utterly separate from, and thus did not affect or vary, the deed: see *White v. Parkin* (1810) 12 East 578; *Nash v. Armstrong* (1861) 10 C.B. (N.S.) 259. For a fuller discussion of this, see Stoljar, 'The Discharge of Contracts by Agreement' (1959) 3 *Univ. of Queensland L.J.*, 356, 362 and *passim*.

payment was by itself no discharge.³ The release was then applied to simple contracts as well. Suppose, to take the typical case, D owed P £100. This debt D could not discharge by paying P only £20, for that, as we shall shortly see, was no 'satisfaction' for the greater amount. In the sixteenth century it was however held that, if D while paying only £20 also obtained a sealed acquittance from P 'in full satisfaction of all debts, duties and demands', this fully discharged him, 'by reason of the specialty', for if a man acknowledges himself satisfied by deed, it is a good bar even without anything received.⁴ This was, and has remained, the most important instance where a sealed contract has greater effect than a simple one.

Hereafter our business will not be with the formal but with the informal agreement, by which a contractual liability, whether liquidated or unliquidated, can be discharged, for this informal kind of discharge gave rise to troublesome problems from the sixteenth to the nineteenth centuries. Accordingly what we shall attend to is not the medieval pedigree of the relevant rules but their later analytical development. And we shall deal first with the discharge of liquidated liabilities, that is, the rule in *Pinnel's Case*, its variations and qualifications; later in this chapter we deal with the discharge of unliquidated claims, including accord and satisfaction and the compromise.

THE RULE IN PINNELL'S CASE

That the payment of a smaller sum would not discharge a larger debt was already firmly established in the sixteenth century.⁵ Thus the famous *Pinnel's Case*⁶ merely reiterated accepted law. The facts were that, in debt on a bond for £8 due in November, D pleaded that he had paid P, at his request, £5 early in October. The court agreed that payment of a lesser amount *before* the due day would be good satisfaction of the whole, but no such earlier payment had here been averred.

³ A fact which caused frequent application to the Chancellor: see Holdsworth, *H.E.L.*, v, 292-3; viii, 81. Later on, payment did become a good defence, though apparently not before the sixteenth century: see *Anon.* (1543) 1 Dy. 56a; *Anon.* (1549) Benl. 6; *Sharplus v. Hankinson* (1595) Cro. Eliz. 420; *Norton v. Rishden* (1596) Cro. Eliz. 458.

⁴ *Anon.* (1563) Dal. 49, pl. 13, Moo. K.B. 47.

⁵ *Anon.* (1576) Cro. Eliz. 46; *Rampston v. Bowmer* (1588) 3 Leon. 98; *Baltton v. Baxter* (1593) Cro. Eliz. 304; and see other cases cited below. The idea itself was already known and discussed in the fifteenth century: see Ames, *Lectures*, 329; Fifoot, *History*, 412.

⁶ (1602) 5 Co. Rep. 117a.

D's plea therefore failed as it amounted to no more than saying that he had paid £5 instead of £8. The payment of a mere 'parcel', the court insisted, could not be satisfaction of a debt, unless accompanied by a 'novelty' or new benefit such as paying earlier or giving something different ('the gift of a horse, hawk, or robe etc').⁷

The important question is why such a rule was established at all. Ames was severely critical of it, believing it to be 'simply the survival of a bit of formal logic of the mediæval lawyers' as well as a rule that preceded the doctrine of consideration rather than being a 'corollary' of it.⁸ But, surely, mediæval logic was not particularly at fault, certainly not that pressed by Brian C.J. Though the payment of ten pounds could not be payment of a debt of twenty, a payment by way of a horse, he admitted, is a good satisfaction, 'for it does not appear whether the horse is worth more or less than the sum in demand. And notwithstanding the horse may be worth only a penny, that is not material, for it is not apparent'.⁹ Some of Brian's contemporaries expressed a different view. Danvers thought that the payment of a lesser sum might be a good *quid pro quo*, while Fineux believed that the agreed or voluntary acceptance of a lesser amount could be as good a 'satisfaction' as anything else.¹⁰ But these were somewhat inferior arguments. It is difficult to see how a debtor's paying less than his full debt could be called a *quid pro quo*, or why the creditor should be regarded as 'satisfied' if he only gets less without any other 'novelty' or benefit.

This brings us to Ames's other criticism, historically no more justified. It is simply a misconception that *Pinnel's* rule arose entirely apart from the doctrine of consideration as it evolved in the sixteenth century. On the contrary, much in *Pinnel* came from the ideas of benefit and bargain

⁷ It is worth remarking that the case further held that a bond could be discharged by an (informal) accord and satisfaction. This concession, so far only applying to a penal bond with a condition of defeasance, was shortly extended to covenants to repair, on the ground that the action here was not based on the deed but on the wrong: *Blake's Case* (1605) 6 Co. Rep. 43b; *Samburne v. Rutcliffe* (1608) Yelv. 124. If, as *Peytoe's Case* (1611) 9 Co. Rep. 77b, more fully explained, there is nothing but damages to be recovered, or the condition in a bond is to pay money, then accord and satisfaction is a good plea, but not where the deed stipulates the doing of a collateral act such as to make a feoffment or to render an account.

⁸ Ames, *Lectures*, 329; but see Fifoot, *History*, 412-13 for a serious criticism of Ames with which the arguments following in the text substantially agree.

⁹ *Anon.* (1495) Y.B. 10 Hen. VII, fol. 4, pl. 4.

¹⁰ *Anon.* (1455) Y.B. 33 Hen. VI, fol. 48, pl. 32; *Anon.* (1495), *supra*.

then coming to the fore. The amends, as was said in *Onely v. Kent*,¹¹ ought to be 'some charge to the one party and commodious and profitable to the other, (else as good never a whit as never the better)'. Other cases made very much the same point. So where goods sold perished in a tempest, as a result of which the seller agreed to take in satisfaction one-sixteenth of the original price, the agreement was held to be nugatory because 'no profit but damage comes to the plaintiff by this new agreement, and the defendant is not put to any labour or charge by it'.¹² Again where an accord was that, in consideration that P paid D £5 (which he owed him) without further suit or trouble, D promised to let P have another bond worth 20 shillings, consideration for D's promise was held to be insufficient since what the plaintiff undertook was no more than he was already compelled to do and so constituted no special benefit to the promisor.¹³

Of course one may still object that the doctrine of *Pinnel's Case* erred as a matter of 'policy', that the law should have supported an agreement terminating a debt, assuming it a fair agreement freely arrived at by the parties most concerned. If the creditor was content to forgo his money why should the law oppose the accord? Such a criticism, though perhaps not invalid for modern law, yet overlooks the essential basis upon which simple or informal agreements were then enforced. Only if some sort of bargain could be constructed could a binding (informal) agreement be upheld. The mere payment of a lesser sum could not constitute such a bargain, unless the debtor 'pleaded payment of a lesser sum before the day, and at another place, in satisfaction of a greater sum of money . . . this peradventure [would be] a good plea'.¹⁴ In short, the ideas underlying consideration and *Pinnel's Case* reveal a close affinity.

ACCORD AND MUTUAL PROMISES

Nevertheless in a few cases, though only a few, the *Pinnel* doctrine was more loosely applied, so loosely that it gave the impression that

¹¹ (1577) 3 Dy. 355b, 356a.

¹² *Richards v. Bartlett* (1584) 1 Leon. 19.

¹³ *Greenleaf v. Barker* (1590) Cro. Eliz. 193. This case, it is true, was adjourned, but the court's thinking was clearly against P. Indeed it is significant that the court much relied on *Sydenham v. Worlington* (1585) Godb. 32, discussed in chap. 5, at note 6, in which the need for a bargain was greatly stressed.

¹⁴ *Balton v. Baxter* (1593) Cro. Eliz. 304; see also *Bagnal v. Sacheverell* (1593) Cro. Eliz. 292.

an anterior debt might be simply discharged by an exchange of mutual promises. In *Goring v. Goring*,¹⁵ perhaps the most ambitious instance, a creditor's executor agreed to take £150 in some seven annual instalments in lieu of an immediate debt of £205. Sued on one instalment, the debtor suggested that his promise to pay was not supported by sufficient consideration. But the court held that it was, for (to take only their most substantial ground) the new arrangement had indirectly discharged the debtor in that, if the executor were to sue for the remainder, the debtor could sue him on the earlier promise, 'for the plaintiff agreeing to take £150 for £205 is a promise on his part, and so one promise against another'.

If this was meant to be a way of saying that a creditor could bring assumpsit for an instalment of a debt, it belongs to the developments before *Slade's Case*, which tried to use assumpsit in lieu of debt. But if the decision was meant to introduce a qualification of *Pinnel's Case*, it was entirely unsound. For, as we saw in chapter 4, mutual promises did not support each other merely by being mouthed; they had to reflect a bargain with benefits to both sides. Nor could it be said that a creditor's promise to take a lesser amount was good consideration inasmuch as 'it is a benefit unto him to have it without suit or charge',¹⁶ for the simple reason that it was not a new 'benefit' but one to which the creditor was anyhow entitled, indeed not just in part but to the whole sum. Nor, again, could it be said that there was good consideration in that, by paying part of his debt, the debtor 'has no remedy for this again',¹⁷ because the amount paid was always deductible from the total sum owed.

Other cases, at all events, continued to confirm the need for a genuine bargain-benefit. In *Dixon v. Adams*,¹⁸ for instance, a surety paid the creditor the principal debt, 'in consideration whereof' the latter promised to deliver up the obligation, together with a letter of attorney, to the surety to enable him to sue the principal debtor. Judgment for the surety in the Common Pleas was reversed by the King's Bench 'because it was not a sufficient consideration', as the surety 'had not done any act whereto the law would not have compelled him'. There had to be

¹⁵(1601) Yelv. 11.

¹⁶As was said in *Reynolds v. Pinhowe* (1595) Cro. Eliz. 429, apparently the only case where such a view of benefit was seriously advanced.

¹⁷As was suggested, rather *obiter*, by Coke C.J. in *Bagge v. Slade* (1616) 3 Bulst. 162, 1 Rolle 354.

¹⁸(1597) Cro. Eliz. 538.

some 'novelty' or benefit from which a new bargain might be implied. It could be small: paying a few days earlier would suffice. In fact the doctrine that consideration can be sufficient even if 'inadequate' emerged, for the most part, just in cases of this sort.¹⁹

One cannot deny that the views inspired by *Goring v. Goring* were occasionally approved.²⁰ In the longer run, however, they had no permanent influence on the law of discharge. On the contrary, the courts went in the opposite direction by insisting that an accord had to be 'executed' or 'satisfied' and that a purely 'executory' accord would not do. That an accord had to be fully satisfied was a very old rule, coming from a time long before executory parol agreements were recognised.²¹ But in the sixteenth century the rule was extended to simple contracts, with the result that a creditor remained free to refuse the agreed satisfaction until he actually accepted the amends.²² It did not matter that this executory accord was in fact supported by a sufficient consideration or benefit. In *Rayne v. Orton*²³ the debtor, though paying but a 'parcel', was to pay the residue in hats which he was always ready to do. In spite of the 'novelty' it was held that 'a concord is always to be entirely executed, and not to be executory in any part'. Then *Peytoe's Case*²⁴ stated as firm dogma that every accord must be 'full, perfect and complete'. Later cases, it is true, showed some reluctance to

¹⁹ See *Foster v. Scarlett* (1588) Cro. Eliz. 70; *Webb's Case* (1578) 4 Leon. 110. A sort of bargain could also be identified in *Knight v. Rushworth* (1596) Cro. Eliz. 469, where the defendant promised to pay the bond of a third person in consideration of the obligee going before a magistrate and deposing on oath that it was rightly read over to the obligor, for 'the travail of coming before the mayor is a very good consideration . . . , and the smallness of a consideration is not material'. And see also *Cook v. Huet* (1581) cited 1 Leon. 238; *Flight v. Gresh* (1625) Hutt. 76; *Flight v. Crasden* (1625) Cro. Car. 8.

²⁰ See, e.g., *Rawlins v. Lockey* (1639) 1 Vin. Abr. 308, pl. 14; *Johnson v. Astell* (1667) 1 Lev. 198, 2 Keb. 155; *Anon.* (1675) 1 Vent. 258. Ames (*Lectures*, 335, 342) even argued that these unorthodox views were the only satisfactory way of dealing with accord and satisfaction and that in *Foakes v. Beer* (1884) 9 App. Cas. 605, the House of Lords missed an opportunity of adopting 'Coke's real opinion' because *Bagge v. Slade*, *supra*, or similar cases such as *Goring v. Goring*, *supra*, were not brought to their attention, only *Pinnel's Case* was. To support this contention Ames had further to maintain that the consideration in mutual promises did not so much rest on bargain but on two promises both given *animo contrahendi*. But this too as we have seen, cannot be supported historically.

²¹ See Ames, *Lectures*, 110ff.

²² *Onely v. Kent* (1577) 3 Dy. 355b, 356a.

²³ (1593) Cro. Eliz. 305.

²⁴ (1611) 9 Co. Rep. 77b, 79b.

accept this doctrine, but thought it too late 'to overthrow all the books'.²⁵

The interesting question therefore is why the law should have disqualified the executory accord, even one that was a bargain, or near enough a bargain, in its own right. One may think that the judges were, a little too mechanically, following the medieval rule, but that may not be the whole truth. A fuller explanation may lie in the fact that an executory accord, though backed by good consideration, was not like an ordinary assumpsit, in that the accord was not meant to enforce a promised performance but rather to act as a bar to any further claim. And if so, was it not reasonable to make this bar as definitive as possible by requiring complete satisfaction or execution of the accord? The cases furnish no direct evidence for this hypothesis, but one may find some, albeit indirect, support for it in a doctrine obtaining in covenants where, very briefly, a release or a covenant not to sue was held to operate only as a permanent extinction of a liability, not as a temporary suspension or bar, for fear that the latter would lead to circuity of action.²⁶ Is it not the same idea behind the rule that, in order fully to discharge a liability, the accord had to be satisfied? Whether this was always a useful idea, we shall shortly discuss.

In any case the law remained thus for a long time to come, without any exception admitted at all. In *Cumber v. Wane*,²⁷ D gave P a negotiable note of £5 for a debt of £15, which was firmly held as incapable of discharging the original debt: 'if five pounds be (as is admitted) no satisfaction for fifteen pounds, why is a simple contract [i.e. a note] to pay five pounds a satisfaction for another simple contract to pay three times the value?' Nor was a composition with creditors yet regarded as an operative discharge for, as was observed in *Fitch v.*

²⁵ *Allen v. Harris* (1696) 1 Ld. Raym. 122. Only *Case v. Barber* (1682) T. Raym. 450, suggested that 'an accord may be pleaded without execution'; but there the accord anyhow failed as it lacked consideration in that it only provided for the payment of a lesser amount.

²⁶ See on this *Anon.* (1507) Keilw. 88, pl. 1; *Hodges v. Smith* (1598) Cro. Eliz. 623; *Acton v. Symon* (1636) Cro. Car. 414; *Moss & Browne's Case* (1641) March N.C. 151; *Buxton v. Nelson* (1699) 1 Lutw. 635; also *Ford v. Beech* (1848) 11 Q.B. 842, 852, further discussed below. A covenant not to sue for a time was not treated like a release as this would suspend the liability forever; hence it remained a covenant giving the covenantee an action for damages if sued before time: *Deux v. Jefferies* (1594) Cro. Eliz. 352; *Aloff v. Scrimshaw* (1689) 2 Salk. 573, Holt K.B. 619, 1 Show. 46, Carth. 63, Comb. 123.

²⁷ (1721) 1 Stra. 426.

Sutton,²⁸ such an accord must show 'a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*'.

QUALIFICATIONS TO PINNELL'S CASE

As regards both negotiable paper and compositions the law was to change. The changes, though certainly out of step with the basic rule, yet did not directly challenge it. Concerning bills and notes, Lord Kenyon somewhat suddenly announced that 'the law was clear', as payment by bill would discharge a debt, even if the bill was for less than the original liability.²⁹ Why, or by what steps, the law thus became clear was never clarified; nor for that matter was its theoretical support. Sometimes the negotiable instrument was said to 'resemble a specialty', sometimes to represent a 'substituted contract' or a 'new' kind of payment.³⁰ None of these was really convincing and the rule always remained in doubt,³¹ even as it somehow did survive, at least until quite recently.³² As for compositions, the charge of *nudum pactum* was overcome through a new idea, according to which a composition agreement bound the creditors *inter se*, lest they commit fraud on each other (were one creditor to receive more than his agreed dividend).³³ The agreement did not discharge the debtor, though he was no longer suable on his original debt as long as he continued to pay as agreed.³⁴ Indeed in practical effect, if not in theory, a composition took effect as a temporary bar, just as it gave effect to an accord as yet executory.

²⁸ (1804) 5 East 230, 232.

²⁹ *Stedman v. Gooch* (1793) 1 Esp. 3, 5-6. Apparently the innovation dates back to *Richardson v. Rickman* (1776), cited 5 T.R. 513, 517.

³⁰ See, respectively, *Baker v. Walker* (1845) 14 M. & W. 465, 468; *Sard v. Rhodes* (1836) 1 M. & W. 153, 155; *Griffiths v. Owen* (1844) 13 M. & W. 58, 64; *Ford v. Beech* (1848) 11 Q.B. 842, 852.

³¹ See *Sibree v. Tripp* (1846) 15 M. & W. 23, also *Foakes v. Beer* (1884) 9 App. Cas. 605, 619-20, per Lord Blackburn.

³² *Curlew v. Clark* (1849) 3 Ex. 375; *Goddard v. O'Brien* (1882) 9 Q.B.D. 37, now over-ruled in *D. & C. Builders Ltd v. Rees* [1966] 2 Q.B. 617.

³³ This idea finds first full expression in *Steinman v. Magnus* (1809) 11 East 390, though it already has been adumbrated in *Cockshott v. Bennett* (1788) 2 T.R. 763. *Good v. Cheeseman* (1831) 2 B. & Ad. 328 pointed to the creditor's 'mutual forbearance' as an alternative basis, but other cases preferred the fraud rationale: see *Cook v. Lister* (1863) 13 C.B. (N.S.) 543.

³⁴ If he failed to pay, so causing the composition to collapse, he again became fully liable to each individual creditor: *In re Hatton* (1872) L.R. 7 Ch. App. 723, 726; *Edwards v. Hancher* (1875) 1 C.P.D. 111; *Currie v. Misa* (1876) L.R. 10 Ex. 153.

Far more interesting, because less familiar, are two other qualifications of *Pinnel's Case*. The first tried to take advantage of account stated, *Milward v. Ingram*³⁵ being perhaps the earliest instance. Sued for a debt of forty shillings, D pleaded that he and P had accounted together for 'divers sums' when D was found to be indebted in only three shillings which he (D) thereupon promised to pay, in consideration of which P also agreed to discharge D entirely. Upholding the discharge, the court agreed that it would not be enough to pay less than one's full debt, but they did not think this now applied, as the parties' accounting covered 'divers' and (apparently) disputable claims, not just 'one debt betwixt them'. The account stated, in other words, had to be virtually a compromise of at least partly doubtful debts, for if it was merely an arithmetical reckoning, it amounted to nothing more than the settling of a larger for a smaller debt. In *Atherley v. Evans*,³⁶ for example, the parties after accounting for their several debts, struck a balance of £12, which amount D paid to P. When P then sued on the older debt, D pleaded that he had already paid. His plea was rejected, since it only revealed that D had made a lesser payment for a larger debt, a payment that could not discharge him entirely. Hence its only effect was to reduce the amount still owing to P, the account stated thus operating as something like a set-off.³⁷ Indeed when the Statutes of Set-Off (1728 and 1734) enabled a debtor to plead such deductions by way of defence, even without a prior accounting, account stated lost much of its practical significance, unless of course it was (as in *Milward v. Ingram*) not a set-off but a genuine compromise.³⁸ In fact compromise and account stated were now doing in effect quite indistinguishable jobs.³⁹

The second qualification was somewhat more complex. Suppose that a creditor agreed not to sue a debtor, so long as the latter kept up certain repayments: how effective was their agreement? We saw

³⁵ (1675) 1 Mod. 205, 2 Mod. 43.

³⁶ (1755) Say. 269.

³⁷ See also *May v. King* (1701) 12 Mod. 537, 1 Ld. Raym. 680; *Anon.* (1729) Fitz-G. 44; *Rolls v. Barnes* (1756) 1 W. Bl. 65, 1 Burr. 9; *Smith v. Page* (1846) 15 M. & W. 683.

³⁸ *Gidgett v. Penny* (1834) 1 C.M. & R. 108 carefully distinguished between set-off and account stated.

³⁹ This was partly perceived in *Cocking v. Ward* (1845) 1 C.B. 858, 869n. In other cases, however, this compromise aspect of account stated became much obscured: see, e.g. *Laycock v. Pickles* (1863) 4 B. & S. 497; *Callander v. Howard* (1850) 10 C.B. 290.

earlier that a covenant not to sue did not operate as a temporary suspension but extinguished the debt once and for all.⁴⁰ This rule was substantially accepted in *Ford v. Beech*,⁴¹ where the Exchequer Chamber, speaking through Parke B., concluded that, to avoid the extinction of the debt, an agreement not to sue had to be construed as an agreement not to sue for a time, a breach of which would give rise to damages but to no other remedy, however much the purpose of the agreement was to give the debtor a temporary bar and not a right to (apparently only nominal) damages. In fact this solution was surprisingly short lived. Covenants or agreements not to sue were shortly to be specifically enforced through an injunction in equity,⁴² while even covenants not to sue for a time were construed as releases subject to a condition subsequent or construed as composition agreements barring creditors so long as the debtor made no default.⁴³ The result was that in these situations, as in the composition agreements mentioned before, temporary suspension of debt had now become very possible.

ACCORDS AND COMPROMISES

Where the parties agreed to discharge not a fixed or liquidated debt, but an unliquidated claim in damages arising from a breach of contract or a tort, the rule in *Pinnel's Case* did not apply. Nor did such a discharging agreement have to be of the same value as P's potential claim against D: since the claim was quantitatively uncertain, he could take less in satisfaction than he might possibly receive in damages.⁴⁴ Yet here too a merely executory accord did not suffice: only 'a concord carried into execution is a good plea'.⁴⁵ The reason for this rule was perhaps the same as the one we attempted to identify earlier—broadly, the desire to avoid circuity of action. This in fact is the explanation advanced in the eighteenth century. So in *Lynn v. Bruce*,⁴⁶ it was said that an executed accord serves the principle of *ut sit finis litium*,

⁴⁰ See above, at note 26.

