

ENGLAND AND THE CONTINENT

by Eugen Bucher

The reader may be aware that the German text is intended for the continental reader. Therefore its sections related to English legal history, being a summary only of the English doctrine related to it, may be of little interest to many readers.

The perfect translation from the printed German text is due to TONY WEIR, Trinity College, Cambridge, to whom the undersigned is gratefully indebted.

Contents

I. Introduction.....	2
II. Preliminary Remarks on Method, and on Frustration	3
1. Impossibility of Performance of the Contract	3
2. The Coronation Cases and the Birth of Frustration.....	3
3. Evaluation.....	4
III. Consideration: the Doctrine and its Historical Background	5
1. Preliminary	5
2. Pinnel's Case	7
3. The traditional connection between obligation and property, and the disregard of unremunerated transactions.	7
4. The Emergence of a Doctrine of Consideration	11
5. Excursus: consideration and causa	12
IV. Procedural Roots of the Requirement of Consideration	13
1. The Original Position: Consensual Claims are not Actionable	14
2. First Moves towards Granting Claims in Contract	15
3. Assumpsit - the Form of Action which gave rise to the Requirement of Consideration.....	16
V. England focuses on the promise not on the contract.....	17
1. Contract Outside England	17
2. English Law focuses on the individual's promise	18
3. Doctrine	18
4. A mere Promise is not binding.	20
VI. The Primary Function of Consideration: Connecting the two Promises	21
VII. The Extension of the Function of Consideration.....	22
1. The Reasons for it.....	22
2. Differing Effects	22
3. It is the validity of consideration rather than of the contract itself which is critical.	23
4. Further aspects of consideration.....	24
VIII. In Conclusion	26

I. Introduction

Since law is indelibly marked by its history, it is hardly surprising that law and legal thinking in England and the mainly Anglophone countries which follow it are very different from those in countries in the European-continental tradition, which includes all of Latin America and much of the Near and Far East. This presents a real challenge to the comparatist who seeks to see the global picture. Here we concentrate on the law of contract, for not only is it at the heart of private law, but it affects other areas as well, and it has been the object of analysis, debate and theorising on both sides of the Channel. If one studies this core of the law of obligations one can come to see the basic structure of a legal system and the way its component parts are interconnected. Indeed, no topic better illustrated the difference between the continent and England than their respective approaches to the law of contract.

On turning to the English law of contract the continental jurist comes up against two quite unfamiliar institutions – *frustration* and *consideration*¹. These need to be explained at the outset. Consideration is the more important, for it is the key to the whole of English contract law, the point where all the basic problems intersect. It is still a central preoccupation of the English lawyer and therefore of primary interest to the foreign observer. Anyone minded to construct a law of contract for the whole of Europe including Britain needs to be fully familiar with this institutions, aware of all the doctrinal differences between the systems, and most of all, conscious of the fact that *English lawyers do not think primarily in terms of contracts at all, but rather of promises.*

Frustration is quite a different figure. Whereas consideration is a precondition of the *formation* of a contract, since the validity of a promise or declaration of intention to be bound depends on its existence, frustration concerns the *termination* of the contract. Thus while consideration must always exist in every informal contract frustration occurs only rarely and exceptionally when an existing contract ceases to bind. In origin and application the two institutions could hardly be more different: something analogous to the requirement of consideration can be found in all early legal systems – it arose in England where originally private agreements could not be litigated in the royal courts at all – whereas the portmanteau concept of frustration, barely a century old, arose almost fortuitously in quite different circumstances.

Whereas both institutions receive extensive treatment in England both in textbooks in court, here, in an article addressed to the continental jurist, we can cover only their rudiments, and will eschew discussion of continental doctrine, which has its own perspectives and has little to say on the topics raised herein.²

In order to understand the essence of English contract law, and especially its two central ideas, one has to go back to its origins. This is not so much a historical investigation of the kind

¹ *Consideration* comes from the Latin *considerare*, to take account of. In this context it designates the advantage - often the counterperformance, the *quid pro quo* - envisaged by a person undertaking an obligation. Frustration (like the word *Frust* of current use in Germany) from the Latin *fraus, frustra, frustrari, frustratio* - mistake, in vain, to foil, thwarting - here referring to the collapse of a contract, regardless of the reason - impossibility, mistake, or whatever.

² This is true, for example, of René David, *Les Grands Systèmes de droit contemporains* (Paris 1964) with many subsequent editions, including one in German by Günther Grasmann, (1966); Konrad Zweigert/Hein Kötz, *Einführung in die Rechtsvergleichung*, (3rd ed. 1996 (translated into English by Tony Weir); Hein Kötz, Axel Flessner, *Europäisches Vertragsrecht*, vol. 1 (Kötz) 1996. See also Jörg Benedict, "Consideration etc.", [2005] *RabelsZeitschrift* 146 which deals with matters not covered herein. Filippo Ranieri, *Europäisches Obligationenrecht* 2nd ed.(Vienna, New York 2003), fundamental for the continent, deals briefly with the common law (pp. 19-29 on consideration). - Many further references on Consideration can be found in Benedict and Ferdinand Fromholzer, *Consideration – US amerikanisches Recht im Vergleich zum deutschen* (Tübingen, 1997), reviewed by the author in [1999] *Zeitschrift für Europäisches Privatrecht* 399-407.

practised by historians as such as an attempt to elicit from the mass of information about the past the elements which help us to understand the present role of these two institutions in the law as a whole. Most of what we have to say comes from works on legal history or from primary works which are readily available - certain court decisions and authors such as Glanvill, Bracton, Beaves and Blackstone as well textbooks written in the past two hundred years.