⁴¹ (1848) 11 Q.B. 842, 866–8, where D, P and A (a third party) mutually agreed that A should liquidate D's debt to P by annual instalments and that, so long as A did so pay, P's right against D was to be suspended. A did not default, but P then sued D on the original debt.

⁴² *Beech v. Ford* (1848) 7 Hare 208.

⁴³ *Newington v. Levy* (1870) L.R. 5 C.P. 607, L.R. 6 C.P. 180; *Slater v. Jones* (1873) L.R. 8 Ex. 186.

⁴⁴ *Adams v. Tapling* (1692) 4 Mod. 88, 89.

⁴⁵ *Andrew v. Boughey* (1552) 1 Dy. 75a.

⁴⁶ (1794) 2 H. Bl. 317, 319.

whereas an executory accord does not, since it substitutes one cause of action for another without bringing litigation to an end. But this explanation had serious flaws. Surely a principle of *finis litium* did require the recognition of an accord even without satisfaction, if only because to insist on actual satisfaction meant to disregard the subsequent compromise and to disinter the original dispute. Even where a party defaulted a second time there still was no particular justification, certainly none connected with *finis litium*, to return to the earlier agreement instead of confining the dispute to the subsequent compromise.

What is more, the requirement of satisfaction led to results sometimes quite extraordinary. To give but two instances. In *Flockton v. Hall*,⁴⁷ D infringed P's patent, whereupon he agreed with P that he would pay for a new licence, an agreement whereby the infringement was to be 'settled, satisfied, discharged and terminated'. Nevertheless the court upheld P's action on the earlier infringement. In *Gabriel v. Dresser*,⁴⁸ P again successfully sued D for breach of contract consisting of the failure to deliver one lot of timber, notwithstanding the fact that they had meanwhile agreed on another lot in satisfaction, that D had already made large deliveries of the second lot and was ready and willing to complete the deliveries. Thus D's substantial part-performance, and even his tender to complete the accord was held to be no effective discharge: the satisfaction had to be complete to the last penny.⁴⁹ Still more surprising is this: that both in *Flockton* and *Gabriel* the court conceded that, though an accord must always be satisfied, an executory compromise can itself be a sufficient satisfaction and that, furthermore, the defendant would have succeeded had he specifically averred that the compromise was given and accepted in satisfaction of the claim.⁵⁰ This was curiously like saying that an accord must include

⁴⁷(1849) 14 Q.B. 380, (1851) 16 Q.B. 1039.

⁴⁸(1855) 15 C.B. (N.S.) 622.

⁴⁹*Flockton v. Hall*, *supra*, at 384. And see to the same effect: *Russel v. Russel* (1684) 3 Lev. 189; *Heathcote v. Crookshanks* (1787) 2 T.R. 24; *James v. David* (1793) 5 T.R. 141; *Brown v. Wade* (1671) 2 Keb. 851; *Shepherd v. Lewis* (1671) T. Jones 6; *Cock v. Honychurch* (1679) 1 Mod. 69; *Reeves v. Hearne* (1836) 1 M. & W. 323; *Collingbourne v. Mantell* (1839) 5 M. & W. 289; *Wray v. Milestone* (1839) 5 M. & W. 21.

⁵⁰'The ground of our decision', said Parke B., 'is the want of an averment that the agreement on the part of the defendants was accepted in satisfaction': *Flockton v. Hall* 16 Q.B. 1039, 1042. For such an earlier suggestion, see *Evans v. Powis* (1847) 1 Ex. 601, 607-8; *Jones v. Sawkins* (1847) 5 C.B. 142.

a satisfaction while the satisfaction may include an accord. Still, the upshot is that both cases were prepared to accept what was in substance if not in form a purely executory accord. For, while the defendant could not formally plead an accord without satisfaction as a bar, a non-satisfied or non-executed accord might yet be upheld. Even so, the formula of 'accord and satisfaction' continued to persist, although the meaning of 'satisfaction' had now radically changed.⁵¹

From the accord, with or without satisfaction, we have to distinguish another discharging agreement, usually referred to as compromise. Where the former was an agreement to extinguish a liability, to bar further action against the debtor, the compromise was an agreement by which the creditor promised to forbear a claim from the debtor in return for the latter's promise to pay a special price, it being this latter promise the creditor then sued upon. The compromise in short was an ordinary simple contract going back to the early days of assumpsit and the days of forbearance-assumpsit in particular. In *Pooley v. Gilbert*,⁵² perhaps the best example, D promised to pay £100 in respect of all further action which P was henceforth to abandon against D. The court regarded it as 'a clear case', as the agreement disclosed sufficient consideration for the mutual promises: P's promise to forbear (for good and all) was bought by D's promise to pay an agreed amount.

Such an agreement could be used to compromise all kinds of claims, liquidated or unliquidated.⁵³ The one major condition was that P should have something to forbear, for without it he would give nothing of benefit. In particular, he could not forbear unless he had an enforceable claim against D, something he did not have if D was an infant or a married woman or not the person liable on a bond.⁵⁴ For a long time, moreover, the rule was that there could be no real forbearance of a

⁵¹ So in *British Russian Gazette v. Associated Newspapers Ltd* [1933] 2 K.B. 616, 644, Scrutton L.J., in a famous passage, speaks of the 'satisfaction' as the 'consideration', not as the execution, of an accord.

⁵² (1612) 2 Bulst. 41.

⁵³ Thus P might agree to cancel a bond if D would submit to arbitration: *Brett & Peagrim's Case* (1584) 3 Leon. 105, Owen 7; to surcease a suit in connection with a will: *Rivett & Rivett's Case* (1588) 1 Leon. 118; to desist from a suit in chancery: *Dowdenay v. Oland* (1600) Cro. Eliz. 768; or to stop further prosecutions: *Dell v. Fereby* (1602) Cro. Eliz. 868; to desist from ordering a debtor's outlawry: *Jennings v. Harley* (1602) Cro. Eliz. 909; or to forbear to sue defendant's son for the father's assault upon the plaintiff's son: *Rippon v. Norton* (1601) Cro. Eliz. 849, 881.

⁵⁴ See, e.g., *Stone v. Wythipol* (1593) Cro. Eliz. 126; *Loyd v. Lee* (1719) 1 Stra. 94, 95; *Barber v. Fox* (1670) 2 Wms. Saund. 134, 136; and other cases in chap. 7.

merely doubtful claim, a view which did not change until the nineteenth century.⁵⁵ The claim still had to be honest or *bona fide*, even if it turned out to be unfounded,⁵⁶ for to say 'do not trouble me and I will give you so much' never initiated an enforceable compromise.⁵⁷

MODIFICATION AND PINNELL'S CASE

The thinking underlying *Pinnel's Case* had important ramifications in relation to the partial modification of contracts as distinct from their discharge or termination as a whole. Just as the parties could, *before* a breach, freely discharge a contract so they could vary or modify it in any manner they wished.⁵⁸ *After* a breach, of course, the right to modify, like the right to discharge, was severely limited because, once liability had accrued, an agreement to modify or discharge had to be by release or by accord and satisfaction.⁵⁹ Furthermore, any modification of an existing contract, if achieved under the apparent threat of breach, could have no effect. So in *Harris v. Watson*,⁶⁰ a captain's promise to pay extra wages was held unenforceable since the increase was for work the seaman was already bound to perform: to allow such an extra charge, said Lord Kenyon, was to surrender to 'extravagant demands'. This decision, it is true, came independently of *Pinnel's Case*, yet its rationale rather converged with it in that it too disqualified an agreement based on too one-sided a concession by the promisor.⁶¹

⁵⁵ *Longridge v. Dorville* (1821) 5 B. & Ald. 117, which reviews the earlier authorities.

⁵⁶ *Edwards v. Baugh* (1843) 11 M. & W. 641; *Callisher v. Bischoffsheim* (1870) L.R. 5 Q.B. 449.

⁵⁷ *Goodwin v. Willoughby* (1625) Poph. 117, 178; similarly *White v. Bluett* (1854) 23 L.J. Ex. 36.

⁵⁸ *Goss v. Nugent* (1833) 5 B. & Ad. 58, 64-5, per Denman, C.J. And see also *Stead v. Dawber* (1839) 10 Ad. & E. 57; *Nash v. Armstrong* (1861) 10 C.B. (N.S.) 259.

⁵⁹ *Edwards v. Weekes* (1677) 1 Freem. K.B. 230, 1 Mod. 262, 2 Mod. 259; *Edwards v. Chapman* (1836) 1 M. & W. 231.

⁶⁰ (1791) Peake 102.

⁶¹ It can remain a matter of debate whether *Stilk v. Myrick* (1809) 2 Camp. 317, where the decision was the same, was equally based on extravagant demands or whether its facts were not more similar to *Hartley v. Ponsonby* (1857) 7 El. & Bl. 872, where because of new and dangerous conditions a demand for extra wages was held to be justified. These doubts do not of course affect the principle of *Harris v. Watson* itself. This principle later merged with that of pre-existing duty according to which D's obligation to X cannot form the basis of a bargain between D and P: see, in particular, *Shadwell v. Shadwell* (1860) 9 C.B. (N.S.) 159; *Scotson v. Pegg* (1861) 6 H. & N. 295. This need not detain us here. It was anyhow something of a side issue, isolated from the main thrust of contract history, notwithstanding the long controversy to which it gave rise: Ames, *Lectures*, 340; S. Williston, 'Successive

Take next a modification by which the parties rather tried to keep the contract afloat: a sale of goods where a seller asked for a postponement of delivery from the original to a later day. The postponement meant that the seller would be in breach of contract, but suppose the buyer did agree to the seller's request. How effective was the buyer's waiver of the original condition of delivery? It was certainly effective against the seller to the extent of stopping him abandoning the contract altogether on the ground (several times pressed though never successfully) that he could not be sued on the modified contract since a parol waiver could not vary a written contract nor was it enforceable by itself, as it too fell within the Statute of Frauds.⁶² On the other hand, the waiver was not effective against the buyer, as he remained entitled to decline acceptance on the new date because the seller could not aver he was ready and willing to perform at the original date, since the date could not be modified by a parol waiver if the contract had to be in writing, including its modified terms.⁶³ On this reasoning, therefore, the postponement of a delivery date (or, for that matter, of a date of payment) was assumed to be valid provided it met the conditions of the Statute of Frauds, so that but for these statutory conditions the above waivers would, in principle, have been binding against a waiver whether or not the waiver was in writing or came before or after breach. In other words, a modification was taken to be valid in spite of *Pinnel's Case*, at least a running or minor modification that enabled a contract to go on.

The lease too contained interesting modificatory ideas which have been astonishingly overlooked. The larger history of this is too specialised for present purposes, but we may allow ourselves two very brief points. A lease usually contained a condition providing for the

Promises to the Same Performance' (1894) 8 *Harv. L. Rev.*, 27; C.C. Langdell, 'Mutual Promises as Consideration for Each Other' (1901) 14 *Harv. L. Rev.*, 496; A.G. Davis, 'Promises to Perform an Existing Duty' [1937] *Camb. L.J.*, 203.

⁶² See *Ogle v. Vane* (1867) L.R. 2 Q.B. 275, (1868) L.R. 3 Q.B. 272, and *Hickman v. Haynes* (1875) L.R. 10 C.P. 598. In the latter the ground was rejected to prevent the waivee from using the postponement as an instrument of fraud. In the former it was even said that though the waiver was but a 'mere forbearance' or 'understanding' or 'licence' it would hold the waivee, if he finally broke the contract, to the damages measurable not at the original but at the postponed date. For a more detailed discussion of these and other cases, see Stoljar, 'The Modification of Contracts' (1957) 35 *Can. B. Rev.*, 485.

⁶³ *Plevins v. Downing* (1876) 1 C.P.D. 220.

lessee's forfeiture should he break his covenant (say) to repair or not to underlet, yet it was early agreed that the condition might be modified. Thus, if the lessor did not show an immediate intention to re-enter (if for example he continued to take the rent), he was taken to have waived the forfeiture, thus saving the term.⁶⁴ Then, under another doctrine, that of surrender, the parties could substantially alter an existing lease, that is, alter the duration of the tenancy or the amount of the rent. As these changes in effect amounted to a new lease, they were said to imply the 'surrender' of the old.⁶⁵ The earlier law was straightforward enough, but later there were complications due to the Statute of Frauds under which the new arrangement was required to be in writing, for unless in writing it could not operate as a surrender of the old or take effect as a new lease.⁶⁶ This statutory requirement apart, however, there was no doubt that a subsequent agreement to reduce rent would modify, as it would replace, the earlier demise. In short, there was no doubt that such a modification (even if the rent reduction was considerable) would be effective, whatever the rule or ramifications of *Pinnel's Case*. Not, in fact, until the celebrated *High Trees Case*⁶⁷ was the Pinnel doctrine assumed to prevent a rent modification, significantly also a case in which the possibilities of the surrender were not explored, let alone invoked.

⁶⁴ *Green's Case* (1582) Cro. Eliz. 3; *Marsh v. Curteys* (1597) Cro. Eliz. 528; *Goodright d. Walter v. Davids* (1778) 2 Cowp. 803; and for many other cases, see Stoljar *op.cit.*, 513ff.

⁶⁵ *Belfield v. Adams* (1615) 3 Bulst. 80, *Donellan v. Read* (1832) 2 B. & Ad. 899.

⁶⁶ *Foquet v. Moor* (1852) 7 Ex. 870.

⁶⁷ *Central London Property Trust Ltd v. High Trees House Ltd* [1947] K.B. 130.

FORMATION OF CONTRACTS

What today we describe as formation posed no problem in contract history, that is, not until the nineteenth century. The Year Books might discuss the question of how long a seller had to wait for the buyer to make tender of the price after he had agreed to buy, but that was a somewhat special matter, confined to debt and detinue.¹ For the rest there was never any difficulty as to whether or not the parties had 'formed' an agreement. Since the parties negotiated their bargain *tête-à-tête*, they emerged from their negotiations either with an agreement or without one. Where, for example, a buyer and seller negotiated for a sale of goods in the morning and were to meet again in the afternoon to allow the buyer more time to consider the seller's terms, and then did not meet, no contract was afoot.²

Only when contracts began to be made by letter did 'formative' difficulties arise. First the difficulty of what such negotiations by letter might amount to: had the parties, in their mutual communications, come to an agreement at all? In the *inter presentes* situation no such inquiry was needed since the parties either did or did not agree. In the *inter absentes* situation, however, the existence of an agreement was often not equally self-evident: hence the first thing to establish was whether the 'offer' of the one had, or had not, been 'accepted' by the

¹ See on this chapter 2 at notes 17-20.

² *Cooke v. Oxley* (1790) 3 T.R. 653. The headnote and some remarks in the case are misleading as they refer to the morning negotiations as an 'original contract' when no such contract was in fact formed. The original agreement may have looked like giving an 'option' to the buyer, though, strictly speaking, even options presuppose that the relevant negotiations are completed, by no means the case here.

other side.³ A second and more technical difficulty was to determine at what point the parties' communications could, or should, be said to be final or complete. Since the parties, being physically separated, could not themselves conclude their negotiations with a final handshake, the law had to say when the exchange of letters had come to an end. As everyone knows, the law accepted a rule of mail acceptance, first proposed in *Adams v. Lindsell*,⁴ but not fully or finally worked out for another half a century.⁵ With this development we need not here deal, it belongs more to modern law than to history.

But we may briefly mention another aspect of offer and acceptance, namely, its profound and indeed revolutionary impact upon the presentation of contract and its major principles. In the nineteenth century, as offer and acceptance were becoming the inevitable prologomenon in later contract books, 'formation' was increasingly distinguished from 'discharge' and both from other or intermediate parts of contract law. The introductory emphasis upon formation also quickened the separation of simple contracts from covenants. The new books tended to concentrate on the former, not just to keep pace with its vastly growing case law but also because of their new concern with offer-and-acceptance rules. Covenants were of course outside those rules, as they could not be made *inter absentes* but had to be executed by the parties in person or at least by their representatives. One has only to compare an older book like that by Addison with the newer books by Pollock and Anson for the great difference in approach and exposition to become apparent at once.⁶

AGREEMENT AND PRIVITY

In earlier law 'privity' referred mainly to the existence of a contractual relationship to which *assumpsit* or *indebitatus assumpsit* applied.⁷ In the nineteenth century however 'privity' acquired another and more special sense. Now to speak of privity was to say that a contract had

³ See, e.g., *Kennedy v. Lee* (1817) 3 Mer. 441, and on the whole subject Stoljar, 'Offer, Promise and Agreement' (1955) 50 *Northw. Uni. L. Rev.*, 445, 454ff.

⁴ (1818) 1 B. & Ald. 681.

⁵ See on this Cheshire and Fifoot, *The Law of Contract* (7th ed., London 1969), 42ff.

⁶ Compare particularly earlier editions of Addison's *Treatise of the Law of Contracts* (London 1847 and 1849) with the contract books of Pollock and Anson which first appeared in the late 1870s.

⁷ 'A general *indebitatus assumpsit* will not lie here for want of a privity, and because there is no contract': *Arris v. Stukely* (1677) 2 Mod. 260, 262.

no legal effect except between the two contracting parties, either because the 'offer' and its 'acceptance' identified two, and only two, specific persons, the offeror and offeree, or because (as it came to be said) the consideration must move from the promisee. In other words, 'privity' now meant that a third party could have no rights under a contract, even though the 'benefit' therein specified was expressly intended for him.

This had not been the view of the earlier common law. Not that it was ever doubted that a contract must always be established between a promisor and promisee, or that two parties could not between themselves impose a new liability upon a third; neither proposition however entailed the further consequence that a 'stranger' was excluded from every contractual benefit, whether as donee or creditor. To give two instructive instances. In *Rookwood's Case*,⁸ D promised X, his father, that he (D) would pay his brothers a specified annual amount if X did charge his land for this annuity. When D did not pay, the brothers sued in *assumpsit*, which the Common Pleas held was well brought as there was a good consideration, since otherwise his (D's) land would have been charged with the annuities. It is true that the brothers were present when D and X made their agreement and also consented to it but this was not regarded as a crucial circumstance: the father was not acting as agent for his sons; nor were they co-promisees; they were simply beneficiaries. The same point comes through in *Lever v. Heys*.⁹ A girl's father promised to pay £200 to his future son-in-law if the latter's father (the person to whom the promise was made) consented to the marriage and endowed the son with some land. The King's Bench not only held that the son-in-law could sue but that on this promise he was the only person to sue: he alone was to have 'the advantage thereof', he was the person 'in whom the interest is'.¹⁰

It is important to see that these were not erratic decisions but as deliberate or careful as any in the sixteenth century, decisions that throw important light on the conceptions of contract and consideration prevailing at the time. In particular, there was no trace of the modern

⁸ (1588) Cro. Eliz. 164.

⁹ (1599) Moo. K.B. 740, sub. nom. *Levet v. Hawes*, Cro. Eliz. 619, 652, sub. nom. *Hadves v. Levit*, Het. 176.

¹⁰ 'There is a difference', said Hutton, of counsel, 'when the promise is to perform to one who is not interested in the cause, and when he hath interest.' The Hetley report cites other Elizabethan cases in which third parties were allowed to enforce a promised benefit.

notion that consideration must always move from the plaintiff or promisee. Certainly there had to be a bargain to begin with between an original promisor and promisee. But given the existence of such a bargain (or of 'consideration' in that sense), contractual rights could extend to a specified beneficiary, not because he was seen as a 'party' to the contract, even though he sued in assumpsit like any regular party, but more simply because the original contract created a special 'interest' or 'advantage' for him. Neither contract nor assumpsit thus excluded third party rights. Nor need this occasion much surprise. Since, as we have seen in chapter 4, a merely 'indirect' benefit to the promisor (as where D promised to pay P if P would give or do something for a third) constituted sufficient consideration for D's promise, it was perhaps not too great a leap to allow the third party a direct action against D, especially where the facts were (to alter slightly the previous example) that P had already performed his part of the bargain but D had not yet performed his promise in return.

Of course the position was different where there was no relevant bargain from which third party rights could derive. *Jordan v. Jordan*¹¹ furnishes an interesting but difficult example. D owed P £40, for which he was about to be arrested by the sheriff (S), but to avoid arrest thereupon promised S to pay the debt to P. The latter now sued on this promise, but failed. The court said that the promise was made to S, not to P, though in view of the above decisions this alone could not have barred P's right to sue. What perhaps did bar his right was the absence of a genuine bargain between D and S. The sheriff's decision not to arrest D was more in the nature of an administrative indulgence than a regular exchange; nor had S anything to give in exchange since he was acting solely as an executive agent or officer for P.

For a long time the law continued very much to the same effect. Thus one case affirmed that 'the party to whom the benefit of a promise accrues, may bring his action'.¹² Another made the important distinction between a 'promise in law' intended for the beneficiary and enforceable by him, and the 'promise in fact' made to the actual promisee.¹³ Yet another again enforced a promise at the behest of a future son-in-law,

¹¹ (1595) Cro. Eliz. 369.

¹² *Provender v. Wood* (1630) Het. 30.

¹³ *Starkey v. Mill* (1651) Sty. 296, where a father gave goods to his son in consideration that the latter would pay off a debt owing to the father's creditor. The son's objection that the creditor could not enforce the promise because the son owed him nothing, having merely an 'appointment' to pay, was over-ruled.

a promise for his benefit though not made to him personally.¹⁴ Then, in the better known case of *Dutton v. Poole*,¹⁵ a beneficiary was allowed an action against the promisor, notwithstanding the latter's objection that not the beneficiary but only the promisee (or his executor) could sue.

LATER DEVELOPMENTS

This clear and confident progression was interrupted by *Bourne v. Mason*,¹⁶ a case which did a great deal to obscure the beneficiary's special position, whether he was (as here) a creditor or was (as in most of the earlier cases) a donee. The facts were that one Parry, indebted to both Mason and Bourne, was in turn owed money by Chaunter. Bourne agreed with Parry that if he would allow him to sue Chaunter in his (Parry's) name, he (Bourne) would pay off Parry's debt to Mason. After the money was recovered from Chaunter, Mason sued Bourne, but his action failed. According to one (the Ventris) report, he failed because he was a 'stranger to the consideration', having done 'nothing of trouble to himself or benefit to the defendant'. But the Keble report also lets fall, albeit a little obliquely, the more interesting point that, even if Mason were to recover the money from Bourne, this would still not discharge Parry as he might still be sued by Mason on the original debt.¹⁷

Though this may have been felt to be a crucial difficulty, it was certainly an exaggerated one. No court or jury could have misunderstood this kind of arrangement so as to allow the creditor to recover his debt twice. This point we shall have to consider again.¹⁸ For the present it received no attention: what did was the wider objection that the plaintiff-beneficiary was a 'stranger to the consideration' or that he lacked 'privity'. Even this need not have been decisive, since the

¹⁴ *Sprat v. Agar* (1658) 2 Sid. 115, as explained in *Bourne v. Mason* (1669) 1 Vent. 6, 2 Keb. 457. And see also *Hornsey v. Dimocke* (1672) 1 Vent. 119; *Bell v. Chaplain* (1675) Hard. 321; *Bafeild v. Collard* (1681) Aleyn. 1, which (as also the previous case) points out that upon mutual promises to pay a beneficiary both the latter and the actual promisee can sue.