II. Preliminary Remarks on Method, and on Frustration

Law in the English-speaking world is what happens in court: it is from court decisions that any general rules, principles and concepts, themselves secondary, emanate, and it is the courts that manipulate and can alter them. This is clear as regards the two concepts discussed herein –*consideration* and *frustration*.

1. Impossibility of Performance of the Contract

If what one has promised to do in a contract validly formed becomes quite impossible the contract is treated as terminated by reason of *frustration*. The decision now treated by writers as the first instance of the application of frustration is *Taylor v. Caldwell* (1863)³, followed by *Robinson v. Davison* (1871). Both were cases of subsequent impossibility, but none of the judgments use the term “frustration” at all, resting rather on the view that the parties had implicitly agreed on a clause to the effect that in the event of accidental impossibility they were to be freed from contractual liability. *Taylor v. Caldwell*, where the owner of a music-hall which he had hired out to the plaintiff impresario for a series of concerts was relieved of liability when the hall burnt down, was decided on the basis that the contract was subject to a presumed *implied condition*, as it was in *Robinson v. Davison*, where a concert pianist who was prevented from performing by reason of illness was held not liable in damages for non-performance.⁴ The term “frustration” does not appear anywhere in the judgments, nor does it figure in contemporary writings.⁵

2. The Coronation Cases and the Birth of Frustration

It was some thirty years later that the concept of frustration became current. This was in the so-called “coronation cases”, where the question was whether contracts entered into in view of the ceremonies attending the forthcoming coronation in 1901 of Edward VII remained in force when the ceremonies were postponed owing to the King’s indisposition. In *Herne Bay Steamboat Co. v. Hutton* the contract was for the charter of a boat from which to watch the King review the fleet: this contract was upheld, on the ground, among others, that the fleet itself could still be viewed even if the King were not there to inspect it. Three weeks earlier a different result had been reached in *Krell v. Henry* where the contract was for the use of rooms from which to view the cavalcade proceeding along Pall Mall: here the owner’s claim for the

³ *Taylor v. Caldwell* 122 Eng.Rep. 309 (1863); *Robinson v. Davison* [1871] All E.R.Rep. 699

⁴ In *Taylor v. Caldwell* Blackburn J. adduced the rule that the duty of the seller to deliver the goods sold is discharged by impossibility when the goods are destroyed, although the buyer’s duty to pay remains intact if the goods sold are destroyed prior to delivery, according to the rule of Roman law and the tradition on the continent (with reference to Pothier, *Contrat de Vente*). He also invoked the rule that if an apprentice dies before the expiry of the contract of apprenticeship the father is not liable. Similar arguments were used in *Robinson v. Davison*

⁵ See, for example, the first edition of Anson, *Principles of the English Law of Contracts*, then about to appear (1879). Frustration makes no appearance in that edition nor in the eighth (1898) the last edited by Anson himself. Nor is the term “frustration” to be found in Chitty, *Law of Contracts* (note 40 below) 13th ed. 1896.

balance of the agreed sum was dismissed.⁶ This, the most famous of the coronation cases, has become the *leading case* on the *doctrine of frustration*, despite the fact that in neither of these decisions, any more than in those mentioned earlier, does the term “frustration” appear. The arguments turned on the interpretation or construction of the contract and the question was whether or not actually being able to see the ceremonies was an essential part of the contract. Thus in *Krell v. Henry* Vaughan Williams LJ said: “I think that the coronation procession was the foundation of the contract” and though he also said “...in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening...”, he was not using the term “frustration” in its technical signification but only in relation to the parol evidence rule

In *Krell v. Henry* the court did not have to decide on the fate of the sum already paid by the defendant, who had abandoned his counterclaim for its return, but in *Chandler v. Webster* (1904) it was held that the money already paid could not be reclaimed since the contract was still in force when the hirer paid it: the contract was not invalidated *ab initio* by reason of the subsequent failure of consideration but remained valid until the time the procession was cancelled, whereupon it came to an end and the parties were freed from their existing obligations.⁷ This result was attributed to the effect of *the doctrine of frustration* as releasing the parties only from *further performance* of the contract. This was the first occasion when the doctrine of frustration was mentioned, and is of interest not only for marking the birth of *frustration* as a technical term but also because it related frustration to consideration, in that the contract was treated as terminated because of the failure of the consideration established at the formation of the contract.⁸ However, the connection between frustration and consideration between 1863 (*Taylor v. Caldwell*) and 1904 (*Chandler v. Webster*) is no longer accepted.

The doctrine of frustration, alive and well in England, proved much less viable in the United States. In the Index to the eighteen volumes of the third edition of Samuel Williston’s work on *Contracts* “frustration” has only one entry (performance of charterparty prevented by force majeure) with a further reference to “Impossibility (this Index)”. Arthur L. Corbin treats frustration as a special case of impossibility, described as “Frustration of Purpose by a Collateral Event that affects the Value of a Performance without making it impossible”.⁹ Recent writings devote more space to the doctrine and refer to the English coronation cases, which have some “persuasive authority” in the United States.¹⁰

3. Evaluation

⁶ *Herne Bay Steamboat Co. v. Hutton* [1903] All E.R. Rep. 627; *Krell v. Henry* [1903] All E.R.Rep. 20.

⁷ *Chandler v. Webster* [1904] 1 K.B. 493.

⁸ Since the failure of consideration did not annihilate the contract *ab initio* but only *ex tunc* (from the time of the cancellation of the procession), prior performance could not be reclaimed. This rule was reversed by *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32 (See 1 Chitty *On Contracts* (28th ed. 1999) no. 24-070). – The Law Reform (Frustrated Contracts) Act 1943, the legislature’s response to that decision, gives the judge some power to order the repayment of moneys paid in advance, subject to a deduction for expenses incurred and rendered useless, and to order payment for benefits received, but its scope is rather limited and the enactment does not seem to have much practical importance.

⁹ Arthur L. Corbin on *Contracts*, (§1355 in the single volume (1962), and vol. 6 in 3^d ed., by W.H.E.Jaeger, 1967).

¹⁰ On the current position in doctrine and practice in the United States see Allan Farnsworth, *Contracts* (Boston/Toronto, 1982) ch. 9 and Calamari/Pedrillo, *The Law of Contracts* (2nd ed., St. Paul, Minn. 1977) ch. 13.

The outcomes of the frustration cases are quite satisfactory and actually in line with those on the continent.¹¹ But in our view the decisions fall in two quite distinct groups. In *Taylor v. Caldwell* and *Robinson v. Davison* it was impossible to perform the principal contractual obligation – the concert hall could not be provided because of the fire, and the pianist could not play by reason of illness –so the only question was as to the secondary obligation of the debtor, namely whether he must pay damages. The coronation cases were quite different, for there it was perfectly possible for both parties to do what they had promised and the problem arose only because performance of the contractual obligation (to provide the boat and the room with a view) was rendered futile.¹²

Taylor v. Caldwell unquestionably represents a step forward: it not only recognised the rule *impossibilium nulla obligatio* but also rooted it in the intention of the parties, by attributing it to a condition implied in their contract. The consequences, which may not have been foreseen by Blackburn J., were significant, for the coronation cases move towards the way continental lawyers deal with defects of intention and the way they apply the concept of “collapse of the foundation of the adventure” (*Wegfall der Geschäftsgrundlage*) respectively. However, the conflation of these two structurally dissimilar sets of facts is logically, analytically and comparatively dubious; impossibility and futility are entirely different things. The roles of the parties are quite different, too. In cases like *Taylor v. Caldwell* and *Robinson v. Davison* frustration is invoked by a supplier whose promised performance has been rendered impossible and who seeks to avoid liability in damages for non-performance, whereas in the coronation cases frustration is invoked by a customer who could perfectly well pay but wishes to avoid paying for a performance now worthless. The interests of the parties in these two sets of facts are entirely different: on the continent they have always been kept separate, and it would conduce to greater clarity if they were kept separate in England as well, even if the results remained the same.¹³ Certainly frustration as presently understood in England is unlikely to figure in any cross-channel pan-European Contract Law.

III. Consideration: the Doctrine and its Historical Background

1. Preliminary

The number of court decisions shows how important consideration is as the precondition of the actionability of contractual promises; likewise the extensive coverage given to the *doctrine of consideration* by writers of textbooks. It was not always so. Decisions on consideration constitute a mere seven pages out of over fifteen thousand in the twenty-three volumes of the *Abridgement* of Charles Viner (1678-1756), while the following entry,

¹¹ So also on the continent subsequent accidental impossibility of performance frees the debtor: French Code civil art. 1302; Austrian ABGB § 880, 920; Swiss OR art. 119; German BGB §275; the customer’s duty to pay in *Krell v. Henry* would be avoided for mistake (in Switzerland, *Grundlagenirrtum*, as in the English argument “the coronation procession was the foundation of the contract”). Likewise art. 1101(1) of the Code civil: “L’erreur n’est une cause de nullité ... que lorsqu’elle tombe sur la substance...”

¹² Contrary to what is often stated in the literature, *Taylor v. Caldwell* cannot be properly seen as deviating from the proposition contained in *Paradine v. Jane* (1648) 82 Eng.Rep. 519 and 897. It was there held that the lessee was bound to pay the agreed rent despite his allegation that he had been extruded from the land by a “German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom”. There is no possible analogy with *Taylor v. Caldwell* where no use could be made of the concert hall once it burnt down, for the leased land remained perfectly usable, and the rule that circumstances rendering its use impossible have to be borne by the lessee is still applied in the case of the purchaser of goods. It would be easier to relate *Paradine* to the *Coronation cases*, for while the land was still available for use it could not, for reasons exterior to the contract, be used for the purpose envisaged.

¹³ This is more in line with Corbin who treats subsequent impossibility of performance as a special case of termination of contract and deals with frustration as a particular case of very restricted application.