¹⁵ (1677) 1 Vent. 318, T. Jones 103, 2 Lev. 210, T. Raym. 302, where D, the promisor, promised his father to pay £1000 to his sister if the father would forgo cutting trees on his land.

¹⁶ (1669) 1 Vent. 6, 2 Keb. 457, 527.

¹⁷ 2 Keb. 527, 528.

¹⁸ In connection with *Liversidge v. Broadbent* (1859) 4 H. & N. 603, at note 32 below.

objection was, if at all, only relevant where the plaintiff was not a donee but a creditor-beneficiary. For in the latter situation there were indeed some special difficulties, in that too automatic a right of action against the defendant as debtor could be unfair, or at least premature, particularly where the defendant's original undertaking to pay depended on conditions or contingencies as yet uncertain or unfulfilled.¹⁹ These, to be sure, were quite manageable difficulties which in time could have been sorted out; they did not call for any blanket denial depriving the so-called 'stranger' from any right to sue. But it is just this notion, that such a denial was required as a matter of principle, which *Bourne v. Mason* left behind.

In *Dutton v. Poole*, too, the court seemed a little doubtful as to a beneficiary's rights, even though there the beneficiary was a simple donee.²⁰ It was to overcome this doubt that the court now laid stress upon certain facts in the case, that is, upon the near relationship between the father and his children, so that, as they said, 'the consideration and promise to the father may well extend to the children'. This distinctly weakened or qualified the beneficiary's position as his right to sue was now to depend on a family relationship akin to the 'moral consideration' we encountered in chapter 5. This, to repeat, was quite out of step with the earlier decisions, and indeed was not followed in the eighteenth century, which continued to uphold a donee-beneficiary's rights even outside family relationships. 'As to the case of *Dutton v. Poole*,' Lord Mansfield remarked, 'it is a matter of surprise how a doubt could have arisen in that case.'²¹ Indeed the common law was soon restated in its earlier and more classical form: if, said Buller J., 'one person makes a promise for the benefit of a third, that third may maintain an action upon it'.²²

Yet it was the opposite rule, inspired by *Bourne v. Mason*, that was to

¹⁹ See, e.g., *Crow v. Rogers* (1723) 1 Stra. 592; *Price v. Easton* (1833) 4 B. & Ad. 433. Similar difficulties were to arise in connection with money had and received, which we discuss below.

²⁰ It is true that *Bourne v. Mason* was not there cited, but there is internal evidence that the court was aware of it: see A.M. Finlay, *Contracts for the Benefit of Third Parties* (London 1939), 13.

²¹ *Martyn v. Hind* (1776) 2 Cowp. 437, 443, where the successful third party was the defendant's nominee as his curate, the promise itself having been made to another, the bishop. Another such ecclesiastical situation is *Curtis v. Collingwood* (1676) 1 Vent. 297.

²² *Marchington v. Vernon* (1787) 1 B. & P. 98, 101n., and see also *Pigott v. Thompson* (1802) 3 B. & P. 147, 148n.

triumph in *Tweddle v. Atkinson*.²³ The declaration stated that, 'in consideration of' an intended marriage, the two fathers promised to give their respective children a marriage portion and that after the marriage the fathers signed a memorandum in which one father further promised to pay the portion directly to the son in law. The latter sued his father-in-law, but did not succeed, on the ground that it was a post-nuptial agreement which amounted to an executory gift.²⁴ This alone sufficiently distinguished it from the earlier cases, including *Dutton v. Poole*, in all of which there existed something of a bargain between the original promisor and promisee. However the court also stated another ground, to become far more prominent, which completely denied the son's right as a beneficiary since, as Crompton J. believed, modern principles established that the consideration must move from the promisee and since it 'would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it to his own advantage, and not a party to it for the purpose of being sued'.

That would indeed have been a monstrous proposition, but it was not the proposition really canvassed at common law. Earlier law, as we have seen, had certainly seen the difference between a 'party' and a 'beneficiary', between a 'promisee in fact' and a 'promisee in law'.²⁵ Nor was it ever denied that a contracting party was suable; the point rather was that in these situations the question of his suability did not arise. For the promisee from whom the beneficiary derived his benefit had already done his part of the bargain. The only performance left outstanding was that of the defendant-promisor; he alone was the party still to be sued. Hence the only question was whether the latter should not be answerable to the beneficiary, since the outstanding performance was anyhow intended for him, not for the original promisee who by now might be unavailable or dead. Indeed the beneficiary might have been named in the contract precisely because the original parties did contemplate the promisee's possible absence or unavailability to enforce the contract on behalf of the beneficiary.

²³ (1861) 1 B. & S. 393.

²⁴ It is doubtful whether the two fathers could have sued each other on their own promises, for though mutual they were only gift-promises. This was indirectly recognised by Blackburn J. (*ibid.*, 399) when he pointed out that even executed the transaction was still 'voluntary' enough to have been avoided under the statutes against Fraudulent Conveyances.

²⁵ See *Starkey v. Mill*, *supra*.

What is more, the notion that the consideration must move from the promisee gave a new twist to the notion of consideration itself. Under the classical notion (as we tried to explain in chapter 4), consideration had, so to speak, to 'move' from both sides inasmuch as there had to be a reciprocal bargain with mutual benefits. Nor had the cases allowing the beneficiary to sue really affected this; they had merely held that a third party might enforce a benefit which the original parties' bargain had specifically intended for him. Under the new notion, however, consideration was not so much concerned with mutual benefit as with a one-sided (the plaintiff's) detriment, with the role of benefit henceforth greatly obscured. Contract law never quite recovered from the blow.

THE BENEFICIARY AND MONEY HAD AND RECEIVED

The rule that consideration had to move from the promisee had a secondary source, nurtured by a peculiar development of money had and received which greatly affected the creditor-beneficiary. If A gave money to D to pay to P, the beneficiary (P) had *indebitatus assumpsit* as for money received to his use.²⁶ This, as the name shows, was originally the major purpose of the action, but late in the eighteenth century it began also to be used as a way of transferring funds, as where A instructed D to pay P some of A's money already in D's hands. *Israel v. Douglas*²⁷ is apparently the first case. D was indebted to A for brokerage services, and A to P for money lent, whereupon A instructed D to pay what he owed A to P. D objected that money had and received would not lie since D's indebtedness to A was only for work done and since furthermore D had not actually *received* any money for the use of P but had merely *assented* to pay him instead of A. The objection did not succeed. For, as Gould J. pointed out, there was no real difference between giving another money for a third and instructing him to pay so much to which he assents: 'in reason and sound law it is money had and received to the use of the third'.

What happened next however was most astonishing. A mass of case law soon utterly overwhelmed the decision, and though it was

²⁶ *Beckingham & Lambert v. Vaughan* (1616) 1 Rolle 391, Moo. K.B. 854, and see chap. 9 above. See also Jackson, *History of Quasi-Contract*, 93-5. Before the count of money had and received, P had of course an action in account, later even in debt. The passage from account to debt is fully traced by C.D. Hening, *The Beneficiary in Assumpsit in Select Essays in Anglo-American Legal History* (Boston 1898), iii, 339.

²⁷ (1789) 1 H. Bl. 239.

never over-ruled, the eventual result was that the creditor-beneficiary was left with virtually no operative claim. The new law became extraordinarily complex but for our purposes it will be enough to pick out and concentrate on two decisions, one marking the beginning', the other the end of this phase of development.

The first decision is *Williams v. Everett*,²⁸ in which A instructed D to pay the proceeds of certain bills to A's creditors, one of whom was P, who brought money had and received against D. The action failed because D had not assented to 'appropriate' the money for P. This result was not immediately at odds with *Israel v. Douglas*; in fact Lord Ellenborough expressly approved of Gould J.'s reasoning. But, whereas in the latter the question of D's 'assent' only arose because of D's objection that he had not 'had and received' money for P, in the present case D's 'assent' became relevant for another purpose, namely, to convert D from being, so to speak, an 'agent' for A into an 'agent' for P. Now there were two respects in which it was essential to identify such an 'agency'. In the first place, only after D became (by his 'assent' or 'appropriation' or 'attornment', as it was later called) P's 'agent' instead of A's did A cease to have the right to cancel his instructions to D.²⁹ In the second place, only such an 'agency' could avoid conflict with the well known rule under which a debt was not assignable at common law. Whereas in an assignment the debt was transferred without the assent of the intermediate debtor (the main reason why the common law regarded an assignment as vitiated by 'maintenance'), in the 'agency' approach precisely such an assent had to be shown or at least presumed.

The trouble is that in *Williams v. Everett* Lord Ellenborough also said that D's 'assent' to P was part of an essential 'privity' or 'engagement', which rather suggested (though Ellenborough was perhaps careful not to say so) that money had and received there applied not by virtue of D's new accountability to P but by virtue of some 'contract' between them. Often, it is true, 'privity' was just a way of saying that P had no action unless D had 'assented' to hold the money for him.³⁰ But often enough 'privity' became a means of denying recovery for

²⁸ (1811) 14 East 582.

²⁹ On this 'agency' approach, see *Gibson v. Minet* (1824) 2 Bing. 7, S.C. 9 Moo. 31; *Lilly v. Hays* (1836) 5 Ad. & E. 548; and see also Jackson, op. cit., 100-2, the first to draw attention to all this.

³⁰ *Stephens v. Badcock* (1832) 3 B. & Ad. 354; *Baron v. Husband* (1833) 4 B. & Ad. 611.

lack of a genuine contract, it being thought (with what justice we shall shortly see) that P could not claim money from D without giving something in consideration or exchange: as a creditor in a novation, he too had at least to discharge the intermediate debtor.³¹

These ideas found their fullest expression in *Liversidge v. Broadbent*,³² our second and final case. D owed A some £113, and A owed the same amount to P. The three met and concocted a document in which A authorised D to pay the £113 to P. It was held that P could not recover from D, mainly on two grounds. First the court denied that it was a case for money had and received, because D had not assented or attorned to P. Secondly, they said there was no contract on which P could sue as P had not given any consideration, since the present arrangement did not amount to a novation, there being nothing to show that it extinguished A's debt to P, so that if P were to recover from D he could still sue A.³³

A little reflection shows either ground to be most unconvincing. As to the first, it is difficult to see why the above arrangement could not be regarded as furnishing the necessary assent to constitute an 'agency' between D and P, for the point of the arrangement was precisely to terminate A's rights as 'principal' against D, who in turn agreed with A and P that A's money should go to P. As to the second ground, it cannot be denied that the arrangement did not technically constitute a novation as P did not therein discharge A.³⁴ Yet (and this argument also applies to the decision in *Bourne v. Mason*) even if the arrangement did not discharge A immediately or formally, this should not have affected P's action against D. Moreover, the effect had to be that A would become discharged as soon as P either claimed or took the money from D. For in claiming and taking the money, P would receive neither a gift nor a debt owed by D personally, but would receive money that D would be paying on behalf of A. Indeed it seems inconceivable, nor is there any reported case actually suggesting that, after being paid by D, P could revive his old claim against A so as to recover his debt a second time. And if so, it was not correct to

³¹ See *Cuxon v. Chadley* (1824) 3 B. & C. 591; *Wharton v. Walker* (1825) 4 B. & C. 163; *Lilly v. Hays* (1836) 5 Ad. & E. 548; *Walker v. Rostron* (1842) 9 M. & W. 411. ³² (1859) 4 H. & N. 603.

³³ This part of the argument was of course very similar to one advanced in *Bourne v. Mason* (1669) 1 Vent. 6, 2 Keb. 457, considered above.

³⁴ As Pollock C.B. pointed out there was nothing in the document to prevent P from suing A *instanter*.

say that 'here the plaintiff was under no obligation to do any act, or to forbear, or to suffer any inconvenience'.³⁵ Surely P's 'inconvenience' was that in taking his money from D he would sooner or later have to forgo his claim against A. By suffering this 'inconvenience', to be sure, P would still not furnish any 'consideration', strictly so called, to D, because between these two there was no bargain in any real sense, just as there is in fact no real bargain even in an ordinary novation; even there P's discharge of A is of benefit to the latter rather than to D: it is immaterial to D whether he has to pay A or P. In one as in the other situation, in other words, we are confronted not by a bargain but by the agreed transfer of a debt, a transfer which, as already pointed out, yet does not conflict with the non-assignability of debts at law precisely because the transfer takes effect with the consent of the intermediate debtor (D).

Be that as it may, the result of *Liversidge v. Broadbent* and cases like it afforded influential support for the view that the third party (P) had to furnish 'consideration' to have any contractual rights, even though the actual role or meaning of consideration was hardly thought through. Yet it is from such slender beginnings that the dogma arose that consideration must always move from the promisee, thus denying altogether any rights to the third party beneficiary.

³⁵ *Ibid.*, 612, per Bramwell B.

Part IV
The Order and Standard of
Performance

The Doctrine of Dependency and Independency

MUTUAL COVENANTS AND MUTUAL PROMISES

Where previous chapters dealt with the foundation of the simple contract, including the rights and liabilities that might enure to a third party (the executor, the guarantor, the beneficiary), the following pages turn to the question of what sort of performance a promisor had to give. This question, little investigated, has been a major theme in contract history, particularly within the doctrine of the dependency and independency, a doctrine originating in the law of covenants since it was for a long time in sealed rather than simple contracts that the parties took the trouble to specify with any care what, or on what condition, each party should perform or pay.¹ Hence courts had to look very carefully at the express terms in a contract to ascertain whether one party had 'intended' his covenant to be conditional or 'dependent' on the other's prior performance, or whether the parties had meant their mutual performances to be free or 'independent' of this conditional hinge. Since the meaning of the parties was not always clear, the courts were often involved in peculiar, sometimes extraordinary, reasoning. It needed a great deal of analytical trial and error before a clearer pattern could emerge.

¹The doctrine became known mainly in its formulation by Serjeant Williams in his famous notes to *Pordage v. Cole* (1669) 1 Wms. Saund. 319, 1 Lev. 274, T. Raym. 183, 2 Keb. 542, 1 Sid. 423. It later attracted the attention of Langdell, who seems however to have been so perplexed by the task of presenting the cases in any rational order that he finally preferred to let them speak for themselves, a circumstance perhaps not entirely unconnected with his discovery of the case method. See his *Summary of the Law of Contracts* (Boston 1880) 31, 134ff. On this and other aspects, see more fully Stoljar, 'Dependent and Independent Promises' (1957) 2 *Sydney L. Rev.*, 217, of which the present pages are an abridged and much revised account.

The initial position was that mutual covenants were generally treated as 'independent', being seen as separately enforceable, unless linked by a verbal formula indicative of an express condition, when they were regarded as 'dependent' covenants. Accordingly a vendor could sue for his price, a servant for his wages, without tendering performance if performance was not expressly stated as having to come first. So, in Chief Justice Fineux's example, 'if one covenant with me to serve me for a year, and I covenant with him to give him £20, if I do not say for said cause, he shall have an action for the £20 although he never serves me; otherwise if I say he shall have £20 for said cause'.²

This distinction could give rise to considerable subtleties. In *Brocus's Case*³ a manorial lord covenanted to enfranchise a copyholder who covenanted to pay him 'in consideration of the same performed'. The latter was held not bound to pay *before* the lord's assurance, although had the words been 'in consideration of the said covenant to be performed' he would have had to pay the money 'presently'. A purely verbal difference (between 'the same performed' and 'the said covenant to be performed') was now used to make the copyholder's duty to pay conditional or dependent, a construction obviously far more satisfactory to him. On the other hand, in *Ughtred's Case*,⁴ where an annuity had been granted *pro consideratione* that the plaintiff would maintain a castle, and he complained of not having received any part of the annuity without averring prior performance by himself, this averment was held not essential. The castle service was now construed not as a condition precedent but subsequent, in defeasance of the grant, for it was a 'matter in law', the court said, whether or not a covenant was enforceable 'independently'. Here, very probably, the plaintiff was unable to aver exact performance (he might for good practical reasons have appointed only five soldiers to maintain the castle instead of the six required by the covenant), so that a strict construction would have denied him every reward, however long or satisfactory his services might have been.

It should not be thought that the courts were always interpreting covenants to help what seemed to them the more deserving side. Suppose a lessee broke his covenant not to underlet, or not to assign, or to do or not to do any other act stipulated by the lessor: was this

²(1500) Y.B. 15 Hen. VII, fol. 10b, pl. 7.

³(1588) 2 Leon. 211, 3 Leon. 219.

⁴(1591) 7 Co. Rep. 9b.

to forfeit his estate or tenancy or was it merely to 'abridge the covenant'?⁵ If total forfeiture was a somewhat disproportionate consequence for a possibly small breach, a mere ('independent') action in damages was equally unsatisfactory for the lessor, considering his certain disadvantage of now being burdened with an undesirable lessee.⁶ This posed a very real dilemma which the courts had no way of resolving except by attempting a 'neutral' interpretation of the contractual terms. And so emerged the rather scholastic learning concerning 'conditions' and 'covenants', which for all its resulting technicality may for present purposes be summarised in two parts. If no penalty was annexed to the proviso, the breach was construed as one of a condition giving rise to a forfeiture, the idea being that unless so held the 'proviso' would be rendered inconsequential.⁷ If, secondly, there was no special penalty, the breach was regarded as merely one of 'covenant' giving a right to damages but not to forfeiture.⁸ In other words, some conditional words were now treated as less conditional than others, yet so treated only because of the supposed intention of the parties themselves.

On a broader view one can nevertheless say that the general movement of construction favoured covenants or independency over conditions or dependency. The development in charter parties shows this well enough. In *Clarke v. Gurnell*,⁹ a shipowner, having covenanted to sail with the first wind, did not so sail, though he had carried the cargo for the charterer. The latter refused to pay any freight, maintaining that he had agreed to pay *pro toto transference omnium praemissarum*, which implied exact performance, a contention with which the King's Bench agreed. Yet only fifteen years later, in *Constable v. Cloberie*,¹⁰ a similar covenant to sail with the first wind was held not to be a condition precedent. The 'substance' of the covenant, it was now said, was that the ship would sail 'accordingly', which might in fact not be the first wind as it could change from hour to hour. In a later

⁵ *Scot v. Scot* (1587) Cro. Eliz. 73.

⁶ *Simpson v. Titterell* (1591) Cro. Eliz. 242, 1 And. 267; *Pembroke v. Barkley* (1601) Cro. Eliz. 384, 560, Gould. 130, Poph. 116.

⁷ *Simpson v. Titterell*, *supra*; *Huntington & Mountjoy's Case* (1589) 4 Leon. 147, Moo. K.B. 174, Godb. 17, 5 Co. Rep. 3b, 1 And. 307; *Thomas v. Ward* (1590) Cro. Eliz. 202. Similarly the words 'provided' and 'it is agreed' were held to be conditional, *Geery v. Reason* (1628) Cro. Car. 128.

⁸ *Archdeacon v. Jenner* (1598) Cro. Eliz. 604; *Cromwel's Case* (1601) 2 Co. Rep. 69b, Jenk. 252, Moo. K.B. 471.

⁹ (1611) 1 Bulst. 167.

¹⁰ (1626) Pal. 397, Poph. 161, Latch. 12, 49, Noy. 75.

case, again, the charterer pleaded that the ship, instead of returning directly 'made divers deviations by which the goods were spoiled', yet the court allowed an action for freight, for 'perhaps the damage of the one side and the other was not equal', so that 'each party is to recover against the other the certain damage he sustained'.¹¹ Obviously it was realised that conditions had to be more flexibly construed in charter parties than in leases, if only because in leases non-compliance with a condition was typically a voluntary or deliberate act, whereas in charter parties non-compliance could result from supervening factors often quite beyond the covenantor's control.

The independent-dependent doctrine, worked out for mutual covenants, was early applied to simple contracts though in a somewhat obverse way. Whereas in covenants such terms as 'for' or 'pro' or 'in consideration of' were (presumptively) words of condition, in mutual promises these words indicated rather the existence of a bargain supporting the promises on each side, from which it was further inferred that a promise 'for' a promise would create independent, not dependent, obligations.¹² Indeed, as we saw in chapter 4, the whole notion of mutual promises being sufficient 'consideration' for each other was closely connected with, almost an extension of, the doctrine of independency. It was moreover a doctrine as appropriate in simple contracts as in covenants, since it furnished a ready answer to a defendant's objection to performing his own promise where the plaintiff had failed in some, usually minor, respect.

A few examples will show how independency worked. D had agreed to buy all the iron made in P's furnace and had received large quantities, for which he had paid only part of the price, but resisted P's claim for the rest of the money, pleading that P had not averred that he had delivered all the iron bought.¹³ This plea was rejected, for, said the court, the 'consideration' here was not that D should *have* all the iron, as P had only *promised* that D should have all the iron. So, by holding the mutual promises to be independent, P was able to recover money for the iron already supplied. In another case P paid D some money which D promised to repay should he (D) fail to perform, but he neither

¹¹ *Cole v. Shallet* (1681) 3 Lev. 41. See similarly *Shower v. Cudmore* (1682) T. Jones 216, and *Tompson v. Noel* (1661) 1 Lev. 16.

¹² *Gower v. Capper* (1596) Cro. Eliz. 543; *Wichals v. Johns* (1599) Cro. Eliz. 703, Moo. K.B. 791.