Conspiracy, rates sixteen and *Conditions* no fewer than 345.¹⁴ The fact that there are so few judicial decisions on consideration indicates the marginal relevance of the topic at the time. Again, of the thirty-one pages in which Blackstone (1723-1780) deals with the whole law of contract less than two and a half are concerned with consideration.¹⁵

Here, just as we saw in discussing frustration, the early judicial decisions now regarded as milestones and leading cases used arguments and terms quite different from those which were later to prove determinative.

The case generally cited in the books on contract as the first important decision on consideration is *Pinnel's case*.¹⁶ Pinnel brought an action of debt on a bond calling for payment of £8 10s. on 11 November, though he had already received the sum of £5 2s. 2d. from the defendant on 1 October and declared himself fully satisfied with it. The report of the case states that “payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole... but the gift of a horse, hawk, or robe &c in satisfaction is good. For it shall be intended that a horse, hawk, or robe &c might be more beneficial ... than the money...”, and then proceeds “in the case at bar it was resolved, that the payment and acceptance of parcel before the day in satisfaction of the whole, would be good satisfaction in regard of circumstances of time; for peradventure parcel of it before the day would be more beneficial to him [the creditor] than the whole at the day...”

The reason this decision is treated as a leading case on the doctrine of consideration is doubtless that, despite the fact that they are *obiter dicta* and irrelevant to the case at bar, the introductory words cited above purport to represent the practice then current.¹⁷ Yet the word “consideration” does not appear at all, and the question whether the release of a debt is contractual or not is not even mentioned. Though the question for decision was whether or not the debt was still valid, the court merely rehearsed the facts, added a few hypothetical variants, and then stated the legal consequences, without a word of reasoning or any hint of a theory or conceptual analysis. This is all the more striking in that Pinnel’s case is included in the Reports of Edward Coke (1552-1634),¹⁸ who elsewhere is very ready to explain the legal grounds for the decisions he reports and even add commentaries of his own.¹⁹ The bareness of the report and the absence of commentary is indicative: if Coke himself, so much given to theorising, saw no reason to formulate a rule we may take it that in 1600 any proper doctrine of consideration or controversy thereon lay far in the future. The courts assume without discussion that a

¹⁴ Charles Viner, *General Abridgment of Law and Equity; alphabetically digested under proper Titles, with Notes and References to the Whole* [1741-1753], here cited to 2nd ed.

London, 1792). – Abridgments, which first appeared in the sixteenth century and have now disappeared as a literary form, summarised decided cases under keywords alphabetically ordered. Viner’s work was by far the most extensive example. Viner also founded the Chair of Law in Oxford named after him, to which he nominated Blackstone as the first holder.

¹⁵ Blackstone, *Commentaries on the Laws of England* (4 vols., Oxford 1765-1769, reprinted Chicago 1979). In vol. 2 (1766), *Of the Rights of Things*, ch. 30, pp. 440-470, is *Of Title by Gift, Grant, and Contract* (pp. 440-470), where consideration is treated from pp. 443 to 446.

¹⁶ *Pinnel's Case*, 77 Eng.Rep 237 (1600), or 5 Coke’s Reports fol. 117.

¹⁷ Despite the fact that the conditions of release from the debt were met, the claim in *Pinnel's Case* was successful because of a fault in the defendant’s pleading. The decision in *Pinnel's Case* was upheld by the House of Lords in *Foakes v. Beer* (1884) 9 App.Cas. 605.

¹⁸ The quotations are from Coke *op.cit.*

¹⁹ On the style of Coke’s Reports see J.H.Baker, *Introduction to English Legal History* (4th ed. 2002), p. 210: “He added ... of his own comment ..., often working into one report of his own notes from earlier cases, and not distinguishing ... his own views from those he was reporting.” Then “...the correctness of the doctrine reported was more important than the historical precision of the report.” See also J.H. Baker, “Coke’s Notebooks and the Sources of his Reports” in *The Legal Profession and the Common Law – Historical Essays* ch. 12, p. 177, at 194 and note 93, referring to the fact that Coke disagreed with the result in *Pinnel's Case*.

promissory obligation (here a release of a debt) is valid only if the promisor obtains some advantage by it.²⁰

2. Pinnel's Case

In order to ascertain the essence of the requirement of consideration we shall stay for a moment with *Pinnel's Case*, as many English writers do.²¹ It is true that the continental lawyer would see the act whose validity was in issue not as a contract giving rise to an obligation but rather as a disposition (*Schulderlass*, a form of *Verfügungsgeschäft*), but the tendency of English lawyers to conflate obligation and transfer means that for present purposes they can be treated alike.

Although the parties had agreed on a waiver by the creditor of his right to an acknowledged debt, it was held that his waiver would be effective only if he obtained some compensating advantage. The “gift of a horse, hawk or robe &c.”²² might be such an advantage, as might premature performance, that is, payment before the debt was due, since getting the money earlier could be of interest to the creditor. It was said by way of amplification that “the value of the satisfaction is not material”, given that a debt of £10 due at Westminster could be discharged by payment of £5 at York. It is worth noting how wide the idea of advantage is: although such advantage is often described as *quid pro quo*,²³ which perhaps suggests something corporeal, the court in *Pinnel's Case* held that there need not actually be any thing such as a horse, hawk or robe: payment in advance or elsewhere would suffice, even if less in amount.

The court focuses on the promisor (here the person releasing the debt) and seems to ignore the position of promisee, here the debtor partially released. Of course it is assumed that the latter was in agreement (since the question litigated would never have arisen if he had voluntarily paid early or elsewhere, or indeed provided something other than money), but it was never suggested that the parties' agreement that the partial payment discharge the debt should be seen in the light of *consensus ad idem*, much less a contract. The only matter considered was the unilateral declaration of the promisor/waiver and its legal consequences (see further below at V).

3. The traditional connection between obligation and property, and the disregard of unremunerated transactions.

The requirement of a *quid pro quo* goes back to the very early days of law, when mere words gave rise to no duties or release of rights, and oral declarations had no obligational effects. There had to be something else (some formal act or delivery of an object, actual or symbolic).

a) Delivery of an Object as a Precondition of Validity

²⁰ Even later when references to consideration became commoner, and still today, the courts are loth to indulge in theorising; e.g. “The truth is that the courts have never set out to create a doctrine of consideration”: P.S. Atiyah, *Essays on Contract* (Oxford 1986) p. 181.

²¹ Some earlier relevant decisions are given by C.H.S. Fifoot, *History and Sources of the Common Law* (1949) pp. 415-443, and by J.H. Baker/ S.F.C. Milsom, *Sources of English Legal History, Private Law to 1750* (London 1986) pp. 482-505. See also H.G. Beale/Bishop/Furmston (3rd ed., London 1995) ch. 6 (Consideration) pp. 93-166.

²² Note that “gift” here designates not donation but delivery. It is left open whether the horse, hawk or robe are supplementary to partial payment or constitute a surrogate for it. For the theory of consideration the difference is irrelevant.

²³ This can be seen in Christopher Saint-German, *Doctor and Student* (1531), on which see Baker/Milsom *op.cit.* p. 483.

In the history of law dispositions of assets (such as conveyances of property outright, for a period, or later as security) were effective long before it became possible to create obligations. For a long time lawyers were very reluctant to treat purely consensual arrangements as generating obligations: there had to be some *property* element. This was essential, though a symbol might suffice (an *arrha*²⁴, or earnest, for example, in the formation of a contract). This is well attested in Roman law²⁵ as well as Germanic and associated Anglo-Saxon law,²⁶ and emerges for Norman England from the oldest and most venerable of the few lawbooks then in existence: Glanvill (ca. 1110-1190). Though he was writing a good five hundred years before the term “consideration” came into use, he laid down a general principle that was later to form a critical element in the institution: ‘*Perficitur autem emptio et venditio cum effectu ex quo de pretio inter contrahentes convenit, ita tamen quod secuta fuerit rei emptae et venditae traditio, vel quod premium fuerit solutum totum sive pars, vel saltem quod arrhae inde fuerint datae et receptae.*’²⁷ Thus the parties to a sale are not bound merely because they agreed to it: obligations arise only when property passes – the duty to pay the price arises only when the property is handed over, the duty to deliver the property only when the price has been paid (though part payment or a symbol, such as an *arrha*, will do). What is said as regards sale is true generally: in the absence of some act of performance such as delivery on one side or the other, oral declarations are not binding.

Glanvil rejected the Roman rule that property once sold is at the buyer’s risk (*periculum est emptoris*)²⁸: he holds that the risk of loss of the goods is not on the buyer but on whichever party has the thing in his hands.²⁹ These two rules of Glanvil’s two rules can be seen in their different ways as evidencing the original view of sale and other contractual obligations as

²⁴ Roman law fully adopted the Greek and Oriental *arrha* (Inst. 3, 23 pr., D.18.1.35.pr.; C.4.21.17). It can be interpreted in two ways, either as security for performance of a contract already formed or as evidencing the formation of a contract. In the latter sense *arrha* allows withdrawal from the arrangement, being forfeited by the party who paid it and returned with the equivalent by the recipient. This is the solution in the Code of Hammurabi: if a dowry is paid in advance, the bride’s father can keep it if the man changes his mind, but must pay double if it is the bride who proves reluctant (Code of Hammurabi §§159 and 160, quoted in Wilhelm Eilers, *Die Gesetzesstele Chamurabis* (Leipzig 1933) p. 38). The latter interpretation, as permitting withdrawal, is no longer presumed (Swiss OR 158(1) - unless explicitly agreed - and §336(2) German BGB).

²⁵ This is established in Roman law for transfers of land and cattle by *mancipatio*, where bronze symbolising the price was weighed out by an official in the presence of at least five witnesses; *in iure cessio*, a fictive lawsuit, served for the transfer of rights of all kinds; finally there was the oral *stipulatio*, which could create duties of all kinds and is the forerunner of our abstract acknowledgement of a debt.

²⁶ On this see Pollock & Maitland, *The History of English Law* [1895]; new edition, with Introduction by S.F.C. Milsom (Cambridge, 1968), vol. 1 pp. 56 ff., vol. 2 pp. 212 ff, with reference to Andreas Heusler, *Institutionen des Deutschen Privatrechts* (Leipzig 1885-6) vol. 1 pp. 76 ff., vol. 2 pp. 227 ff. Concrete examples are to be found in Pierre Engel, *Epingles, Donatifs et douceurs, ou de l’art des arrhes au nectar des pots-de-vin* (Mélanges Jean-Pierre Sortais)

²⁷ The Latin, whose spelling has been classicised, means that a contract of sale comes about when the parties are agreed on the price, provided always that delivery follows or the price is paid in full or in part or at least an earnest is given. So Ranulf de Glanvill, X, 14 de *emptione et venditione*, in *The Treatise on the laws and customs of the realm of England commonly called Glanvill*, ed. G.D.G.Hall (London 1965) p. 129.