¹³ *Bettisworth v. Campion* (1608) Yelv. 133, perhaps the first example of an 'output contract' by mutual promises.

performed nor repaid, yet when sued for the return of the money objected that P had not averred their prior delivery.¹⁴ This objection, again very technical, failed on the same ground: that the promises were 'consideration' for each other so that either party could sue on the other's promise independently.¹⁵ In our final instance P promised to surrender, then did surrender, certain copyholds to D, making the surrender not to D directly but to two copyholders to the use of D, which was according to custom. D refused to pay for the surrender, arguing that the performance was not good: the court seemed divided, but eventually held for P as it considered the promises to be independent, 'here being mutual promises'.¹⁶

EXECUTORY SALES AND THE RULE IN *PORDAGE V. COLE*

As applied to purely executory contracts, and executory sales in particular, the doctrine of independency was however apt to cause untold difficulty. Independency meant that a seller could, for instance, claim the price for a cow without any delivery since, as an early case has it, he 'need not aver the delivery of the cow, because it is promise for promise'.¹⁷ Even an averment of readiness to perform was held to be 'idle, and more than the plaintiff was compelled to do'.¹⁸ This led to the extraordinary result that, as in *Gibbons v. Prewd*,¹⁹ a seller could successfully claim a great deal of money (there £2000 by way of an annuity) without so much as tendering conveyance of the land sold. The point that the price was promised only for an actual conveyance was dismissed as a 'mistake': first, because the buyer's own promise to pay did not depend upon the seller's performance but on his reciprocal counter-promise and, second, because it was 'a general rule' that when one 'has a remedy for the consideration of a promise, that consideration needs not be averred to be performed'.

Independency thus created a one-sided credit for the benefit of the

¹⁴ *Spanish Ambassador v. Gifford* (1615) 1 Rolle 336.

¹⁵ The court added that, had D's promise been for something to be done, P would have had to aver performance 'because there he [D] has no remedy over'. A similar point had been made by Coke C.J. in *Everard v. Hopkins* (1614) 2 Bulst. 332, 333-4, but it is difficult to see the strength of this. For these were contracts executed, or partly executed, by P for which D had as yet done nothing in return; having done nothing on his own promise, what 'remedy over' could D have against P?

¹⁶ *Beany v. Turner* (1670) 1 Lev. 293, 2 Keb. 666, 1 Mod. 61.

¹⁷ *Nichols v. Raynbred* (1615) Hob. 88.

¹⁸ *Thorp's Case* (1639) March. N.C. 75.

¹⁹ (1655) Hard. 102.

party happening to sue first. It is true that the contract would be construed as dependent if it contained clear words of conditions to show which performance was to take precedence. But though conditional words were common in covenants they were less so in mutual promises. An 'independent' construction was sometimes defended by saying that the parties 'trusted' each other's promise, unlike the situation where they adopted express words of dependency.²⁰ But this rationalisation overlooked the fact that even a 'dependent' construction was, by itself, no satisfactory solution for the executory sale, since dependency merely shifted the one-sided credit, leaving the other party still obliged to part with property or money without getting his return of the exchange. The simple truth is that a contract of sale, whether construed as independent or dependent, was caught between two undesirable alternatives. The appropriate solution was of course that of concurrent conditions, but concurrency was still far away.

In the meantime another complication arose. A contract with a condition stipulating payment on a particular day was construed as an 'independent' rather than a 'dependent' one, a construction particularly associated with the famous case of *Pordage v. Cole*.²¹ Pordage had covenanted that he would pay on a specified day for a house to be conveyed by Cole. The latter brought an action for the price to which Pordage's 'great exception' was that 'the word "for" (*pro*) made a condition in things executory' so that his promise to pay was dependent upon some tender of conveyance to him. The decision however was that Pordage had to pay on the named day, on the ground that his duty to pay had to be independent of the other's duty to convey since 'perhaps the conveyance cannot be made by that day'.²² This ground is not very persuasive as there was nothing to suggest that Pordage had agreed to pay in advance, the specified date being probably meant to indicate the expected time for execution, not to impose a credit burden on the purchaser. In fact the decision again reveals the continuing inability to make payment and performance concurrent in sale.

Though disappointing, the decision did contain a novel element.

²⁰ See, e.g., *Lea v. Exelby* (1602) Cro. Eliz. 888; *Smith v. Shelberry* (1675) 2 Mod. 33, 34, 1 Freem. 195.

²¹ (1669) 1 Wms. Saund. 319, 1 Lev. 274, T. Raym. 183, 2 Keb. 542, 1 Sid. 423. The rule of construction is traceable back to *Pole v. Tochesser* (1375) Y.B. 48 Edw. III, fol. 2, pl. 6, but had recently been revived in *Ware v. Chappell* (1649) Sty. 186, there on somewhat peculiar facts.

²² See this in T. Raym. 183.

By defeating an express dependency and making the covenants independent, it upset a tenet of interpretation dominant for over a century; if the word 'pro' could be trifled with, the same might happen to other express conditions. Indeed very soon it was held that 'proinde', hitherto one of the strongest conditional words, was not inevitably a condition precedent.²³ Then it was said, rather more candidly, that an 'independent' approach tended to support 'the merits of the case' and the 'meaning of the parties'.²⁴ In other words, by extending the scope of 'independency', *Pordage v. Cole* encouraged a new flexibility in the construction of covenants. So in a covenant not to compete, the words 'in consideration of the performance' were not treated as conditional.²⁵ Covenants in a lease were now construed as independent.²⁶ Even more importantly, in a contract of employment a covenant to pay so much 'for service' was held not to be a condition precedent.²⁷

The courts were striving for greater flexibility also in another way. In *Peeters v. Opie*,²⁸ where a builder averred not performance but only being ready and willing to perform, the court agreed that the words 'for his labour' constituted a condition precedent, with the result that he could claim nothing without showing his work actually done or at least that he was hindered or prevented from doing it. The builder had already obtained a favourable verdict but judgment was then arrested against him. However the court later reversed itself, on the ground that an averment of being ready and willing was sufficient after verdict, a reversal which is difficult to explain, unless the reason why the plaintiff had not performed was that he had been prevented by the other side: a fact which he had not pleaded but which may have come out in the evidence.²⁹ Holding an averment good after verdict thus

²³ *Smith v. Shelberry* (1675) 1 Freem. 195, 2 Mod. 33.

²⁴ *Samways v. Eldsly* (1676) 2 Mod. 73, 77.

²⁵ *Hunlocke v. Blacklowe* (1670) 2 Wms. Saund. 156, 1 Mod. 64, 1 Sid. 464, 2 Keb. 674.

²⁶ *Hayes v. Bickerstaff* (1675) 1 Freem. 194, 2 Mod. 34, Vaugh. 118.

²⁷ *Guy v. Nichols* (1694) Comb. 265. One covenant, said Holt C.J., 'cannot be pleaded in bar of another; if he serves one month, and then runs away, the first month's wages is due'.

²⁸ (1671) 2 Wms. Saund. 350.

²⁹ This interpretation is indirectly supported, first, by another pleading rule that, unless a plaintiff did aver that he was always ready and willing (*uncore prest*), his complaint as to the other's prevention was not made out: *Hobson v. Rudge* (1661) 1 Sid. 30, and secondly, by the rule that, in a case of manifest prevention, the covenants would be held independent, thus dispensing with a full averment as required in dependent covenants: see *Towlcarne v. Wright* (1616) 1 Rolle 414.

furnished another means of avoiding an express dependency, especially where a jury was presented with new facts. It was a device which older cases had firmly rejected;³⁰ but perhaps the courts had become more confident in handling juries than they had earlier been.

These innovations nevertheless created a deeper uncertainty in the rules of pleading and, in particular, as to what a plaintiff had to aver. For, even granting that a plaintiff had to show fully his work done or things delivered, especially where the contract contained a conditional term such as 'for' (*pro*),³¹ how necessary was such a rule, given the possibility that dependent terms could still be construed as independent, or a faulty averment be cured after verdict? This uncertainty appears vividly in *Thorpe v. Thorpe*.³² The facts were that P, having promised to release his equity of redemption in return for D's promise to pay a specified price, then made the release. D did not dispute his liability to pay; what he objected to was being sued on his promise without P's averment of full performance. His very ingenious point was that, since the promises were independent (P's promise to release being the consideration of D's promise to pay), P could originally have sued D on the mutual promises, but only as long as they were both independent and unperformed, for once performed the mutual promises were no longer independent but became dependent, so that a full averment became indispensable. Holt C.J. conceded this argument to be 'very true and necessary' and accordingly addressed himself to the question whether the mutual promises were originally independent as alleged or had instead become dependent. He recognised 'a variance in the books upon this learning', yet hoped 'on this occasion to settle it', although in the end he merely restated the old rule that, 'when one promises, agrees, or covenants, to do one thing *for* another, there is no reason he should be obliged to do it till that thing *for* which he promised to do it be done'.³³

Moreover, the admission that the promises were dependent clearly supported D's point that P had to be non-suited, his declaration being faulty in that it only 'generally' averred performance, not 'specially' as it should have done. Nevertheless Lord Holt now found another

³⁰ See *Clarke v. Gurnell* (1611) 1 Bulst. 167; *Austin v. Jervoyse* (1615) Hob. 70, 77; *Towlcarne v. Wright* (1616) 1 Rolle 414.

³¹ So *Large v. Cheshire* (1671) 1 Vent. 147, 2 Keb. 801 rejected an averment 'in general terms' that did not show prior delivery.

³² (1701) 1 Ld. Raym. 235, 662, 1 Salk., 171, 1 Com. 98, 12 Mod. 455.

³³ 1 Ld. Raym. 665.

way out. He held that, by 'pleading over' (that is, by pleading the release rather than taking his stand on the faulty averment), D had in fact admitted P's satisfactory performance and so had 'aided' the defect in the declaration. It is plain that the dependent-independent distinction was now being manipulated as required, both substantively and procedurally, to achieve reasonable results.

THE MOVEMENT TOWARDS CONCURRENCY

The discussion in *Thorpe v. Thorpe* had a broader effect. It vindicated, at least theoretically, a notion of dependency which was of special importance in sale. For only a dependency approach could prepare the way for the introduction of concurrent conditions; concurrency could not evolve in a climate of independency, as that did nothing to require the parties to co-operate: concurrency was essentially a form of co-operation in the mutual completion of an exchange. The law had therefore to adapt the rule of dependency for, unaltered, even this would not work. But adapt how? An analogue was found in the notion of tender which had originated in bonds where an obligor forfeited his bond unless he either tendered according to his covenant or unless his tender came to nothing solely because of the 'refusal' or prevention by the obligee.³⁴

This idea was first tried in *Ball v. Peake*.³⁵ P declared that he tendered the agreed sum for a lease, but that D did nothing to assign it. Though the court upheld the declaration after verdict, they agreed that it was bad initially for, though P had shown a tender, he had not shown D's refusal to accept: precisely this refusal was what was issuable here. The need for a refusal was so far rigidly insisted upon. In *Shales v. Seignoret*,³⁶ for example, P covenanted to pay for and accept £1000 worth of Bank

³⁴ The law of tender goes back a very long way. In *Anon.* (1424) Y.B. 3 Hen. VI, fol. 4, pl. 37, Rolle Abr. 453, pl. 5, the obligor was to erect a mill and announced to the obligee that he was ready to start, but the latter would not have it so that the former was excused. In *Anon.* (1482) Y.B. 22 Edw. IV, fol. 26, pl. 26, the obligee refused to teach the obligor's son when the latter was presented, so that the bond was not forfeited. Similarly the obligor was excused where he was to pay at a certain place and though 'ready every day at that place', there was nobody to take the tender: *Hughes v. Phillips* (1603) Yelv. 38, Cro. Eliz. 758, Cro. Jac. 13. The obligor, in short, had to show that he had done 'everything in his power' to complete and that he was actively prevented by the other side. See also *Barker & Fletwel's Case* (1586) Godb. 69; *Morris v. Luttarel* (1599) Cro. Eliz. 672; *Blandford v. Andrews* (1600) Cro. Eliz. 694; *Anon.* (1622) 2 Rolle 238.

³⁵ (1660) 1 Sid. 13.

³⁶ (1699) 12 Mod. 248, 1 Ld. Raym. 440.

of England stock. P averred that he notified D that he would make tender on the day required and had attended the whole day at the Bank of England, but D never came. It was held a bad averment, since it failed to declare that P had in fact tendered and that D had refused. As Holt C.J. insisted in a later case, the seller had to show that he did 'his utmost endeavour' to perform or 'how it came to pass that he did not, or could not do' what he had to do.³⁷

This strict interpretation of tender went considerably beyond the corresponding rule in bonds. There it was a sufficient tender if the obligee was not present when the obligor was at the stipulated time and place.³⁸ In the sale of shares, on the other hand, there was an understandable reluctance to give the seller the full price if the buyer did not get the shares, unless the buyer had shown a complete refusal to co-operate. This need for co-operation was perceived by Lord Holt: a party, he said, must either show his own tender and the other's refusal or show the lack of an appropriate tender on the other side.³⁹ With this discovery of reciprocal tenders, the way was opened for concurrent conditions, properly so-called. So a little later, the execution of a contract was said to require 'concomitant acts' since a buyer could not simply sit back, insisting that the seller had to make the first step.⁴⁰ Unless the parties had expressly stated who was to perform first, 'a middle way is to be chosen', by which a buyer, though under no duty to make an absolute tender, must at least indicate his own readiness to perform.⁴¹ A seller, in other words, could no longer be expected to go to the trouble of preparing for the execution of a sale if the buyer's response threatened to be negative.

It was not yet seen that such co-operative or concurrent performance also meant that the dependent-independent distinction had lost much of its earlier relevance. But for a while, at least, the distinction was still regarded as fully operative. In *Blackwell v. Nash*,⁴² another agreement for stock purchase, D refused a tender from P, saying he was entitled

³⁷ *Lancashire v. Killingworth* (1700) 12 Mod. 529, 1 Ld. Raym. 686, 3 Salk. 342, 1 Comb. 116.

³⁸ See *Hughes v. Phillips*, *supra*.

³⁹ *Callonel v. Briggs* (1703) 1 Salk. 112, Holt K.B. 663.

⁴⁰ *Turner v. Goodwin* (1714) 10 Mod. 153, 189, 222, Fort. 145, Gilb. Cas. 40; *Merrit v. Rane* (1721) 1 Stra. 458, 460.

⁴¹ *Anvert v. Ennover* (1733) 2 Barn. K.B. 308, sub. nom. *Amcock v. Ennover*, 2 Barn. K.B. 337.

⁴² (1722) 1 Stra. 535, 8 Mod. 105.

to, as his obligation to pay was conditional or dependent upon stock actually being transferred to him. Apparently conceding this, the court nevertheless held the covenants to be independent, in an obvious attempt to deprive the buyer of his right to refuse. It was not seen that strict dependency no longer applied, having become qualified by its fusion with tender, as the buyer could no longer by his own refusal prevent the dependent condition from happening. This reversal to independency was to cause other difficulties. For it seemed that, if such contracts were indeed independent, the seller could (as in earlier cases) demand his price independently of any transfer or tender of the shares.

This point was soon made, minute arguments being raised as to which party should perform the first act. The courts, not without wavering, eventually realised that some act of tender had to be a condition precedent 'because otherwise the intention of the defendant to have the stock for his money can never take effect', for it 'could never be the intention' of the parties 'to make the payment depend upon the [buyer's] own acceptance', for that would be tantamount to letting him plead his own fault.⁴³

Nevertheless so long as the dependent-independent distinction remained a residual argument or, more precisely, so long as dependency or independency was not converted into concurrency in relation to sale, it was always possible to maintain that (for example) a seller, not having to do the first act, could therefore claim the price without tender, much less delivery.⁴⁴ This *lacuna* obviously called for further attention: it came in *Kingston v. Preston*,⁴⁵ where concurrent conditions finally received a distinct and official stamp. D was to transfer property to P, who covenanted to pay later but to advance an immediate security

⁴³ *Lock v. Wright* (1723) 1 Stra. 569, 8 Mod. 40; *Wyvil v. Stapleton* (1724) 1 Stra. 615. And see also *Dawson v. Myer* (1725) 2 Stra. 712.

⁴⁴ In fact one (though seemingly only one) case so held: *Martindale v. Fisher* (1745) 1 Wils. K.B. 88, following *Nichols v. Raynbred* (1615) Hob. 88, mentioned above.

⁴⁵ (1773) 2 Doug. 684, 689, Lofft. 197. This famous case came to be regarded as the 'first strong authority' in the history of concurrent conditions: see *Glazbrook v. Woodrow* (1799) 8 T.R. 366, 371, 374. Some even asserted that Lord Mansfield was here deciding 'contrary to what had been held for law from time immemorial' (Langdell, *op. cit.*, 184) or 'in spite of three centuries of opposing precedents' (Williston on *Contracts* (rev. ed., New York 1936), §817). The simpler truth is, as T.A. Street in *Foundations of Legal Liability* (New York 1906, ii, 137-8) more clearly saw, that Mansfield merely gave 'shape and consistency' to but did not create new law.

for the price. This security was obviously very important to D; equally obviously the decision was that P could not claim the property without concurrently offering to give the security as agreed. There are, said Lord Mansfield, three kinds of covenants: independent, dependent and, as here, 'mutual conditions to be performed at the same time'. In the third situation it may not be certain that either party is obliged to do the first act but, continued Mansfield, one party can always offer to perform his part and, if the other neglects or refuses to perform his, he who is ready can maintain an action for the other's default.⁴⁶ The struggle for concurrency was finally won, some of the old cases being now even said to 'outrage common sense'.⁴⁷

At last it was clear that the parties to a sale must co-operate as fully as possible. In *Jones v. Barkley*,⁴⁸ it is true, a buyer still tried to suggest that a seller must proffer full execution where an agreement provided for payment by the buyer only 'upon' an assignment (there being no 'more emphatical term of express priority than the word "upon"'). But the court easily dismissed this point; the seller had done enough by tendering or showing the buyer a draft of the required document which the latter would not read; hence the seller did not have to go further and 'do a nugatory act'. Only one detail was still unsettled: the meaning of 'readiness and willingness' where the parties' roles were reversed. In *Morton v. Lamb*,⁴⁹ the buyer declared that he was 'ready and willing' to accept wheat sold to him but the seller never delivered. His action failed, since he had never told the seller that he was ready to pay for the delivery. The buyer, in other words, could not assert he was ready and willing; he had to indicate to the seller that he was ready and willing to take delivery and pay the price. Admittedly,

⁴⁶ It is worth noting that to Lord Mansfield this construction of a contract depended on the 'intent' of the transaction, 'to be collected from the evident sense and meaning of the parties and, that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance'. Lord Mansfield was not the first to underline this 'intent'. See, in particular *Hunlocke v. Blacklowe* (1670) 2 Wms. Saund. 156, 157; *Thorpe v. Thorpe* (1701) 12 Mod. 455, 460, where Lord Holt spoke of 'the nature of the agreement', and *Russen v. Coleby* (1733) 7 Mod. 236, where Lord Hardwicke similarly said that 'these cases do not so much depend on the manner of penning the covenants as to the nature of them'.

⁴⁷ *Goodisson v. Nunn* (1792) 4 T.R. 761, 765; and see also *Porter v. Shephard* (1796) 6 T.R. 665, 669; *Glazbrook v. Woodrow*, *supra*, at 372.

⁴⁸ (1781) 2 Doug. 684.

⁴⁹ (1797) 7 T.R. 125.

he did not have to make a formal statement that he was ready, but he did have to do enough to permit his own readiness to be presumed.⁵⁰ A buyer, in sum, had to be as ready and willing to perform on his side as a seller had to be on his.

THE PRINCIPLE OF *BOONE V. EYRE*

We saw the courts were prepared all along to manipulate the independent-dependent distinction to achieve appropriate results with executed contracts. In the eighteenth century a few cases concerned with leases threatened to return to a literal interpretation of conditional words.⁵¹ But they were isolated episodes, soon anyhow overshadowed by the famous decision of *Boone v. Eyre*.⁵² Briefly, the problem here was whether the buyer had to pay the price for a West Indian plantation, together with a stock of negroes, in spite of the fact that, contrary to his covenant, the seller was not possessed of all the negroes, thus lacking complete title to them. On demurrer judgment went for the seller claiming his price. The distinction, said Lord Mansfield, is between 'mutual covenants' that 'go to the whole of the consideration on both sides' so that one becomes precedent to the other, and covenants where the consideration goes 'only to a part' so that a breach ought to be paid for in damages rather than pleaded as a condition precedent: 'If this plea were to be allowed any one negro not being the property of the plaintiff would bar the action.' Consequently the buyer had to pay in full, subject only to his remedy over, i.e., his separate action for the admitted deficiency. The same rationale had of course been implicit in many of the seventeenth-century decisions previously discussed. But the telling facts of the case, together with the renown of Lord Mansfield,

⁵⁰ *Rawson v. Johnson* (1801) 1 East 203. However some uncertainty as to the buyer's position continued throughout the nineteenth century. This matter need not here be discussed: it is dealt with in the notes to *Peeters v. Opie* (1671) 2 Wms. Saund. 350, and more generally in 2 Williston on *Sale* (rev. ed., 1948), §445.

⁵¹ The outstanding example is *Thomas v. Cadwallader* (1744) Will. 496, where a lessee covenanted to repair with the lessor 'finding and allowing timber'. In an action for non-repair, the lessor could not aver that he had found and allowed anything, for the simple reason that he had expected to be informed as to what, when and how much timber would be required from him. Yet so impressed was the court with the phrase 'finding and allowing', which they believed to have always been strictly conditional, that the lessee's covenant to repair was construed as completely dependent on the lessor's finding and allowing, even though the lessee had done nothing at all.

⁵² (1777) 1 H. Bl. 273n., 2 W. Bl. 1312, 1314n.

gave *Boone v. Eyre* very special prominence.⁵³ Its success, however, rather falsified its true place in the historical process, for, important though it was, the decision was part of a continuing development, it was not a sort of sudden act of creation in contract law.

Though *Boone v. Eyre* was primarily meant to cope with executed contracts, the judgment appeared wide enough to permit application to executory contracts as well. In *Duke of St Albans v. Shore*,⁵⁴ P was to convey land to D, who then repudiated the agreement on the ground that P had, some time before completion, cut timber on the land, thus seriously diminishing its value. The court upheld D's repudiation, since what P had done went not just to 'part' but to the 'whole' of the consideration, the timber having been 'the chief inducement to a purchase of that estate'. Though correct in result, this was nevertheless a misleading application of *Boone v. Eyre*. In an executory contract a seller might well be required to perform 'punctually, exactly and literally', because otherwise he would still be left with his property—quite unlike an executed contract, where a similar requirement of complete performance gave the plaintiff nothing, however great the benefit the defendant received. In an executory contract, in other words, even a breach going to only 'part' of the consideration ought to be treated as a 'dependent' one, though to say this is also to say that, in relation to purely executory contracts, the part-whole distinction is almost entirely out of place.

A wider application of *Boone v. Eyre* had another peculiar effect. Consider the case where a builder, having covenanted to complete by a stated date, failed to complete because of many alterations ordered by the owner (D).⁵⁵ Could D refuse to pay on the ground that, the parties having 'positively agreed' upon completion in time, this made his covenant wholly dependent upon the contract being so completed in time? How was the court to meet this argument? It could not be met by saying that punctual completion went only to 'part' of the consideration, because of *Albans v. Shore*, which had insisted on a 'punctual' performance of covenants. Of course it could be said that the owner's additions or alterations had prevented the builder from completing

⁵³In *Fothergill v. Walton* (1818) 8 Taunt. 576, 583, it was remarked that the decision had 'all the weight which some of the greatest names in Westminster Hall can give it'. It has also been one of the most cited cases in English law.

⁵⁴(1789) 1 H. Bl. 270.

⁵⁵*Terry v. Duntze* (1795) 2 H. Bl. 389.

in time, a prevention which excused the condition precedent, but prevention was not yet recognised as a separate excuse.⁵⁶ The one remaining possibility was to fall back on *Pordage v. Cole*, that is, on the principle that covenants are 'independent' if a day is named for payment and if that day be before performance. This, to be sure, enabled the builder to recover some payments, but only those due to him before, not after, the completion date. It follows that the builder's right of recovery was made to depend not on work done or benefits bestowed, but on the fortuitous specification of dates. Nor was that all; the decision also meant that *Pordage v. Cole* was brought back from retirement, which in turn led to a revival of the older learning about dependent and independent covenants.

SERJEANT WILLIAMS'S FIVE RULES

Against this background Serjeant Williams in the 1790s set himself to 'deduce' the principles governing dependency and independency.⁵⁷ His aim was distinctly practical, to determine 'when it is necessary to aver performance in the declaration, and when not', an inquiry which ended in the formulation of five rules—very briefly, these: (1) that if the day of payment is to, or may, happen before the other's performance, the payor's promise is independent so that P can claim payment without having to aver performance; (2) if such payment is appointed after performance, the payor's promise is subject to a condition whose fulfilment P has to aver; (3) if a covenant goes only to part of the consideration, it is independent so that P may maintain an action without averring performance; but (4) if mutual covenants go to the whole consideration, they are mutual conditions and must be averred; and (5) if two acts are to be done at the same time, neither party can maintain an action without showing performance or an offer to perform.⁵⁸

His rules were misleading in several respects, the first because it resurrected *Pordage v. Cole* as though it had never been superseded by the principle expressed in *Boone v. Eyre* or the doctrine of concurrency. Nor was the first rule in harmony with the fifth, which made

⁵⁶ See *Holme v. Guppy* (1838) 3 M. & W. 387, where the doctrine of prevention, especially applicable to building contracts, really begins.

⁵⁷ In his notes to *Pordage v. Cole* (1669) 1 Wms. Saund. 319, 320n., which first appeared in 1798.

⁵⁸ For the individual derivation of these rules, see more fully 2 *Sydney L. Rev.*, 217, 245-6.

conditions concurrent if performance were to occur at the same time, a rule which, as Williams said, 'particularly applies to all cases of sale'. Now if an exchange could not take place at the same time, or the parties did not wish it to take place, the buyer would have to pay on the day agreed, since in such a case he would have agreed to pay before the seller's conveyance or delivery. But suppose that, notwithstanding the day named for payment, the exchange *could* take place simultaneously: was the first rule to over-ride the fifth? This question was to give trouble for the next fifty years.⁵⁹ It is true that Williams's first rule was later overlooked, owing mainly to the growing specialisation of the law of sale, which gave concurrent conditions a recognised niche, with less and less room left for *Portage v. Cole*.⁶⁰

Consider next Williams's second rule, to the effect that performance had to precede payment if payment was postponed. While merely intended to state the obverse of rule 1, the second introduced a wider difficulty in relation to executed contracts, for it was certainly not invariably true that payment depended wholly on performance, unless performance was expressly meant to be entire or complete. Even if the second rule was qualifiable by the third (that deriving from *Boone v. Eyre*), the question arose which contracts were adjustable under rule 3 and which remained caught by rule 2. Thus suppose the plaintiff's breach went only to 'part of the consideration', was the principle of *Boone v. Eyre* to be ignored simply because the second rule applied? In particular, if a servant or builder did not render complete performance, was his right to payment to be utterly denied, however much he might have done? Or if the contract was to be construed as independent, then on what ground? Serjeant Williams gave no hint of this difficulty; indeed his renewed emphasis upon the need to aver complete prior performance seemed to diminish the applicability of *Boone v. Eyre*, which was to give rise to new problems more fully considered in chapter 13.

A final criticism concerns rules 3 and 4, which of course embodied the two-fold effect of *Boone v. Eyre*, but left certain things more than

⁵⁹Sec, e.g., *Matlock v. Kinglake* (1839) 10 Ad. & E. 50; *Wilks v. Smith* (1842) 10 M. & W. 355; *Sibthorp v. Brunel* (1849) 3 Ex. 826; with which compare *Marsden v. Moore* (1859) 4 H. & N. 500; *Bankart v. Bowers* (1866) L.R. 1 C.P. 484.

⁶⁰This progress is quickly traceable through *Waterhouse v. Skinner* (1801) 2 B. & P. 447; *Bloxam v. Sanders* (1825) 4 B. & C. 941; *Parker v. Rawlings* (1827) 4 Bing. 280; and 2 Williston on *Sale* (rev. ed., 1948), §448; Benjamin on *Sale* (8th ed., 1950), 599ff.

vague. The phrase 'part—or whole—of the consideration', though a flexible calculus, did not indicate how great or small a 'part' would uphold or defeat the plaintiff's right of recovery. Again, rules 3 and 4 could be easily misunderstood. So, where the breach went to the 'whole', it began to be called breach of condition, whereas a breach going to 'part', was referred to as breach of stipulation, term, warranty or other so-called 'lesser' terms. This terminology obscured the fact that, properly speaking, all contractual terms qualifying a promise are conditional, but some require strict fulfilment whereas others can be adjusted or excused. Worse still, rules 3 and 4 suggested a contrast that was logically misplaced, for while Serjeant Williams did remark that the third rule applied to executed situations, his principal illustration of rule 4 was *Albans v. Shore*, where however the contract was not executed but executory—which did not make it at all apparent how a rule relating to an executory contract could be relevant to an executed one.

Nevertheless, the fact that rules 3 and 4 appeared in this juxtaposition allowed the doctrine of independency to be extended to some purely executory situations and, in particular, to certain types of instalment and employment contracts. In *Bettini v. Gye*,⁶¹ perhaps the best illustration, a singer started his first day of employment by arriving late for rehearsal. His employer was unable to dismiss him since his lateness was held to go only to 'part' and not to the 'whole' of the consideration, even though he had expressly agreed to be on time for all occasions. It is difficult to see how this extension could have been possible without recourse to a doctrine as confused and confusing as it had been left in Serjeant Williams's rules.

⁶¹(1876) 1 Q.B.D. 183, regarding which see chap. 13, at note 48.

13 The Adjustment of Part Performance

EXECUTED CONTRACTS AND CHARTER PARTIES

In executed contracts the central difficulty had always been to find a way to reward a plaintiff who had rendered perhaps considerable and always beneficial performance without having fully or strictly complied with the express contractual terms. The doctrine of independency, both before and after its restatement in *Boone v. Eyre*,¹ had made a fundamental attempt to deal with the difficulty by giving each side an 'independent' action, so that one could sue for the price of his performance and the other for the breach of the contract to compensate him for any deficiency. However the curious fact is that in the nineteenth century this doctrine found distinctly less application than one would have thought, even in major types of executed contracts (such as building or service contracts) where *Boone v. Eyre* could have done the most as well as the simplest good. The blame, if blame there be, can only be laid with Serjeant Williams's rules, for they somehow obscured the special importance of independency by giving equal prominence, thus attaching equal weight even in relation to executed contracts, to the express terms of a contract and the plaintiff's compliance with them. The result was a growth of new doctrines which were in time to leave the law of contract in a conceptually bewildering state.

Only in charter parties was an 'independent' approach carried through with any consistency. There the typical question was whether the shipowner could recover his freight, notwithstanding shortcomings in his performance often beyond his control. The question was answered in broadly three parts, in a quick yet concentrated succession of cases

¹(1779) 1 H. Bl. 273n., and see chap. 12, at note 52.

which still constitute the basic framework of carriage by sea. First, it was clear, long before and certainly after *Boone v. Eyre*, that a shipowner could recover his full freight even if he had not sailed on the day agreed.² One court regarded such a condition as 'impossible' or 'nugatory' since it was 'absurd' to assume that the parties envisaged a denial of freight after a completed voyage,³ while another considered it an 'outrage to common sense' to refuse the owner any payment even where (for example) a lack of proper repair had caused delay and expense to the charterer for even this did not go to the full extent of the freight.⁴ Second, it was held that a shipowner could recover his freight even if he had loaded and carried a lesser cargo than specified. In *Ritchie v. Atkinson*⁵ it was strongly urged that delivery of a complete cargo was a condition precedent, but the court rejected this, following *Boone v. Eyre*, because a rigid requirement of a full cargo would defeat any claim however minor the deficiency.⁶

The third answer was very different from the first two. Suppose the owner, having agreed to carry a cargo to A, delivered at another (prior) port B, usually because of supervening circumstances which made delivery at A impracticable or impossible. Assuming the charterer did take possession of the goods, so as to derive some benefit from the carriage, could the owner recover if not the total then at least a rateable or proportional amount, his so-called 'distance freight'? Lord Mansfield

² *Constable v. Cloberie* (1626) Pal. 397, had already shown a remarkable ingenuity in reconstruing the 'substance' of a time covenant: see chap. 12, at note 10.

³ *Hall v. Cazenove* (1804) 4 East 477.

⁴ *Havelock v. Geddes* (1809) 10 East 555. And see also *Davidson v. Gwynne* (1810) 12 East 381.

⁵ (1808) 10 East 295.

⁶ The earlier law had been unclear: thus cp. *Bright v. Cowper* (1616) 1 Brownl. 21 with *Tompson v. Noel* (1661) 1 Lev. 16, 1 Keb. 100. In *Ritchie*, it is true, the terms provided for *pro rata* payments, so that the contract could be said to have contemplated 'proportionate' or 'divisible' freight instead of a single or 'entire' amount. Nevertheless the significance of the decision does not lie in this, but in the basic recognition of the owner's right to his freight, always subject to a cross action by the charterer. Again, though the present action was framed in *indebitatus assumpsit*, with counts for work and labour and *quantum meruit*, this was not a claim for a reasonable reward: for one thing because this action could not succeed without the promises being independent, for only then would the charterer have a duty to pay at all; for another thing because the charterer had his own remedy only by cross action, that is, he could still not deduct or set off his own damages for breach from or against the owner's action for freight: see on this point also *Sheels v. Davies* (1814) 4 Camp. 119, 6 Taunt. 65; *Dakin v. Oxley* (1864) 15 C.B. (N.S.) 646.

had thought that he could.⁷ Yet in *Cook v. Jennings*⁸ such a claim was emphatically denied. A very formal view was now taken of the covenant: 'we do not sit here to make, but to enforce contracts', said Kenyon C.J., although another judge conceded that the decision was 'technical' and did not 'meet the justice of the case'. What, then, explains the result? Mainly this: that as the voyage terminated prematurely the plaintiff was patently unable to aver his 'readiness' to perform; indeed his 'unreadiness' now looked rather stronger than in the first two situations, late sailing and short delivery. Even so, it could also be said that a plaintiff was in fact always 'unready' wherever he broke his covenant and that, moreover, it mattered nothing more to the charterer (retaining his remedy over) whether the breach consisted of premature termination or of any other breach.

In the above case Lawrence J. had suggested that an actual receipt of the goods might furnish evidence of a new agreement to pay *pro rata* freight; this suggestion was shortly taken up in *Christy v. Row*,⁹ where enemy action prevented a ship from going to A, whereupon the consignees directed her to B. The court now upheld a claim for distance freight, since the defendant through his consignees had both initiated and accepted the benefits of an alternative delivery. This was to remain the only situation in which an owner had a claim. Thus it was not enough if the charterer merely happened to obtain a benefit from the carriage, for that did not indicate the charterer's real consent so as to allow a new contract to be implied. Nor was it enough for the charterer to act under pressure, or the master acting in good faith to sell the cargo because of necessity as where the ship was captured or the cargo in a state of putrefaction.¹⁰ A great judge, Cockburn C.J., protested that this made little sense because obvious necessity did give the master an (implied) authority to sell; yet his remained very much a minority view.¹¹

⁷ *Luke v. Lyde* (1759) 2 Burr. 882, where earlier maritime laws were found to support an action for freight, provided it was not caused by the master's fault and the goods were not lost.

⁸ (1797) 7 T.R. 381.

⁹ (1808) 1 Taunt. 300, where the so-called 'covenant' embodying the charter party was in fact not sealed; but nothing turned on this since it mattered nothing whether the contract was a formal or an informal (or simple) one.

¹⁰ *Liddard v. Lopes* (1809) 10 East 526; *Hunter v. Prinsep* (1808) 10 East 378; *Vlierboom v. Chapman* (1844) 13 M. & W. 230.

¹¹ See *Metcalfe v. The Britannia Ironworks Co.* (1876) 1 Q.B.D. 613, 627, (1877) 2 Q.B.D. 423.

THE GENESIS OF 'SUBSTANTIAL PERFORMANCE'

While charter parties formulated their (three) basic rules with amazing rapidity, building contracts long meandered between various alternatives before settling (not so much by a rational progression as by a sort of unwitting compromise) on a new solution, that of substantial performance. The earliest cases had indicated a much simpler approach. Where a structure collapsed owing to bad work and materials, the promises were held to be independent; hence P could sue for his work, while D had a cross action for P's improper performance.¹² More interestingly, the owner was allowed to give evidence of misperformance in the same action instead of having to make his claim in a separate cross action, at any rate where the builder was not suing for a fixed but only a reasonable reward, that is, for the value of the work done: 'then why should not the defendant be permitted to meet this with contrary proof . . . ?'¹³ In *Farnsworth v. Garrard*,¹⁴ also an action for work and labour on a *quantum meruit*, Lord Ellenborough admitted that there had formerly been 'considerable doubt' but (after 'a conference with the Judges on the subject') he announced the 'correct rule' according to which a builder could only recover for the value of his work: his claim had to be 'co-extensive with the benefit'.

The position then was that, notwithstanding bad performance, a builder could recover either his contract price or in *quantum meruit*, except that in the former case the owner had his separate remedy over and in the latter a counter-claim in the same action. In either case the builder always ended up with some payment provided he had conferred *some* benefit upon the owner, however small. This solution, it will be noticed, went rather further than *Boone v. Eyre*, since a builder's claim was now upheld even if his performance went only to 'part' of the consideration. Nor was there any reason why the law should have adhered to the 'part-whole' distinction, being now faced with executed services whose benefits were no longer returnable. The whole point of recognising part performance was to compensate the builder for a net benefit to the other side.

¹² *Broom v. Davis* (1794) cited 7 East 479, 480n.

¹³ *Basten v. Butter* (1806) 7 East 479. The court rejected P's objection that such proof would constitute an untoward surprise to him, for where P sues on a *quantum meruit* he must anyhow come prepared to show the worth of his work, so that there can be no injustice in allowing contrary proof even without notice. This, added the court, had been an earlier practice, citing the relevant authorities.

¹⁴ (1807) 1 Camp. 38.

However this approach was not to last. It was deflected by situations with a further complication, situations in which the owner's complaint related not just to bad workmanship but to a deviation from contract specifications. The complication was less serious than it appeared, as it was always clear that a builder could not claim for deviations, however considerable a benefit the owner received. Indeed in *Ellis v. Hamlin*,¹⁵ the builder, admitting a partial deviation from specifications, conceded the owner's right to an appropriate deduction from the contract price. Nevertheless the decision was that he could recover nothing: neither the diminished contract price, nor anything on a *quantum meruit*. The court admitted the hardness to the builder of the result, but saw an insuperable difficulty in drawing a line between one deviation and another or in allowing a builder to alter unilaterally the contract and then demand a 'measure-and-value price'.¹⁶

On the face of it, the decision did not actually conflict with the approach in *Farnsworth v. Garrard*, for it was still possible to hold that a builder could recover on an implied assumpsit for beneficial work where he was only guilty of delay or improper workmanship.¹⁷ Yet it is no less clear that *Farnsworth* and *Ellis* did represent a deeper conflict, since the latter, with its emphasis on the express specifications, made the benefit conferred almost irrelevant. Moreover, where a building contract was sufficiently specific, virtually anything could be seen as a deviation from its terms. In *Cutler v. Close*,¹⁸ P was to instal a specified stove but having done it incompletely D refused to pay the price. Still Tindal C.J. now advised the jury that if they regarded the work 'in the main substantial' as well as work that might be completed without too great expense, then the jury was to allow P his claim subject

¹⁵(1810) 3 Taunt. 52.

¹⁶One may observe that in *Ellis v. Hamlin* the builder had in fact already been paid 'the principal part of the price' and thus had perhaps already been rewarded for the net benefit he had given. The decision may therefore be interpreted as merely a refusal to reward a builder for all his work, taking into account the benefit to the owner. But this would be too limited an interpretation of the principle the decision sought to establish, and was taken to establish: see, e.g., *Rees v. Lines* (1837) 8 C. & P. 126; *Humphreys v. Jones* (1850) 5 Ex. 952.

¹⁷As, for example, in *Burn v. Miller* (1813) 4 Taunt. 745; *Thornton v. Place* (1832) 1 M. & R. 218 (where P recovered subject to 'the sum which it would take to alter the work, so as to make it correspond with the specifications'); *Lucas v. Godwin* (1837) 3 Bing. (N.C.) 737 and *Mondel v. Steel* (1841) 8 M. & W. 858.

¹⁸(1832) 5 C. & P. 337.

to a sum to compensate for the defect. And so advised they awarded the builder £60, only £10 less than the contract price.

This judgment thus introduced a new idea, that to succeed in *quantum meruit* one had to confer not just a net but a considerable benefit, what amounted to (but was not yet called) substantial performance: so if the deficiency had amounted to (say) £30 or more, the builder would have recovered nothing at all. This idea was something of a compromise between *Farnsworth* and *Ellis*, perhaps the only one possible given their opposing drifts. The fact remains that 'substantial performance' did not then, nor for quite some time, become official doctrine; indeed not before this century was *Cutler v. Close* found to be 'exactly applicable' and its rationale fully recognised.¹⁹ How is the hiatus to be explained? Perhaps simply by a quite fortuitous interstitiality in case law. For the next influential case was *Munro v. Butt*,²⁰ a case which again drew special attention to the express stipulations and thereby also greater attention to the owner's rather than the builder's rights. Munro did not complete two houses until five days after the due date, and the surveyor would not certify his approval, as he found the work incomplete. Butt successfully refused payment on two grounds: first, because the 'special' or express contract remained 'open', so that no *quantum meruit* could be implied;²¹ second, because no *quantum meruit* could be implied, there being no evidence that the owner had derived any benefit—merely taking possession of the building was no relevant benefit for, it was said, the owner must occupy the building, if only to pull it down.

This was not as it appears at first sight a return to the ideas of *Ellis v. Hamlin*. For it is legitimate to infer that Munro's work fell far short of anything describable as substantial performance, an inference greatly strengthened by Lord Campbell's remark that, had the builder's deficiency been 'very slight', the case 'would have been very different': in such a case, apparently, an 'acceptance' by Butt might have been implied even though the contract was still an 'open' one. We may therefore assume that Munro had fallen far short of substantial performance. And so reinterpreted, *Munro v. Butt* can be regarded

¹⁹ *Dakin v. Lee* [1916] 1 K.B. 566, 573.

²⁰ (1858) 8 El. & Bl. 738.

²¹ The principle that *quantum meruit* was inapplicable if the express contract remained 'open' was a legacy of *Cutter v. Powell* (1795) 6 T.R. 320 (fully discussed below) which was strongly approved in the present case.

as essentially in line with *Cutler v. Close*.

However this may be, the considerable limitations of the doctrine must not be overlooked. Anything less than substantial performance still left the builder without reward; if, for example, a builder, having undertaken to build to an amount of £500, did only half the value (say £300), he would recover nothing even though his work did confer a considerable benefit and even though the reason for non-completion was his physical or financial inability.²² The law thus ended with a strange reversal of fortunes. Where the benefit test of *Farnsworth v. Garrard* tended to protect the builder, the rule of substantial performance lent greater weight to the owner's interests. Moreover, a puzzle remained, for it was never really explained why the owner's interests could be adjusted in the case of a substantial performance, but not similarly adjusted in case of a lesser but still net benefit. In short, the rule of substantial performance was by no means quite as self-explanatory as it looked.

EMPLOYMENT CONTRACTS: CUTTER V. POWELL

Charter parties and building contracts usually managed to give a plaintiff at least some reward, faulty though his performance was. But the law was strikingly severe upon a servant who failed to complete. The reasons are very peculiar and derive in the main from a single case, *Cutter v. Powell*,²³ a case as 'great' as it was unsatisfactory.²⁴ Cutter had agreed to serve as second mate on a ship sailing from Jamaica to England and served from July to September, but suddenly died some three weeks before the vessel arrived in Liverpool. For this work his administratrix claimed remuneration, the actual amount being unspecified but certainly less than the lump sum of thirty guineas which Powell had agreed to pay for the total run. Nor was a claim for reasonable or proportionate wages extraordinary as the law then stood, for there were various precedents allowing a seaman to wages *pro tanto*, provided the inter-

²² Such, broadly, were the facts in *Sumpter v. Hedges* [1898] 1 Q.B. 673, where the builder failed in *quantum meruit*, having 'abandoned' the contract without there being evidence of a 'fresh contract to pay for the work already done'. The builder could only recover for the value of some materials left on the land which the owner had used.

²³ (1795) 6 T.R. 320.

²⁴ 'Great case' was the description for it in *Button v. Thompson* (1869) L.R. 4 C.P. 330, 348. For a fuller discussion, see Stoljar, 'The Great Case of Cutter v. Powell' (1956) 34 *Can. B. Rev.*, 288.

ruption of his work was not due to his own fault.²⁵ However Powell contended that Cutter, having specifically contracted for an 'entire' journey for a 'lump sum', was thus on the horns of a dilemma: either he had taken 'the chance of earning a large sum' for the whole voyage instead of a certain but smaller rate of pay for the time actually served, or he was caught by his failure to perform entirely.