²⁸ Glanvill Book X, para. 14 ad fin. states *Periculum autem rei emptae et venditae illum generaliter respicit qui eam tenet, nisi aliter convenerit*: unless otherwise agreed, the risk of loss falls on the party who has the thing at the time the risk occurs – quite the most reasonable rule, contrary to the rule of Roman law and, in effect, the rule in the French Code civil and the several codes which follow it on this point (including the Swiss Civil Code). See Bucher in 1998 *Zeitschrift für Europäisches Privatrecht* 615 ff., and for Swiss law p. 664 f.

²⁹ In current English law ownership, and consequently risk, passes to the buyer in a *sale* of specific goods (with the same result as in the French Code civil), but not if the parties have merely entered an *agreement to sell*, importing an obligation to proceed to a conveyance. This treatment of sale as a conveyance in property law is retrogressive as compared with Glanvill, who here represents the old Anglo-Saxon law rather than any Norman novelty.

property-determined, a further indication of the relative unimportance of mere consent in the formation of contract in the twelfth century.³⁰

Bracton confirms what Glanvill says.³¹ In dealing with gift (*donatio*) as a ground of acquisition (p. 49) he asserts that it is not valid until the donee has obtained full possession (*antequam donatarius plenam habuerit possessionem*) (p. 121). He confirms that a sale is good when the object and the price have been determined, provided that the seller has received something as *arra* [sic], though the need for *arra* or delivery of the object is dispensed with if the agreement is in writing.³² An item once delivered (*traditio*) cannot be reclaimed, even if the price has not been paid or paid in full.³³ Bracton's follows Glanvill in rejecting the Roman rule of *periculum emptoris*.³⁴

These quotations show how intimately the creation of obligations depended on questions of property, leading to the position that a *promise* is binding only if the promisee on his side has handed over a thing, whether in actuality or virtually by promising to deliver it. This, in very broad outline, is the background from which the requirement of consideration developed.

b) No clear distinction between real and personal claims

Whereas on the continent the distinction between real and personal claims is self-evident and permeates the entire law, in English law the distinction between property and obligation is drawn only inconsistently and here and there: personal claims (*choses in action*), for example, are classed as "property".³⁵ There are two explanations for this. First, it is a continuation of old Germanic notions, whereby the *Gewere* guaranteed possession and also served to determine ownership.³⁶ Secondly, it reflects the general refusal to receive Roman law (and procedure³⁷) with its clear and consistent distinction between the two types of claim which is the source of the current view on the continent. The absence of Roman law on this point is already notable in Bracton who, though sometimes said to be the conduit for Roman law into

³⁰ Since consent by itself was insufficient in Roman law, the jurists hypothesised that when the contract was perfect there was a quasi-transfer of ownership carrying the risk with it; Glanvill, however, rejected any such fiction and stuck to the rule that a merely consensual contract to sell had no effects and no passing of the risk because there was no transfer of the goods. [By way of amplification, the Roman rule as to the passing of the risk was not only conceptually justified as stated above, but also substantively just. Sale in Roman law is a *market sale*, and in the market it is almost always the buyer who delays the completion of the transaction, generally because he does not have the money for the thing. It was therefore perfectly proper to put on him the risks of which he was the cause.]

³¹ Henry de Bracton (ca. 1210-1268), *De Legibus et Consuetudinibus Angliae*, ed. Woodbine, translated by Samuel E. Thorne (Harvard 1968) vol. 2.

³² On *donation* see *ibid.* p. 49 (general significance) and p. 121 (need for delivery); on *emptio venditio* see p. 182. Giving an earnest was not only a requirement for a valid sale but also proof (*quod arrarum nomine datum est, argumentum est emptionis et venditionis contractae*). The illustration is given: *Et cum arrae non intervenerit vel scriptura, neque traditio fuerit subsequuta, lous erit paenitentia et impune receder possunt contrahentes a contractu* – Either party may freely withdraw from the contract if there has been neither *arra* nor writing nor subsequent delivery.

³³ *Sed si traditio subsequuta, perfecta erit emptio et venditio, nec poterit postea aliquis contrahentium a contractu resilire praetextu pretii non solute in parte vel in toto (ibid.)*.

³⁴ *Cum emptio et venditio contracta fuerit ... periculum rei emptae et venditae illum generaliter respicit qui eam tenet... (ibid.)*

³⁵ See, for example, Law of Property Act 1925, s. 136, on the transfer of rights ("assignment ... of any debt or other legal thing in action...").

³⁶ If the person dispossessed of his *Gewere* could prove his better right to possess, his claim for reinstatement was treated as a dynamic procedure, not fundamentally distinguished from a personal claim (itself generally a claim for property).