With this the court very much agreed. They were greatly impressed by the fact that Cutter was to receive almost four times the usual rate and that he had apparently bargained to have 'either 30 guineas or nothing'. It seems undeniable that Cutter's wages were unusually high; it may even be that he struck a hard bargain which Powell was perhaps unable because too short-handed to resist.²⁶ Even so, we must deal with the case as though the bargain was reasonable rather than oppressive, as we are now concerned, as was the decision itself, with the second point, namely, that full performance became a condition precedent, however considerable or beneficial the partial performance in fact was. The condition precedent defeated not only any payment under the express contract, but also any remuneration on *quantum meruit*, as the condition was now given a most literal meaning according to which payment depended on entire performance and nothing less.

It is necessary to re-emphasise this point to show that the court, in accepting the notion of 'entirety' was not following an old common law rule against apportionment (i.e. the rule that fixed wages could not be apportioned so that if they failed partially they failed entirely).²⁷ To the court 'entirety' was synonymous rather with construing complete

²⁵ *Anon.* (1700) 1 Ld. Raym. 639, 738, which Lord Stowell called 'the great leading case in the common law': *The Juliana* (1822) 2 Dods. 504, 516. See also *Guy v. Nichols* (1694) Comb. 265; *Wiggins v. Ingleton* (1705) 2 Ld. Raym. 1211, where Holt C.J. repeated that seamen could recover wages *pro tanto*, provided freight was earned which explains his contrary decision in *Chandler v. Meade* cited *Wiggins v. Ingleton*, *supra*, where, the ship being captured by pirates, no freight was earned. And see also *Edwards v. Child* (1716) 2 Vern. 727; *Worth v. Viner* (1746) 3 Vin. Abr. 8-9.

²⁶ See on this point *Appleyby v. Dods* (1807) 8 East 300, 303, per Lord Ellenborough.

²⁷ This rule is adverted to in Brooke's *Abridgement*, sub. tit. Apportionment, pl. 13, Labourers, pl. 48, Contract, pl. 31; and see G.L. Williams, 'Partial Performance of Entire Contracts' (1941) 57 *L.Q.R.*, 373, 375-6. It arose in the fifteenth century in the action of debt, not surprisingly in view of the latter's requirement of a fixed as distinct from a variable amount. The rule continued to apply in the seventeenth century: as in *Needler v. Guest* (1647) Aleyn. 9, Sty. 12 and *Countess of Plymouth v. Throgmorton* (1688) 1 Salk. 65, 3 Mod. 153, in both of which debt failed for the purpose of recovering a proportionate sum, i.e. less than the original contract sum.

performance as a condition precedent. Hence our key question is whether, or to what extent, 'entirety' constituted a proper requirement. Speaking generally, entirety of course suggests a very valid idea: that a promisor must give or do what he promised, that he cannot alter the contractual terms unilaterally. He cannot, for example, supply less than, or other than, the things or services specified: a tailor cannot tender half a suit,²⁸ nor a craftsman half an article,²⁹ nor can a doctor stop treating a patient in the middle of attending to him.³⁰ In these and similar situations anything less than an 'entire' or total product (or at any rate a substantially total product) would utterly frustrate the bargain expectations of the promisee. In one sense a person getting half a suit or some treatment still gets a 'benefit' but, in another sense, he gets no benefit at all, for without complete performance he may be in a much worse position than before. Nevertheless it is one thing to say that a tailor cannot tender half a suit, and another thing to say that a servant must work for his entire term to entitle him to any reward. It is indeed confusing to assume that, because a contract is 'entire' in the one, it has to be similarly entire, with identical legal consequences, in the other case: the price payable to a tailor is entire because his product is entire, whereas a servant's wage might include many separate tasks or 'units' of work, so that even a wage payable by a lump sum is, typically, but a convenient way of remunerating a variety of tasks linked by their quantitative volume rather than their qualitative 'entirety'.³¹

Still the impact of *Cutter v. Powell* was pervasive and profound. Not that the judges were insensitive to the hardship involved, but they felt

What is far more significant however is that this rule was relatively little heard of and never, seemingly, outside debt except occasionally in quite different contexts that do not affect the present discussion: see *The Case of an Hostler* (1605) Yelv. 66; *Best and Jolly's Case* (1660) 1 Sid. 38.

²⁸ *Warren v. Perkins* (1621) Palm. 223.

²⁹ In *Sinclair v. Bowles* (1829) 9 B. & C. 92, the stock illustration of an 'entire' contract. Here P was to repair some chandeliers, but broke one of the arms and several spangles previously undamaged. Suing for payment for work done, he was non-suited on the brief ground that the contract was 'entire'.

³⁰ *Bates v. Hudson* (1825) 6 Dow. & Ry. 3.

³¹ Precisely this sort of point underlies *Roberts v. Havelock* (1832) 3 B. & Ad. 404, where a shipwright agreed to put a ship 'into thorough repair'. Before completion he required payment for the work already done, refusing to proceed until paid. It was held that he could demand for work already done, though the work was incomplete, the court distinguishing *Sinclair v. Bowles*, *supra*.

bound to deny the claim as a matter of legal principle;³² its stark simplicity probably appealed to them: the law, said Baron Martin, is 'clear and free from doubt', so that, if a man contracts 'to do certain work for a certain sum, then if he die before he completes it, he can recover nothing, not even if before his death he has done nine-tenths of it'.³³ Moreover, though in *Cutter v. Powell* it was admitted that a servant (hired in a general way but regarded as hired for a year) would be entitled to wages for the time he serves without continuing for the whole year,³⁴ the view now became that a servant, dismissed before his term, would be entitled to nothing, though he might have done substantial work. As Lord Ellenborough said, if the contract is for a year, the year must be completed before the servant can be paid: entire performance was again a condition precedent.³⁵

Great though it was, the influence of *Cutter v. Powell* did not, perhaps could not, stifle all attempts to temper its harsh effects. As regards seamen, it is true, the common law adamantly refused to follow the more liberal admiralty rule.³⁶ But as regards other servants, various efforts were made to allow an employee some payment because, as Best C.J. put it, 'his necessities would require it'.³⁷ These efforts, however, never acquired any clear or consistent shape. Some cases were prepared to allow wages where a servant was dismissed for only a minor fault or where he left without notice, provided the loss thereby caused to the master was relatively small.³⁸ Correspondingly it was held

³² So, in *Jesse v. Roy* (1834) 1 C. M. & R. 316, 334, 343, it was said of *Cutter v. Powell* that if 'ever there existed a case of hardship, it was this', but that the court finally rejected 'equitable principles—principles which have no application to decisions in courts of law'.

³³ *Stubbs v. Holywell Ry Co.* (1867) L.R. 3 Ex. 311, 314.

³⁴ See the remarks of Lawrence J. and Wood, of counsel, who had admitted as much against his own client: 6 T.R. 320, 323, 326.

³⁵ *Spain v. Arnott* (1817) 2 Stark. 256, 257. And see, to the same effect, *Turner v. Robinson* (1833) 6 C. & P. 15, 5 B. & Ad. 789; *Brown v. Croft* (1828) 6 C. & P. 16n.; *Ridgway v. Hungerford Market Co.* (1835) 3 Ad. & E. 171; *Lilley v. Elwin* (1848) 11 Q.B. 742.

³⁶ See the discussion in *Appleby v. Dods* (1807) 8 East 300; *Jesse v. Roy* (1834) 1 C. M. & R. 316.

³⁷ *Pagani v. Gandolfi* (1826) 2 C. & P. 370, 371.

³⁸ In *Huttman v. Boulnois* (1826) 2 C. & P. 510, the servant, leaving prematurely, was allowed somewhat less than he would have been entitled to under his contract, but a sum which took into account the employer's right to a cross action, it being understood that no cross action would be brought. To similar effect is *Stavers v. Curling* (1836) 3 Bing. (N.C.) 355, where the servant had disobeyed certain instructions and carelessly damaged certain stores; these things, it was admitted, might

that, if the master's damage was significant or the servant was dismissed for major misconduct, he totally forfeited his pay, as in such circumstances the master's cross action would normally prove to be 'barren'.³⁹ Other cases, however, allowed wages up to the time of the servant's dismissal, whether justified or not,⁴⁰ although this approach became less available as the idea hardened that no agreement for work and labour could be 'implied' as long as the old contract was 'open', that is, not rescinded but in breach.⁴¹

More effective was another approach which, fastening on some

justify a cross action, but they did not constitute a condition precedent to a claim by a captain against the owners of a ship.

³⁹ *Button v. Thompson* (1869) L.R. 4 C.P. 330. For this interpretation see further *Turner v. Robinson*, *supra*, where a servant's claim failed because his services had been 'worse than useless'; Lord Denman's remarks in *Ridgway v. Hungerford Market Co.*, *supra*; and *Stavers v. Curling*, *supra* at 368, where the court spoke of the 'intention' of the parties as being more than the 'technical form of words used in the instrument'. For a different interpretation of the cases see Williams, *op. cit.*, 376ff. Of course a servant could always sue if unjustifiably dismissed: *Robinson v. Hindman* (1800) 3 Esp. 235; *Beeston v. Collyer* (1827) 2 C. & P. 607, 4 Bing. 309; *Callo v. Brouncker* (1831) 4 C. & P. 518, which also shows that a yearly servant, if unjustifiably dismissed, might become entitled to wages for the whole year. This, however, seemed to allow a claim for 'constructive service' which came to be disallowed: see also next note.

⁴⁰ In *Atkin v. Acton* (1830) 4 C. & P. 208, where a servant hired by the year assaulted a maid servant, a good cause for dismissal without notice, the court said that the master was 'not liable to pay him any more than for the time during which he actually served, which will bring it round to the demand on the counts for work and labour'. See also *Thomas v. Williams* (1834) 1 Ad. & E. 685; *Hurcum v. Stericker* (1842) 10 M. & W. 533; *Bayley v. Rimmel* (1836) 1 M. & W. 506, where no difficulty at all was felt about the servant's action, the contract not being even a yearly one. Almost concomitantly it was established that a servant, even if unjustifiably dismissed, could not claim damages for (future) employment not yet performed but only compensation to cover his actual loss subject to his duty to mitigate damages: *Elderton v. Emmens* (1848) 6 C.B. 160, (1853) 4 H.L.C. 624.

⁴¹ See, e.g., *Lamburn v. Cruden* (1841) 2 Man. & G. 253. The notion of 'open' contracts first appeared in connection with money had and received when employed for the recovery of money as on a consideration that failed, for which see more fully chap. 14, at notes 12-14. Similarly an indebitatus count for work and labour was held not to lie, on the ground explained in *Hulle v. Heightman* (1802) 2 East 145, that where a servant was wrongly dismissed the contract remained 'open' so that he had to sue on the master's breach. In *Gandall v. Pontigny* (1816) 4 Camp. 375, 1 Stark. 197, a servant did succeed with a count for work and labour, but this was later over-ruled, this count being confined to actual work done: see *Archard v. Hornor* (1828) 3 C. & P. 349; *Fewings v. Tisdal* (1847) 1 Ex. 295; *Goodman v. Pocock* (1850) 15 Q.B. 576, this last quite an outrageous example of how easily a meritorious claim could be defeated by pleading technicalities as to whether in such a case indebitatus assumpsit or express assumpsit should be brought.

expression in the contract, proceeded to construe it as not an 'entire' but a 'divisible' one. In *Taylor v. Laird*,⁴² perhaps the best example, P contracted to act as captain for £50 'a month'. P acted for eight months but only received payment for seven since, in the employer's view, he had terminated the voyage before its agreed end. One would have thought this to be an 'entire' expedition, but to the court this was 'plainly' a contract by the month, so that P acquired a claim each month, which could not be 'divested' even by his abandonment of the work. Divisibility was then a transparent device for, as the court revealingly confessed, without a divisible construction nothing would be payable to P even if he died or the voyage failed at the last moment, since the condition of 'entire work' would demolish his right to receive anything.⁴³

This 'divisibility' approach was not, at least not formally, at odds with *Cutter v. Powell*, but certain other results certainly were. Under a separate line of cases a seaman, if temporarily disabled by illness in the course of the voyage, was entitled to his whole wages though he had not performed the whole: a result achieved by saying that, since wages were not apportionable, the whole amount became due.⁴⁴ Later decisions adopted the same rule, though on somewhat different grounds. In one case it was maintained that a temporary interruption only 'suspended' a contract without breaking or dissolving it.⁴⁵ In another it was said that an employer could not deny that his sick servant was 'ready and willing' to serve, when he was only absent for a time; hence their 'mutual covenants' were regarded as independent, with the result

⁴²(1856) 1 H. & N. 266.

⁴³Divisibility was foreshadowed in *Huttman v. Boulnois*, *supra*; *Bayley v. Rimmel*, *supra*, and *Hartley v. Harman* (1840) 11 Ad. & E. 798. But only now did it emerge as a new principle to be applied in preference to *Cutter v. Powell*: see *Stubbs v. Holywell Ry Co.*, *supra*, and *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888) 39 Ch.D. 339. Divisibility was sometimes possible because of a 'custom' (cf. W.P. Eversley, *Domestic Relations*, 6th ed., London 1951, 645, 648), but was then more formally introduced by the Apportionment Acts, beginning in 1870, and the Merchant Shipping Acts, on which see D. Machlachlan, *Merchant Shipping* (7th ed., London 1932), 178.

⁴⁴*Chandler v. Grieves* (1792) 2 H. Bl. 606n. And see also *Clements v. Mayborne* (1784) and *Paul v. Eden* (1785), both cited in Abbott on *Shipping* (14th ed., London 1901), 255, 444n.

⁴⁵*Beale v. Thompson* (1804) 4 East 546, where the interruption in fact lasted for six months, the plaintiff being detained by enemy action. On the other hand, in *Melville v. De Wolf* (1855) 4 El. & Bl. 844, a seaman, sent home to act as witness in a trial against the master, was denied wages for the whole period on the ground that his absence (he never returned to the ship) was not temporary but permanent.

that the employer could make no deduction for an illness lasting a day or a week or a month, although he could have dismissed the servant had he become 'permanently incompetent'.⁴⁶ Technically, independency still gave the master his remedy over, but this was of no consequence since the servant could meet such an action with the defence of impossibility.

The total result was highly paradoxical. On the one hand, the law was quite prepared to protect a servant's right to wages during illness but, on the other, refused to protect his wages for work done if he failed to give 'entire' work. All this is reminiscent of the law relating to charter parties, where we noticed a not dissimilar distinction between premature termination and other breaches or deficiencies, except that employment contracts went a step further in that a plaintiff might in fact recover for no performance at all, provided his illness did not come at the tail-end of the contract so as to offend the rule of 'entirety'. Nor was this inner conflict squarely faced. The principles of *Boone v. Eyre* and *Cutter v. Powell* developed quite separately, each with its own cluster of cases and, with the law thus compartmentalised, the conflict was all too easily overlooked.

A DIGRESSION TO EXECUTORY CONTRACTS

Our business has been with part performance in executed contracts but a few words are necessary about executory contracts as well. In the latter, no problem of part performance can normally arise. The contract not being executed there is nothing on which any claim for payment can rest. If, said an old case, I promise to pay you twenty shillings for going to York on my behalf, you must allege performance before you can claim the promised amount.⁴⁷ But sometimes even an executory contract can raise a question about part performance, though in a different form.

Suppose the promisor does not punctually begin performance: is non-compliance with the time stipulation to be treated as a condition precedent entitling the promisee to repudiate the contract, however immaterial the delay to the promisee and however material the repudiation to the promisor? In *Bettini v. Gye*,⁴⁸ we saw, the employer was denied his usual right of dismissal, no doubt because the singer, though

⁴⁶ *Cuckson v. Stones* (1859) 1 El. & El. 248, 257.

⁴⁷ *Rogers v. Snow* (1572) Dal. 94.

⁴⁸ (1876) 1 Q.B.D. 183.

arriving late, had nevertheless made some investment in his part-performance, at least by sacrificing the possibility of alternative employment for the time being at any rate. Instalment contracts furnish a similar example relating to sale. Though a wrong or late delivery *at the outset* constituted a rejectable performance,⁴⁹ an unsatisfactory delivery *in the course* of the contract was said to go only to 'part of the consideration', the breach being treated as an independent covenant.⁵⁰ The reason for this is again not far to seek. As in such contracts a seller would have to invest sometimes heavily in the preparation of future deliveries, a rule of strict performance could cause him a loss out of all proportion to any possible damage to the other side. A cognate rationale can be discerned in sale of land, as dealt with in equity. A vendor's delay in producing abstracts of title was often considered not to be material since, in Lord Hardwicke's words, 'time is not of the essence' here.⁵¹ Clearly equity tried to protect a vendor whose delay was due to unforeseen difficulties in the course of completion; a strict rule would have given the purchaser an extended but undeserved opportunity to repudiate the contract if he wished.⁵²

For the most part, however, the law showed very much less concern for the part performer, even in situations where his position was equally vulnerable. In charter parties, where this problem frequently occurred, executory contracts continued to be sharply distinguished from executed ones. Whereas in the latter a time stipulation had long been construed as an 'independent' covenant,⁵³ in executory contracts the date for loading was held to be a condition precedent entitling the charterer to repudiate, notwithstanding the harmlessness of the delay.⁵⁴ This strict construction was not followed where the owner failed to load with (say) 'all reasonable speed', the courts being reluctant to

⁴⁹ *Hoare v. Rennie* (1859) 5 H. & N. 19; and see *Honck v. Muller* (1881) 7 Q.B.D. 92.

⁵⁰ *Jonassohn v. Young* (1863) 4 B. & S. 296; *Simpson v. Crippin* (1872) L.R. 8 Q.B. 14.

⁵¹ *Gibson v. Pattinson* (1737) West T. Hard. 235, 1 Atk. 12.

⁵² See also *Guest v. Homfray* (1801) 5 Ves. 818; *Roberts v. Berry* (1835) 3 De G.M. & G. 284. Of course time was of the essence where the other party had a countervailing interest, such as an interest in immediate possession as in leaseholds or where the property was of fluctuating value. For these exceptions as well as other difficulties not here relevant, see Stoljar, 'Untimely Performance in the Law of Contract' (1955) 71 *L.Q.R.*, 527, 557.

⁵³ See chap. 12, at notes 9-11.

⁵⁴ *Shubrick v. Salmond* (1765) 3 Burr. 1637; *Shadforth v. Higgin* (1813) 3 Camp. 385; *Glaholm v. Hays* (1841) 2 Man. & G. 257.

speculate as to what was reasonable speed.⁵⁵ But it was followed where the owner had misdescribed the whereabouts of a ship, at first only if such a misdescription caused a loss to the charterer,⁵⁶ then in every case as a result of *Behn v. Burness*.⁵⁷ Here, as everyone knows, a ship described as 'now in the port of Amsterdam' did not, on account of gales, actually enter that port until four days later, which was not only a short but also a harmless delay, easily absorbable as the subsequent voyage was from England to China, and thus very long. Yet the Exchequer Chamber held the description to be a condition precedent, not a 'mere representation', because it was a description on which the charterer based his calculations and so was a 'substantive part' of the contract, irrespective of the events following it.

In sale of goods, too, it had always been clear that a party had to pay or deliver on the exact day,⁵⁸ until a more difficult question arose as to whether this strict rule applied to goods shipped from abroad, a question much discussed throughout the nineteenth century. Suppose the seller agreed to notify the buyer of the name of the vessel but briefly delayed, without causing any injury at all to the buyer. Such notification was nevertheless held a condition precedent: 'if it be not', said Gibbs C.J. a little rhetorically, 'everything else to be done by the seller might be plucked from the contract'.⁵⁹ On a later occasion the seller much pressed *Boone v. Eyre*, but the court distinguished it as relating to an executed contract, not (as here) an executory one.⁶⁰ This was true as far as it went, but still neglected the fact that *Boone v. Eyre* was more concerned with the question whether a buyer had to pay for a performance even if incomplete, it being there held that he had to pay *after* execution for the benefit received, subject to his 'independent' remedy over for a minor deficiency. In other words, *Boone v. Eyre* did not completely dispose of the question whether a buyer could repudiate a contract *in limine* when threatened by a (harmless) delay.

The 'independent' argument not only continued to be pressed but

⁵⁵ See especially *Clipsham v. Vertue* (1843) 5 Q.B. 265, 272; *Tarrabochia v. Hickie* (1856) 1 H. & N. 183, 187.

⁵⁶ Thus compare *Ollive v. Booker* (1847) 1 Ex. 416 with *Dimech v. Corlett* (1858) 12 Moo. 199, where the charterer could not prove a relevant loss.

⁵⁷ (1863) 3 B. & S. 751, 32 L.J. Q.B. 204.

⁵⁸ But a day extended beyond sunset to midnight: *Startup v. Macdonald* (1843) 6 Man. & G. 593.

⁵⁹ *Busk v. Spence* (1815) 4 Camp. 329.

⁶⁰ *Graves v. Legg* (1854) 9 Ex. 709, 11 Ex. 642.

even succeeded in a few instances, such as the employment or instalment contracts mentioned before.⁶¹ Yet as regards ordinary sale of goods, the battle was about to be finally lost. On one occasion, a court was still equally divided as to whether to adopt a literal or a more functional approach, one investigating the consequences of a delay.⁶² But in *Bowes v. Shand*,⁶³ where there was a similar divergence of opinion through several courts, a majority in the House of Lords eventually adopted a strict or literal rule, a rule which, in the opinion of the minority, paid scant attention to the seller's wasted performance and his disproportionate loss.

⁶¹ See at notes 48-50 above.

⁶² *Coddington v. Paleologo* (1867) L.R. 2 Ex. 193. The literalists thought a strict approach the only possible one ('It has the merit of being literal, and I think reasonable', per Bramwell B. at 195), while the functionalists were clearly impressed by counsel's argument that a slight initial delay was usually quite irrelevant.

⁶³ (1876) 1 Q.B.D. 470, (1877) 2 Q.B.D. 112, (1877) 2 App. Cas. 455.

INTRODUCTORY

We come finally to performatory questions of quite another kind. What, we now ask, did a promisor have to do or give if a contract happened to be silent as to all the terms of an exchange? Was he liable only for the breach of his express contract, or was he also liable for the breach of certain 'implied' or imported terms? Was the promisee bound to a contract, no matter how it turned out, or did he have some rights and defences if the contract failed to give him anything of value in return?

For centuries the well known rule was that neither party could go beyond the express contract. In sale, for example, *caveat emptor* threw the risk of quality upon the purchaser, on the general ground that he had no reason to complain provided he got *this* land or *this* chattel as the bargain specified. In particular, he could not complain about patent defects, for his own inspection should have revealed them to him; nor about latent defects, for which the seller could not normally be supposed to take any greater responsibility. Of course the seller could expressly warrant good quality or title, but that was a different matter. In fact the express warranty was long treated not as an ordinary contractual liability but rather as one arising in deceit; not before the eighteenth century was *assumpsit* extended to breach of warranty.¹ In the nineteenth century, of course, the sale of goods did introduce new standards of exchange through the *implied* warranty of quality. The buyer, Lord Ellenborough said, cannot without an express warranty insist on any particular quality, yet 'the intention of both parties must

¹The turning-point was *Stuart v. Wilkins* (1778) 1 Doug. 18; *Williamson v. Allison* (1802) 2 East 446; and see Ames, *Lectures*, 136-7; Kiralfy, 'The Action on the Case', 83ff.

be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to put them on a dunghill.'²

But this was a very special development, confined to chattels and to no other sale. To understand how more general exchange standards came to be accepted, we must turn to two other doctrines, that of failure of consideration and that of impossibility of performance, including frustration of the adventure. The former doctrine tried to protect a buyer who had pre-paid and then either got no performance or the performance given proved a worthless one. The latter doctrine offered protection, until the advent of frustration only limited protection, where a promisor or performer was confronted by some objective impossibility or either party was threatened by an inordinate delay. We shall now trace the genesis of these doctrines in turn.

FAILURE OF CONSIDERATION: THE BASIC RULE

If a party did not get the agreed benefit or performance for which he had paid his money in advance, there arose a 'failure of consideration', a phrase which simply meant that the exchange had failed to materialise: *causa data causa non secuta*, as it was aptly described in Roman law. For such a failure the original remedy was debt, the payee having taken money without giving a *quid pro quo*.³ In the fifteenth century, as we have mentioned,⁴ debt on failure of consideration completely disappeared from sight, a fact which poses something of a riddle, though a partial explanation of this disappearance may be this: that a buyer could not recover his price even if the things delivered were worthless, being caught by the rule of *caveat emptor*, and that, if he wished to recover advances to the seller, where the seller failed to deliver anything at all, it was often a situation where a buyer did not rely on simple debt but rather on a penal bond. Indeed when in the late fifteenth century buyers took to advancing the price to a seller, in an attempt to secure future deliveries without securing themselves by bond, it was again recognised that debt would lie for the pre-paid price if deliveries failed.⁵

² *Gardiner v. Gray* (1815) 4 Camp. 144, 145.

³ See Jackson, *The History of Quasi-Contract*, 18ff.

⁴ See chap. 1, at note 19; chap. 2, at note 26.

⁵ *The Case of Barley* (1505) Y.B. 20 Hen. VII, Mich., fol. 8, pl. 18; see also chap. 2, at note 33, and chap. 4, at note 8 and *passim*.

Moreover, since debt would here lie as well as (though this became clear only later), the action of account⁶ (and, since both these actions were largely taken over by the action of money had and received, the latter count) also began to serve for failure of consideration, at least as from the 1690s or thereabouts. The main reason for resorting to *indebitatus assumpsit* was of course its procedural advantages; it avoided wager of law and permitted the claimant to declare generally instead of specially. Another, and broader reason, given by Holt C.J., was that 'the money was received without any reason, occasion, or consideration and consequently it was originally received to the plaintiff's use'.⁷ At first sight this employment of money had and received does seem a little misplaced, in that the failure of consideration overlapped with breach of a contract by the seller, so that it could be argued that the more appropriate action was in damages on the contract itself. However a series of decisions established money had and received as a legitimate alternative. So in *Dutch v. Warren*,⁸ where D sold shares for which P paid but which D then refused to transfer, telling P that 'he might take his remedy', P sued in *indebitatus*. D strongly objected that P should have brought special *assumpsit* for the non-delivery of the shares, yet the plea was dismissed.⁹ Similarly, in a contract for the sale of land where D, unable to complete, contended that P should have sued not in *indebitatus* but in damages for the non-completion of the sale, Kenyon C.J. agreed that B could have sued in covenant, but also held that B was entitled to rescind the bargain and bring money had and received.¹⁰ Finally, where D had sold P all his cordwood ready cut but did not eventually cord the wood, P successfully sued for his money on a consideration that failed.¹¹

⁶ *Austen v. Gervas* (1624) Hob. 77, 99.

⁷ *Martin v. Sitwell* (1691) 1 Show. K.B. 156, 157. See also *Tomkins v. Bernet* (1693) 1 Salk. 22, Skin. 411; *Hard's Case* (1696) 1 Salk. 23; *Walker v. Walker* (1698) Holt K.B. 328, 12 Mod. 258, Comb. 303; *Holmes v. Hall* (1704) Holt K.B. 36, 6 Mod. 161.

⁸ (1720) 1 Stra. 406, 2 Burr. 1011.

⁹ The price paid was £262, but the Chief Justice left it to the jury to determine the measure of damages. They awarded the buyer £174, being the value of the stock on the day of the defendant's refusal. There can be little doubt that this assessment was wrong, being quite at variance with all notions either of debt or money had and received. This was virtually admitted in *Anon.* (1721) 1 Stra. 407, also a purchase of stock, where P recovered the full price pre-paid when D did not transfer the stock.

¹⁰ *Greville v. Da Costa* (1797) Peake Add. Cas. 113. And see on similar facts *Farrer v. Nightingal* (1798) 2 Esp. 639; *Granger v. Worms* (1814) 4 Camp. 83.

¹¹ *Giles v. Edwards* (1797) 7 T.R. 181, 1 Doug. 24n.

So far money had and received only lay where the seller failed to deliver or transfer the (whole) article bought. But suppose that the seller had in fact delivered the article but one of defective quality, contrary to his express warranty. Could the buyer still bring money had and received for the pre-paid price or did he have to sue in assumpsit on the warranty? This question was debated for some considerable time, from *Weston v. Downes*¹² to *Payne v. Whale*,¹³ after which a two-fold rule emerged. On the one hand, money had and received would not lie in (what were now called) 'open' contracts, which had to be declared on specially in order to 'try' the issue, that is, whether or not the seller had actually broken the express warranty; for this purpose, it was thought a general or summary declaration on a common count would confront a defendant with too much of a 'surprise'.¹⁴ On the other hand, money had and received would lie if the unsound article had meanwhile been rejected and returned, since with the return of the article to the seller no separate (triable) issue on the warranty remained.¹⁵

FAILURE OF BARGAIN AND STANDARDS OF EXCHANGE

The next step was the more interesting as well as the more crucial. Hitherto, we have seen, a buyer had no action, either on an express or an indebitatus assumpsit, unless the seller had expressly warranted the soundness of the article, for only this justified a complaint about inferior quality. Now we come to situations in which a buyer would complain about a worthless exchange even without a warranty. Perhaps the earliest example of this is money paid for a 'void' annuity, it being

¹²(1778) 1 Doug. 23.

¹³(1806) 7 East 274.

¹⁴*Weston v. Downes*, *supra*, as further explained in *Towers v. Barrett* (1786) 1 T.R. 133; *Fielder v. Starkin* (1788) 1 H. Bl. 17; and *Payne v. Whale*, *supra*. These and other cases are fully discussed in Stoljar (1959) 75 *L.Q.R.*, 53, 57-62.

¹⁵*Towers v. Barrett*, *supra*. The cases make it very clear that an unsound house could be returned to the seller, provided the buyer's rejection came within a reasonable time: *Fielder v. Starkin*, *supra*; *Buchanan v. Parnshaw* (1788) 2 T.R. 745; *Curtis v. Hannay* (1800) 3 Esp. 82, 83-4. It is true that the emphasis on trying the express warranty began somehow to obscure the buyer's right to return: see, for example, the headnotes of *Payne v. Whale*, *supra*, and *Lewis v. Cosgrove* (1809) 2 Taunt. 2. The fact remains that the buyer did retain a right of return, provided he had not derived an intermediate benefit and could put the defendant *in statu quo*. It is only later that this right of rejection was almost entirely lost sight of owing to the doctrine of *Street v. Blay* (1831) 2 B. & Ad. 456. See further below.

quickly allowed that such money was recoverable by the annuitant.¹⁶ At first it was even thought that the total price paid was recoverable,¹⁷ but such recovery was often far too generous, as the annuitant might in the meantime have received annual payments, a fact soon recognised in *Hicks v. Hicks*.¹⁸ This accordingly permitted the grantor to set off advances already made: if, said Lord Ellenborough, 'the consideration of the annuity be money had and received, it must be money had and received with all its consequences; and therefore the defendant must be at liberty to set off his payments as such on the same score'. On this basis, for example, nothing was recoverable if the annuity, though technically void, was fully paid up for the whole of the annuitant's life, since in this situation he had received all he had bargained for.¹⁹ In this way the action for money had and received managed to give effect to the financial (or exchange) merits of each case. Recovery was allowed to the extent, yet only to the extent, to which the consideration failed.

This approach offered new scope for other sales. Consider *Fortune v. Lingham*,²⁰ where P had bought and paid for stockfish which several witnesses swore to be putrid and wholly unfit. The court dismissed P's indebitatus for the pre-paid price for the simple reason that (as earlier explained) one could not try in this action whether the goods were as warranted or were not. However, and this is the interesting point, Lord Ellenborough conceded that, if sawdust had been delivered instead of fish, the price might have been recovered in money had and received. And a little later the same judge allowed an indebitatus where P had mistakenly over-paid as he had got less than specified.²¹ Both this and

¹⁶ *Shove v. Webb* (1787) 1 T.R. 732. A 'void' annuity was one invalidated or vacated by an Annuity Act, the first of which, that of 1777, was expressly directed against the 'pernicious Practice of raising money by the Sale of Life Annuities', hence required registration and other formalities. For the nature of these, see *Straton v. Rastall* (1788) 2 T.R. 366; *Chawner v. Whaley* (1803) 3 East 500; *Scurfield v. Gowland* (1805) 6 East 241; and for the policy as a whole *Huggins v. Coates* (1843) 5 Q.B. 432, 437.

¹⁷ See, e.g., *Beauchamp v. Borret* (1792) Peake 148; *Widdle v. Lynam* (1795) Peake Add. Cas. 30, 1 Esp. 309.

¹⁸ (1802) 3 East 16, 17.

¹⁹ *Davis v. Bryan* (1827) 6 B. & C. 651, 655.

²⁰ (1810) 2 Camp. 416.

²¹ *Cox v. Prentice* (1815) 3 M. & S. 344, where B bought and paid for a bar of silver at so much per ounce as an assayer certified. The latter, it transpired, had mistakenly over-stated the silver contents of the bar and P sued to recover the difference in price. Similarly in *Devaux v. Conolly* (1849) 8 C.B. 640, an excess was recovered, as on 'a simple case of failure of consideration', where P had paid for 175 tons but delivery was 20 tons short.

the sawdust result clearly implied that *caveat emptor* no longer obtained to its previous full extent, since money had and received would now allow recovery if the buyer had paid for something utterly worthless or obviously in excess. All this became more explicit in several situations involving the sale of forged or faulty bills of exchange. 'There was nothing for the money', it was said in one case which readily allowed recovery for the price paid.²² The consideration on which the plaintiff paid his money, Tindal C.J. later remarked, has 'failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead'.²³ It is, Campbell C.J. added elsewhere, 'as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case the purchaser may recover.'²⁴ In other words, the doctrine of failure of consideration now required a seller to give at least something for the money the buyer paid, thus introducing a minimum but nonetheless very basic standard of exchange.

Moreover, it needed but a small shift in the meaning of 'worthless' for money had and received to operate very much like a warranty implied by law. This, to be sure, did not often happen, but two instances were these. In the first, P bought a bill of exchange on which all the signatures happened to be forged, except the signature of the last indorser (who had committed the forgery).²⁵ As the bill retained *some* value, D indeed argued that the present case was different from those where P received an entirely worthless thing. Yet it was held that P could recover the full amount paid for the bill; in fact, he could not have done better had the bill carried an express undertaking of 'merchantable' quality. In the second P bought from D goods which belonged to a third person to whom they had to be returned; though D had not given a warranty of title, P nevertheless recovered his purchase price.²⁶ In 'almost all the transactions of sale in common life', the court observed, 'the seller by the very act of selling holds out to the buyer he is the owner of the article he offers for sale'. It is in this rather roundabout way that

²² *Jones v. Ryde* (1814) 5 Taunt. 488, where the court also refused to follow an earlier decision which on similar facts had held such money to be irrecoverable precisely because (without fraud on the seller's part) *caveat emptor* was supposed to apply fully to all purchases.

²³ *Young v. Cole* (1837) 3 Bing. (N.C.) 724, 730.

²⁴ *Gompertz v. Bartlett* (1853) 2 El. & Bl. 849, 854.

²⁵ *Gurney v. Womersley* (1854) 4 El. & Bl. 133.

²⁶ *Eicholz v. Bannister* (1864) 17 C.B. (N.S.) 708, taking up a suggestion in *Morley v. Attenborough* (1849) 3 Ex. 500.

the implied warranty of title entered the law of sale.²⁷

TOTAL AND PARTIAL FAILURE

Concurrently another idea took hold, namely, that money had and received would not apply unless the failure of consideration was 'total'. It was a misleading idea since, as we have seen, money had and received did obtain even in situations where the failure was in fact 'partial', as where the plaintiff had overpaid, or paid in excess, in view of the seller's short delivery. But, though misleading, it was not an unnatural notion, in the sense that it resulted directly from two related developments. One was the significant change in the law of sale due to *Street v. Blay*.²⁸ Where, before this decision, goods warranted to be sound could be returned to the buyer whether they were worthless or merely inferior, the seller having to disgorge the price in either case, after it specific goods were thought to be no longer returnable.²⁹ As a result the law became that, while the buyer could not reject but could sue in damages for breach of warranty, if he had no warranty he might still bring money had and received for the purchase price, but only if and where the consideration had totally failed.³⁰

The second development related to the parties' altered position after a sale. Even before *Street v. Blay* it was clear that a buyer could not return the goods and recover the total purchase price if he had 'accepted' the goods, that is, used them for his own benefit or otherwise diminished their value.³¹ Where a contract was to be rescinded, said Lord Ellenborough in a well known case, 'it must be rescinded *in toto*, and the parties put *in statu quo*'.³² Here, it may be, the principle was wrongly applied. P was non-suited in an action to recover £10 paid for the lease of a house which he had left after only a few days, when D, the lessor,

²⁷ The warranty now arises under the Sale of Goods Act, 1893, s. 12, unless expressly disclaimed.

²⁸ (1831) 2 B. & Ad. 456. This announced the principle that a specific article could not be rejected once property had passed, though perhaps the truer reason for denying this right to reject was that the buyer had 'accepted' the article in that he had resold the horse, had rebought it at a profit, and had in fact suffered no relevant loss to entitle him to say that the consideration had failed.

²⁹ See *Gompertz v. Denton* (1842) 1 C. & M. 207, and the discussion of all this in (1952) 15 *Mod. L. Rev.*, 425, 436.

³⁰ See, for example, *Young v. Cole*, *supra*, 730, per Tindal C.J. and Bosanquet J.

³¹ See, e.g., *Rowe v. Osborne* (1815) 1 Stark. 140; *Hopkins v. Appleby* (1816) 1 Stark. 477; *Parker v. Palmer* (1821) 4 B. & Ald. 387; *Harnor v. Groves* (1855) 15 C.B. 667.

³² *Hunt v. Silk* (1804) 5 East 449.

failed in an undertaking to make alterations: was it really obvious that after P's short occupation D could not be put back *in statu quo*? Apart from this, the general principle was not in dispute: a party could not both derive a benefit and complain that his consideration had failed totally.

This principle was frequently applied,³³ perhaps most vividly in connection with patent rights. Suppose a patent was discovered not to be new and the licensee thereupon claimed the return of all his payments as on a consideration that wholly failed. Such a claim would not succeed, for 'there never has been a case, and there never will be', it was said, 'in which a plaintiff, having received a benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid It might as well be said, that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent, though he has taken the fruits of the land.'³⁴ This alone shows how easy it was to arrive at the generalisation that a failure of consideration had to be 'total', not merely 'partial'. It was a generalisation certainly true of many and possibly most cases, but still not true of all.

SUPERVENING IMPOSSIBILITY: UNFORESEEN EVENTS

Turning to impossibility of performance, we are of course concerned with unforeseen or supervening events (an act of God, an inevitable accident or an act of war), that is, new circumstances which radically alter the parties' calculation as to their respective burdens and benefits.

³³ See, e.g., *Beed v. Blandford* (1828) 2 Y. & J. 278; *Blackburn v. Smith* (1848) 2 Ex. 783; also *Ehrensperger v. Anderson* (1848) 3 Ex. 148, all more fully discussed (1959) 75 *L.Q.R.*, 53, 73.

³⁴ *Taylor v. Hare* (1805) 1 Bost. & Pul. (N.R.) 260, 262, per Heath J. A licensee, it was later held, was not even entitled to refuse payment for a patent where the grant was still executory since a grantee had no right to insist on a new patent in the absence of any special undertaking to this effect: see *Bowman v. Taylor* (1834) 2 Ad. & E. 278; *Lawes v. Purser* (1856) 6 El. & Bl. 930; *Hall v. Conder* (1857) 2 C.B. (N.S.) 22; *Smith v. Neale* (1857) 2 C.B. (N.S.) 67, 89; *Begbie v. Phosphate Sewage Co.* (1875) L.R. 10 Q.B. 491, (1876) 1 Q.B.D. 679. Only *Chanter v. Leese* (1838) 4 M. & W. 295, 5 M. & W. 698, seems to contrary effect. D refused payment for an executory grant of six patents, one of which was void. It was held that he was not liable for the price, for the price could not be apportioned, so that 'failing partially the consideration fails entirely'. This explanation obviously begged the very question at issue, namely, whether the licensee was entitled to an 'entire' benefit, or whether he was not caught by the above benefit rule, as most of the other patent cases held.

How did the law react to such events? Broadly in two ways. If a promisor was overwhelmed by a purely personal impossibility his performance was readily excused. Certainly, death was an excuse from an early date;³⁵ so was sickness, provided it directly affected the promisor's capacity or skill.³⁶ Nor was there any doubt that a legal or statutory prohibition, an *act en ley*, excused the promisor.³⁷ But, secondly and more importantly, other events offered no similar defence. In particular, such 'impossible' events as floods or tempests, though clearly acts of God, were not seen as affecting the performatory ability of the promisor himself; nor was an event like fire regarded as a ground for discharge, as it was an accident or 'casualty' not due to God but, at least sometimes, to the promisor's own negligence.³⁸

The law of bailment, like the law of waste, did distinguish between culpable and non-culpable impossibility, inasmuch as a bailee was excused from redelivering the article entrusted to him if its loss was due to no fault or negligence of his own.³⁹ But this distinction did not obtain in covenants. A lessee who had covenanted to repair was not discharged for, as an early Year Book explained, a covenantor remained liable to do what could be done 'by the power of man' and thus remained liable to repair, though the premises were damaged by an act of God.⁴⁰ The lessee, admittedly, was excused if for example he failed to prevent a river from overflowing, if it was due to a sudden flood; but he was still bound 'to make and repair the thing in convenient time, because of his own covenant'.⁴¹

³⁵ See *Hyde v. The Dean of Windsor* (1597) Cro. Eliz. 457; *Sparrow v. Sowgate* (1623) W. Jones 29, where a guarantor's liability was held extinguished by the debtor's death.

³⁶ In *Hall v. Wright* (1859) El. B. & El. 746, 765, a bare majority held that extreme ill health offered no excuse in a promise of marriage if the bride was prepared to put up with the groom's infirmity. Short of this, however, there was nothing else a bedridden promisor would have been expected to do.

³⁷ See Co. Litt. 206b; also Rolle Abr. 451, 452, where Rolle distinguishes between the *act en ley* and an *act del ley*, the latter being (e.g.) the imprisonment of the payor. A statute hindering performance was said to 'repeal' the covenant: *Brewster v. Kitchell* (1697) 1 Salk. 198. In later law, the legal prohibition usually arose in connection with acts of war, including an embargo or blockade, which was treated as an excuse provided the legal prohibition did prevent performance: see *Avery v. Bowden* (1855) 5 E. & B. 714, and *Baily v. De Crespigny* (1869) L.R. 4 Q.B. 180.

³⁸ *Richard le Taverner's Case* (1543) 1 Dy. 56a.

³⁹ *Williams v. Lloyd* (1628) W. Jones 179, Palm. 548.

⁴⁰ *Anon.* (1366) Y.B. 40 Edw. III, fol. 5, pl. 6.

⁴¹ *Anon.* (1537) 1 Dy. 33a. In *Lawrence v. Twentiman* (1611) 1 Rolle Abr. 450, pl. 10, a covenant to build a house before a certain day was suspended during a plague

This stringent rule became part of contract law through the important case of *Paradine v. Jane*.⁴² To an action for rent, the lessee pleaded that a foreign prince had invaded the realm and had kept him out of possession for a considerable time, so depriving him of the 'profits' of the lesse. This plea was rejected on very broad grounds. A party, the court maintained, was bound to make good an obligation he had freely undertaken, notwithstanding 'any accident by inevitable necessity' as where a house is burnt by lightning or destroyed by an enemy. Not only should a party expressly provide against such events but, just as 'the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor'. It has been asserted that *Paradine v. Jane* was not a 'true case of impossibility at all', either because the impossibility was due to the wrongful act of a third person against whom the lessee could have had 'adequate legal redress in times of peace', or because the lessee's real plea was that, owing to enemy action, he did not have enough money to pay, lack of money never having been recognised as a defence in law.⁴³ But this assertion is difficult to support. The lessee's plea certainly suggested a lack of funds, but the precise reason was not his general lack of money but the failure of the bargain brought about by the King's enemies. The significance of the decision then lies in its allocation of risk: it puts the loss arising from a supervening event wholly on the promisor, irrespective of hardship and exactly as the express terms provide. We may perhaps question whether the decision was desirable on its facts; we may question whether the decision stands easily with more modern developments. What we cannot question is that the decision totally rejects *vis major* as an excusing plea.

What is more, later common law consistently supported, even extended, *Paradine v. Jane*. Where a house burnt by 'casualty' the lessee had no defence: a lessee under a covenant to repair, said Rolls C.J., 'ought to do it if the house be burnt, be it by negligence, or by other means'.⁴⁴ Again, where a covenant to repair excepted destruction

'for the law would not wish [the covenantor] to compel him to venture his life for it', but he must complete after the plague.

⁴²(1647) Aley. 26.