³⁷ The distinction between real and personal claims in Roman civil procedure was followed through logically in the case where the defendant declined to appear: in an *actio in rem* the property in issue was simply taken away, whereas in an *actio in personam* the *indefensus* risked having all his assets put at risk by *missio in bona*.

England, often deviates from it in favour of Germanic ideas. Although he offers quite an extensive discussion of the Roman actions, he underplays the distinction between the two types of claim: in dealing with the “sources” of claims he speaks only of those which arise from obligations, and defers real claims till much later, when he is considering how they should be classified, and even here he speaks of *actiones mixtae*, a novelty unknown to the law of the Romans.³⁸

c) Gifts Require a Countergift

All legal systems are chary of validating gratuitous dispositions. In Germanic law for a gift to become effective and vest in the donee both parties, not just one of them, must transfer property or at least promise to do so, and this was true of executed manual gifts, let alone donative promises.³⁹ In pre-Norman England this Germanic practice was followed, and is a further feature of the background of consideration.

d) The Consensual Element in Dispositions of Property

Even dispositions of property contain a consensual element, in as much as there must be an intention to receive as well as an intention to transfer. It is true that effective dispositions are commonly treated as unilateral on the part of the transferor, but that is because his role is critical whereas the agreement of the recipient is self-evident and unproblematic, and so is underplayed and rather taken for granted. Legal historians are of the view that even if gifts were seen as unilateral acts on the part of the transferor, reciprocal transfers (one of which was often merely symbolic) were invariably needed for them to have any legal effect, whereas modern lawyers tend to see the matter in more functional terms, as being *consensual*, the transfer being an objective and perceptible declaration of *agreement*: if in order to acquire the property the donee had to make some symbolic countergift, the latter was important not because of its value but because it indicated the donee’s agreement with the transfer and his continuing intention to retain the property, much as the *arrha*, however interpreted, always indicated assent and perhaps also evidenced a promise to perform.

Consideration can be made to fit into this model: the voluntary act on the part of the promisee which is generally required is also an expression of the promisee’s willingness to perform his part. Thus we arrive at our goal of recognising consensual, contractual relationships, even if the recognition came about historically by means of giving the promisee a quasi-delictal claim because mere agreements were not actionable.

³⁸ See Bracton (*op.cit.*) *De Actionibus* pp. 282-326. In the section *Unde action oritur* (p. 228) *obligatio* is described as the *mater actionum*, and the sources of obligations are given as *ex contractu vel quasi* and *ex maleficio vel quasi*. Real claims appear in the section *De prima divisione actionum* (p. 290). The category of *actiones mixtae*, not Roman but sensible enough, is considered on p. 293: they include divisory actions arising from successions or boundary disputes and have the characteristic that both parties act as both claimant and defendant. The *prima divisio actionum* comes from the *Corpus Iuris* (Inst. 3.13.2; D.44.7 and C. 4.10); the formula *obligatio mater actionum*, later a commonplace on the continent, is first found rather casually in Azo († 1230?) *Summa*, at Inst. 3.13 (*De obligationibus*), and was known to Bracton who probably studied with Azo in Bologna.

³⁹ See R. Schröder/E.Frh. v. Künssberg, *Lehrbuch der deutschen Rechtsgeschichte*, 6th ed. (1922) §35 especially at n. 35 ff.; H. Mitteis/Liberich, *Deutsches Privatrecht* 9th ed. (1981) ch. 40/II.3: “Sale was the absolute model of the remunerated transaction and remuneration became the basic principle of the law of obligations, gift long remaining unrecognised”, or in ch. 49/I/1 “every gift had to be matched with a countergift in order to become effective. In Lombardic law there had to be some money payment, even if nominal, like the *arrha*. In other laws services sufficed...” Again in ch. 40/II.3: “English law adhered to the rule that there must always be an equivalent of some sort (consideration).”

4. The Emergence of a Doctrine of Consideration

A rule can be applied without being understood: in substance there was a requirement of consideration from the earliest days,⁴⁰ but the legal doctrine appeared only much later. The matter was firmly established by 1600, but Coke did not use the word and it was not a technical term in contemporary use.⁴¹ The word “consideration” certainly appears in some earlier decisions, but in the fifteenth century at least it seems to be used rather casually, not as a technical legal concept,⁴² and while it was in current, though not very widespread, use at the time of Viner’s Abridgement (ca. 1743)⁴³, there was really no true doctrine of consideration as such until the nineteenth century. Perhaps the first writer to describe the scope and content of the word “consideration” was Wyndham Beawes, who opened his chapter *Of Contracts, Bonds and Promissory Notes* as follows:⁴⁴ “A Contract (in Latin, *Contractus*) is a Covenant, or Agreement between two or more Persons, with a lawful Consideration or Causes, as when a Man makes the Sale of any Thing to another, for a Sum of Money, or covenants, in Consideration of Fifty Pounds, to make him a Lease of a Farm, &c. These are good Contracts, because there is a *Quid pro Quo*, or one Thing for another; but if a Person promises me Twenty Shillings, and that he will be Debtor to me for it, and after, when I demand Completion of his Promise, he refuses me, I cannot have any Action for its Recovery, because this Promise was no Contract, but a bare Promise, or *Nudum Pactum*, though if any Thing had been given for the Twenty Shillings, even to the Value of a Penny, then it had been a good Contract. Every Contract doth imply in itself, an *Assumpsit* in Law for its Performance, for a Contract would be to no Purpose, if there were not Means to enforce the Performance thereof.”⁴⁵