⁴³W.H. Page, 'The Development of the Doctrine of Impossibility of Performance', in *Selected Readings on the Law of Contract* (New York 1931), 979.

⁴⁴*Compton v. Allen* (1649) Sty. 162; and see also *Poole v. Archer* (1684) 2 Show. K.B. 401, Skin. 210 (which however conceded that in such a case a jury 'would give but small damages'); *Chesterfield v. Bolton* (1739) 2 Com. 627.

by fire, the lessee was still liable to pay the rent.⁴⁵ So also a person who was not a lessee was bound by his covenant to repair, including rebuilding a bridge which had broken down in an extraordinary flood.⁴⁶ These rent and repair decisions were applied to carriage by sea. Where the owner did not sail with all convenient speed, 'by reason of contrary winds and bad weather', this was no defence.⁴⁷ Two other cases, often cited throughout the nineteenth century, were still more decisive against any excuse for impossibility. In *Hadley v. Clarke*,⁴⁸ a vessel was detained by an embargo for two years. This excused non-performance during the embargo ('a legal interruption of the voyage') but did not absolve the owner of completing after the delay, however 'hard or inconvenient' it was for him, for 'neither of the parties being in fault, the strict law must take place'.⁴⁹ The same applied to the charterer: where a ship, hired for the carriage of fruit, was detained more than six months when the fruit season was over, the charterer was not excused.⁵⁰

It is sometimes said that equity evolved a different doctrine.⁵¹ In one instance, it is true, chancery showed much sympathy for the lessee: it issued an injunction against the lessor demanding rent for a house that had burnt down, at any rate until the house was rebuilt, and Northington L.C. expressed surprise that there should be no defence at law to an action for the rent, for 'the justice of the case is so clear, that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to'.⁵² But this was a lonely voice. Buller J. thought the equity cases discharging a lessee from paying rent after fire to be resting on particular facts.⁵³ The Court of Exchequer continued to hold a tenant liable for rent and

⁴⁵ *Monk v. Cooper* (1737) 2 Stra. 763, 2 Ld. Raym. 1477. In *Shubrick v. Salmond*, *infra*, Lord Mansfield thought this a hard case, but had no doubt that it was covered by the authorities. See also *Pindar v. Ainsley* (1767) 1 T.R. 310; *Belfour v. Weston* (1786) 1 T.R. 310; *Bullock v. Dommitt* (1796) 6 T.R. 650.

⁴⁶ *Brecknock Co. v. Pritchard* (1796) 6 T.R. 750.

⁴⁷ *Shubrick v. Salmond* (1765) 3 Burr. 1637.

⁴⁸ (1799) 8 T.R. 259.

⁴⁹ See also *Spence v. Chodwick* (1847) 10 Q.B. 517, for a convenient collection of contemporary authorities.

⁵⁰ *Touteng v. Hubbard* (1802) 3 B. & P. 291; and see also *Blight v. Page* (1801) 3 B. & P. 295a.

⁵¹ Page, *op. cit.*, 984.

⁵² *Brown v. Quilter* (1764) Amb. 619.

⁵³ *Doe v. Sandham* (1787) 1 T.R. 705.

disagreed with the equitable rule and its alleged superiority.⁵⁴ In Lord Eldon's view there was in fact no equity in this sort of case, that is, no equity to relieve the lessee from his duty to pay rent.⁵⁵ A lessee, he admitted, would not be liable for repairs in case of fire, if fire were excepted, but this exception did not entail that rent did not have to be paid; if that was the effect at law, 'I cannot see any equity', for where the equities are equal, the law must prevail.⁵⁶

So far, then, the principle of impossibility had been both rigid and restricted in the extreme. A promisor had no excuse except where he died or became sick or his act was prohibited or was exactly covered by an exception clause. Hence if performance became impossible in any other way—by fire or flood or pestilence—no excuse was available. Not, in fact, until *Taylor v. Caldwell*⁵⁷ was this approach at all qualified. P hired a music hall from D for concerts on a certain date. A few days earlier the building burnt down. P had incurred expenses as well as losses through cancellations and so on, and he sued D for breach of the agreement to let, P's argument being that the destruction of the hall did not raise an excuse for D. But the Queen's Bench held otherwise. Blackburn J. did not think it was a letting, merely a licence to use, but little depended on this, for his decision embodied a wider principle, namely that, while a promisor must always perform, it was subject to the 'implied' condition *de certo corpore* that, where performance depends on the continued existence of a given person or thing, his death or its destruction at once terminates the contract on both sides.

However welcome the decision, one should not overlook its deeper difficulties. The judge supported his conclusion with various analogies (death excusing a personal duty as well as lack of fault in the law of

⁵⁴ *Hare v. Groves* (1796) 2 Anst. 687.

⁵⁵ *Holtzapffel v. Baker* (1811) 18 Ves. Jun. 115, where indeed Sir Samuel Romilly had put up a powerful argument for the lessee, for a modern echo of which see E.O. Walford, 'Impossibility and Property Law' (1941) 57 *L.Q.R.*, 339.

⁵⁶ Nor is the rule *res perit domino* in sale of goods an exception to all this. For this rule derived from the buyer having property rather than the seller's impossibility. '[If] the horse die in my stables, between the bargain and delivery, I may have an action of debt for the money, because by the bargain the property was in the buyer': Noy's *Maxims* (London 1641) xlii; Blackburn, *Contract of Sale* (London 1910), 288-9. Not until the nineteenth century was the notion of passing of property given wider scope: see the expanding development through *Hanson v. Meyer* (1805) 6 East 614; *Hinde v. Whitehouse* (1807) 7 East 558; *Rugg v. Minett* (1809) 11 East 210; *Simmons v. Swift* (1826) 5 B. & C. 857; *Tarling v. Baxter* (1827) 6 B. & C. 360; and see Serjeant Manning's comments in *Bailey v. Culverwell* (1828) 2 M. & Ry. 567n.

⁵⁷ (1863) 3 B. & S. 826.

bailment excusing the bailee), but his analogies were not really to the point, because the strict rule as to impossibility had grown and solidified in spite of them. Nor is it easy to see why the hirer did not himself remain liable for the rent. Why, in particular, was a hiring to be treated differently from a tenancy? In a tenancy a lessee was not excused. Did it matter that the hirer was not to have 'exclusive control' or that the letting was not in the form of a demise? In the judge's view nothing depended on the hire-tenancy distinction; yet this distinction must have had some influence, for otherwise the rule would (consistently) have had to be the same as in a tenancy. Or is the proper interpretation of the decision only this, that the promisor would be excused only where the specific thing was destroyed before the term commenced? And if so, did *Taylor v. Caldwell* then apply to tenancies as well, provided the fire happened before a tenancy commenced rather than in the course of it?

Whatever the answer, *Taylor v. Caldwell* was accepted as a new departure, though its actual range was relatively small. It was applied to excuse a builder from completing work destroyed by fire,⁵⁸ or to excuse personal performance on the grounds of sickness (an application in fact redundant since such an excuse had never been in doubt)⁵⁹ or, more frequently, to excuse a seller from supplying specific goods that had perished or been destroyed.⁶⁰ Moreover, as we shall shortly see, the principle of *Taylor v. Caldwell* was to merge with that of frustration, even though the two principles were very different both in origin and scope.

THE DEVELOPMENT OF FRUSTRATION

Compared with impossibility, the doctrine of frustration was destined for a more spectacular career. The term 'frustration', or more fully 'frustration of the adventure', originated in charter parties, where it first referred to the failure of the charterer's expectations caused by an inordinate delay particularly in the loading of a ship. There was a special reason for this. In charter parties, as we have seen, an (executory) engagement to arrive for loading on a particular day was treated as a condition precedent, but not so an undertaking to arrive for

⁵⁸ *Appleby v. Myers* (1867) L.R. 2 C.P. 651, 660, on which see note 76 below.

⁵⁹ *Boast v. Firth* (1868) L.R. 4 C.P. 1; *Robinson v. Davison* (1871) L.R. 6 Ex. 269.

⁶⁰ *Howell v. Coupland* (1876) 1 Q.B.D. 258.

loading with all speed, which was construed as 'independent', leaving the charterer to his cross action for such damages as the delay might have caused.⁶¹ This was clearly an attempt to help the shipowner, who in bringing his ship for loading had invested in considerable part performance which a charterer should not be too free to reject. *Freeman v. Taylor*⁶² further extended this by holding that a charterer could not refuse to load even where the ship arrived six weeks late. Here the charterer insisted that such delay amounted to a condition precedent, at least while the contract was still executory, especially since the charterer's object had been defeated by the owner's 'own wilful act', the latter having deviated for his own purposes. Nevertheless it was held that an engagement to sail with all reasonable speed, being independent, gave the freighter only a cross action but no right to put the contract at an end. Except, as Tindal C.J. added in words that proved prophetic, 'where the deviation was so long and unreasonable that, in the ordinary course of mercantile concerns, it might be said to have put an end to the whole object [of] the freighter' as the delay deprived him of 'the benefit of the contract'.

This idea was quickly picked up. In *Tarrabochia v. Hickie*,⁶³ the charterer refused to load on the ground that the ship arrived so late that the object of the contract was 'wholly frustrated'. The court thought that in the circumstances the alleged frustration had not occurred, but they conceded the charterer's right to withdraw if it had.⁶⁴ Another case held a delay of 152 days not to be a frustrating event;⁶⁵ indeed what amounted to operative frustration did not really emerge until the *Jackson Case*.⁶⁶ A ship that was to proceed to loading with all reasonable dispatch ran aground, necessitating repairs which would have taken six months to complete. The Exchequer Chamber, by a majority, held the charterers entitled to rescind. After the repairs, Bramwell B. remarked, it would have become a 'different voyage': the one contemplated was a spring voyage, the voyage remaining possible was an autumn one. The contract included an exception clause

⁶¹ See chap. 13, at notes 53-55.

⁶² (1831) 8 Bing. 124.

⁶³ (1856) 1 H. & N. 183.

⁶⁴ *MacAndrew v. Chapple* (1866) L.R. 1 C.P. 643, very similar on its facts to *Freeman v. Taylor*, *supra*, made the same point.

⁶⁵ *Hurst v. Usborne* (1856) 18 C.B. 144.

⁶⁶ *Jackson v. Union Marine Ins. Co.* (1874) L.R. 10 C.P. 125.

covering delay resulting from accidents, but the only effect of that, it was further held, was to protect the shipowner; it gave him no further rights so that the charterer could not sue him in damages for the delay, though he could still rescind.⁶⁷

One will observe that to speak of 'frustration' was as yet merely a way of saying that an 'inordinate delay' constituted a fundamental or total failure of consideration for the charterer, taking 'consideration' now in an executory or future sense.⁶⁸ What, then, of the shipowner? He, one would have thought, could not rely on failure of consideration, so that his defence (if any) was confined to one of impossibility. But this was not the solution adopted in *Geipel v. Smith*,⁶⁹ a most crucial case. An owner, having agreed to proceed with all convenient speed, could not reach the port of loading owing to a war between France and Germany. Unable to carry out the agreement except by running the blockade, the owner certainly had an excuse within the exception clause of 'restraint of princes' as well as within the principle of an impossibility or prevention by law. However the more interesting question now was whether the owner could throw up the contract entirely. The charterers conceded that he could 'suspend' the contract for the time of the blockade, but contended that he could do no more since, here as elsewhere, impossibility did not give him a wider ground of discharge. Still the Queen's Bench upheld the shipowner's defence. According to Cockburn C.J., it would be 'monstrous' to say that the owner must wait, 'with his ship lying idle, possibly rotting—the result of which might be to make the contract ruinous'. According to Blackburn J., 'the object of each was the carrying out of a commercial speculation within a reasonable time', so that after too long a delay, making this speculation impossible, 'each had a right to say, "Our contract cannot be carried out" '.

⁶⁷ Bramwell B. disapproved of the earlier cases, though Cleasby B. wholeheartedly supported them, with (technically) no less consistency. The older cases, the latter judge thought, offered the most desirable results, since they yielded a rule that was 'certain, clear, and not influenced by unfair collateral considerations of interest', while the new rule gave 'each party the chance of getting out of the charter, according as it is his interest to do so'.

⁶⁸ That is, not in an executed sense as we used it earlier in connection with money had and received. That the legal excuse here rested on failure of consideration, not really on impossibility, was first pointed out by Page, *op. cit.*, 994, and then by R.G. McElroy and G.L. Williams, *Impossibility of Performance* (Cambridge 1941), 75ff., 123ff.

⁶⁹ (1872) L.R. 7 Q.B. 404.

THE MERGING RULES

The above conclusion, it will be seen, not only extended the doctrine of frustration, but *eo ipso* amended and altered the law of impossibility, at any rate as far as a shipowner's position was concerned. The earlier cases to contrary effect⁷⁰ now became superseded, though they were never over-ruled. Nor, technically, did they have to be; the 'implied condition' introduced by *Taylor v. Caldwell* could apply to frustration cases as well since it was now possible to excuse the shipowners from further performances, not through a formal exception to *Paradine v. Jane* but more simply by saying that the parties had themselves intended an 'implied' condition to the effect that the contract should terminate for both sides if their adventure was frustrated by a delay.⁷¹

By the end of the nineteenth century the law of impossibility-cum-frustration had then evolved into a complex structure of rules. The root principle was still that of *Paradine v. Jane*, though qualified in a number of ways, both old and new. On the one hand, performance was excused if the promisor was physically unable to act, or under a legal prohibition, or if his performance came within the 'specific things' under *Taylor v. Caldwell*. These latter excuses, it should be noted, did not apply where the defendant was a payor since an obligation to pay was not affected by death or illness, nor by *Taylor v. Caldwell*, nor by a legal prohibition, since in practice payment of money was never forbidden, at least not within the realm. On the other hand, a party was excused from accepting performance, or from paying for it, if it was offered only after inordinate delay, on the ground of failure of consideration in an extended sense, now called frustration of the adventure. Inordinate delay or frustration also discharged the performer, not so much because he was prevented by an impossibility (for a delay only 'suspended' performance and did not strictly prevent it) as rather because he too could not be expected to keep to a bargain

⁷⁰Cases such as *Hadley v. Clarke, supra*, or *Touteng v. Hubbard, supra*.

⁷¹'The charterer is released from the charter. When I say he is, I think both are': Bramwell B. in the *Jackson Case, supra*, 144. A by product of this approach was to regard the contract as valid until the time of the actual impossibility or frustration, since the condition would not be operative until then, with the further consequence that any money paid or payable before the condition becoming operative would be money validly due even if the payor was subsequently to get nothing for his price or advance once performance was excused. This, to be sure, was a peculiar but possible, though by no means necessary, result and was adopted in *Chandler v. Webster* [1904] 1 K.B. 493, remaining effective until *Fibrosa v. Fairbairn* [1943] A.C. 32.

financially disastrous to him. This excuse applied typically to charterers and shipowners but was not necessarily confined to them.⁷²

This tidy appearance of the law should not conceal the severe tension within it: one part insisting upon performance exactly according to contract, irrespective of hardship, the other more concerned with the actual exchange situation between the parties, that one should get at least something for his money and the other something for his services. The antithesis was not immediately apparent as long as the rules remained situationally separate, but it did surface where the separation was not or could not be maintained. Suppose, to take a crucial case, that P had done work on D's property and that the property later perished: could P recover for his work? In *Menetone v. Athawes*⁷³ it was held that he could. P had done repairs on D's ship, which burnt down in dock only three hours before the work's completion. D pleaded that, getting no benefit from the work, he was under no obligation to pay, just as a tailor cannot ask to be paid where the cloth is destroyed before the suit is finished. P rejoined that D's benefit mattered nothing; what mattered was that he did the work as requested and so was entitled to be paid for it. 'This is a desperate case for the defendant,' said Lord Mansfield. But it was, added Wilmot J., 'like a horse that a farrier was curing being burnt in the owner's own stable'; the risk was therefore with the owner. The result was very much in line with *Paradine v. Jane*, albeit on different facts.

Other cases however tended to go the other way. Where P's printing work for D was nearly completed when a fire destroyed D's manuscript, P's claim to be paid did not succeed.⁷⁴ The decision, it was said, followed a custom of the trade under which a printer could not claim for work destroyed; but the result, together with the custom, could also be put on a broader basis, namely, that one could not claim for work and labour unless there was a corresponding benefit.⁷⁵ Another way of denying P's claim was to say, as the Exchequer Chamber said in

⁷² It may be noted that the law of frustration did not apparently displace the old law in other respects. Thus the old law still applied to initial impossibility, as in *Medeiros v. Hill* (1832) 8 Bing. 231, where a blockade already existing at the time of the contract merely suspended a voyage but did not afford a permanent excuse. See also *Hills v. Sughrue* (1846) 15 M. & W. 253.

⁷³ (1764) 3 Burr. 1592.

⁷⁴ *Gillett v. Mawman* (1808) 1 Taunt. 137.

⁷⁵ Apparently so held in *Adlard v. Booth* (1835) 7 C. & P. 108, also a claim for (destroyed) printing work.

Appleby v. Myers,⁷⁶ that no claim would lie for the partial performance of an 'entire' or lump sum contract. P was to erect machinery on D's land and keep it in repair for two years, the price to be paid when the 'whole work' was complete. Much work had been done, some of it fully completed, when D's premises with all the machinery were destroyed by fire. Still to put P's non-recovery on the ground that the work was 'entire' rather begged the question rather than answer it, because the reason that P's work was not 'entire' did not lie in his unwillingness to complete, but in what happened on D's own premises. Was it not then like Wilmot's example of a horse burnt in the owner's stable? and if so how was the 'entirety' rule of *Cutter v. Powell*⁷⁷ relevant? A little reflection shows that the latter rule rather served as a convenient way of excusing D from paying for work the benefit of which he would never see. But if so, again, what about the non-benefited defendant in *Menetone v. Athawes*? One has only to put the question to realise how fundamentally unsettled the law still was.

A FINAL SUMMARY

Our last question reveals once again a basic dilemma in contract history, one we encountered all over the performatory field. Two opposing principles were struggling for supremacy: a 'strict' principle under which the parties were confined to the contractual rights and duties expressly specified in the contract itself, and a second (which with some apology to the word we may again call a) 'synallagmatic' principle more concerned with the adjustment of a contract according to the parties' actual exchange position when a contract for any reason collapsed. The strict principle we saw operating in the doctrine of dependency as literally applied, in the rule requiring complete performance, including the entirety (or lump sum) doctrine of *Cutter v. Powell*, as well as in the rigid impossibility rule of *Paradine v. Jane*.⁷⁸ The synallagmatic principle was exemplified by the doctrine of independency and, especially, the principle of *Boone v. Eyre*,⁷⁹ by various attempts to allow proportionate or reasonable reward for part perform-

⁷⁶ (1867) L.R. 2 C.P. 651, reversing L.R. 1 C.P. 615, where the Queen's Bench had held that, since D had some duty to maintain the buildings, P was entitled to some payment on a *pro rata* basis, i.e. for the work actually done, but not for that not completed.

⁷⁷ (1795) 6 T.R. 320, fully considered in chap. 13, at notes 23 *et seq.*

⁷⁸ (1647) Aleyn. 26.

⁷⁹ (1779) 1 H. Bl. 273n.

ance, notwithstanding some deficiency by the promisor,⁸⁰ and by the doctrines of failure of consideration or frustration of the adventure we lately discussed.

On the 'formative' side, on the other hand, contract always adhered to a profoundly synallagmatic theme; while the law might be in doubt whether a bargain should be 'strictly' or 'functionally' interpreted, according to its view of how a bargain should be kept, there was never much doubt that a simple contract actually had to be a bargain when formed. This bargain idea, already very discernible in debt *sur contract* with its characteristic feature of the *quid pro quo*, came to the fore in the sixteenth century when *assumpsit*, together with the doctrine of consideration, began evolving into a general contractual action both for sale and for all kinds of services. Consideration primarily ensured that the parties' undertakings or promises entailed mutual benefits and burdens and that their agreement thus necessarily amounted to a bargain as distinct from the promise of a courtesy or a gift. Indeed this synallagmatic theme was carried through with remarkable consistency. It lay behind the distinction between past and present consideration,⁸¹ behind the requirement that a forbearance had to be for the promisor's benefit,⁸² as well as behind the notion that a contractual debt or liability could not be discharged by a bare agreement but required a 'novel' bargain, in the form of an accord or satisfaction or compromise, a notion which so actively survived in the doctrine of *Pinnel's Case*.⁸³

This synallagmatic element was not really diminished by the extension of *assumpsit* to the executor,⁸⁴ nor even to the third party beneficiary,⁸⁵ for either extension fully assumed the existence of an initial and regular bargain between an original promisor and promisee. What did happen however was that the element of mutual benefit became obscured, when the emphasis shifted from the promisor's benefit to the promisee's detriment as a result of three quite disparate sets of events: the extension of *assumpsit* to the gratuitous bailment,⁸⁶ the changes in the notion of

⁸⁰ See generally chaps. 12 and 13.

⁸¹ See chap. 5.

⁸² See chap. 6.

⁸³ (1602) 5 Co. Rep. 117a, and see chap. 10.

⁸⁴ See chap. 8.

⁸⁵ See chap. 11.

⁸⁶ See chap. 4, at note 57 *et seq.*, and for a modern example *Bainbridge v. Firmstone* (1838) 8 Ad. & E. 743.

forbearance after *Slade's Case*⁸⁷ and, particularly in connection with the guarantee,⁸⁸ the emergence of the doctrine that consideration must always move from the promisee.⁸⁹ At one point in the nineteenth century, it was almost an act of courage to assert that consideration could be both benefit and detriment.⁹⁰

These events must not overshadow the central and deeper significance of contract development at common law. The so-called simple contract did not derive its strength only from the parties' mutual consent but also from their bargaining, from the exchange expectations built thereon and from the identifiable loss or injury which a breach of a bargain, and only of a bargain, could cause: without bargain promises to begin with there could be no relevant loss.

⁸⁷ (1602) 4 Co. Rep. 91a.

⁸⁸ See chap. 8, at note 62.

⁸⁹ See chap. 11.

⁹⁰ *Currie v. Misa* (1875) L.R. 10 Ex. 153, 162. The action here was on a cheque for a pre-existing debt, the defendant (drawer) objecting to a lack of consideration as the plaintiff (holder) had not shown a special forbearance or detriment, the cheque being payable on demand, not after due date. To this Lush J.'s well known reply was that consideration could consist of either some benefit to one or of some detriment to the other side. The case, admittedly, was most concerned with a particular difficulty relating to cheques, but it was also symptomatic of a wider misunderstanding as to what consideration had basically or historically meant.

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