Blackstone’s *Commentaries*, which appeared fifteen years after Beawes’s first edition, deal with contracts very summarily and in the two-and-a-half pages devoted to consideration hardly go beyond the text just cited, with the difference that Blackstone elects to discern, quite erroneously, the influence of Roman law: he says that “in all contracts, either express of

⁴⁰ All the nineteenth-century English legal writers, following Blackstone (note 15 above) vol. 2, pp. 443-446, stated that consideration had always been required in England: Joseph Chitty Jr, *Practical Treatise on the Law of Contracts*, 5th ed., by John A. Russel (1853): “such consideration must exist ..., otherwise the promise is void”, and then “The earliest records of our law show that this maxim was always recognised in this country” (p. 25). The following Note (f) refers to decisions from the reigns of Henry IV (1399-1413), Henry VI (1422-1461) and Edward VI (1461-1483) before proceeding: “But it is a principle not peculiar to English law. It obtained, generally speaking, in the civil law; and indeed, we have borrowed from the Roman jurists the term *nudum pactum*, as applied to promises without consideration.” There is then a reference to the requirement of *cause* in the French Code civil. Addison on *The Law of Contracts* [1847] 6th ed. by Lewis W. Cave (1869) says much the same as Chitty at p. 3 f. – There is no basis for the statement that there is a connection with Roman or later continental law, including that of France: legal development in England was autonomous on this point and uninfluenced by what happened on the continent.

⁴¹ See *Pinnel’s Case* (note 19 above).

⁴² See the decisions collected in J.H. Baker, *The Legal Profession and the Common Law* (1986) 371 ff., and Baker/Milsom (note 21 above) pp. 482-506, which document the developments before 1600. At that time the requirement of consideration was insisted on in practice but the term was not used in its technical or normative sense. The first case to show this is, in the author’s view, *Hodge v. Vavasour* (1616), given by Baker/Milsom at p. 504-5. For A.W.B.Simpson *A History of the Common Law of Contract - The Rise of the Action of Assumpsit* (Oxford 1987) the first case is *Newman v. Gylbert* (1549), but in the author’s view the word consideration is not there used in its technical sense.

⁴³ See note 14 above.

⁴⁴ Wyndham Beawes, *Merchant’s Dictionary, being a Complete Guide to all Men in Business* [1751], 4th ed., by Thomas Mortimer (London 1783) p. 439. The last edition (1813) was edited by Joseph Chitty.

⁴⁵ W.S.Holdsworth refers to Beawes in his *Sources and Literature of English Law* (Oxford 1925) pp. 210 and 213, and confirms the importance of the publication and its basis in court practice. – Note Beawes’s equiparation of cause and consideration, his use of *nudum pactum* to refer to agreements which are ineffectual for want of consideration, and his indication that *assumpsit* is the means whereby performance can be enforced.

implied, there must be something given in exchange, something that is mutual or reciprocal” [this is amplified by a reference to the Roman formulae *do ut des, facio ut facias* and their variants] and concludes “therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude.”⁴⁶ – To be noted is that Blackstone is still of the view that formal documents such as a deed still require consideration: they must not be usurious and must indeed be based on some kind of consideration, either *good* or *valuable*, the former being familial, the latter economic or equivalent.⁴⁷

As regards the law of the United States reference must be made to the *Commentaries on American Law* by James Kent (1763-1847) which, though based on Blackstone’s *Commentaries*, sometimes go beyond them, being well documented and characterised by the author’s astonishingly wide knowledge. Consideration is not given much prominence, being treated rather cursorily in connection with donation and mentioned briefly in connection with ownership of land, where the *deed* serves as the conveyance.⁴⁸

Neither in the United States nor in England did the nineteenth century produce any deep historical research, let alone a monograph on consideration, and though the numerous new and comprehensive textbooks on the law of contract deal with consideration, they do little more than assert the need for the promisor to bargain for some counterperformance.⁴⁹ In Addison’s very lengthy book the treatment of consideration is rather cursory,⁵⁰ and the mention in Stephens’ *Commentaries* is even briefer.⁵¹

5. Excursus: consideration and causa

Ever since Beawes and Blackstone consideration has often been discussed in relation to the *causa* of Roman law and the *cause* which figures in the French Code civil. Causes are naturally of interest to philosophers and thinkers because human beings faced with any phenomenon tend to ask what provoked it and what its consequences may be.⁵² Jurisprudential doctrines of cause are, however, of very little help in understanding consideration. After all, *causa* has always been shrouded in uncertainty – the very word was unspecific in Latin and became quite

⁴⁶ 2 Blackstone, *Commentaries* (note 15 above) pp. 443-446.

⁴⁷ *Ibid.*, pp. 296-7. This view, now long abandoned, was still held by Chitty (note 40 above) p. 26, note 5, referring to Blackstone, but not to Beawes (note 44 above). Addison (note 40 above) pp. 46 ff. explains with historical evidence that in equity deeds required consideration.

⁴⁸ James Kent, *Commentaries on American Law* [1826-1830] (reprinted Buffalo, 1984), which deal with gift and sale in vol. 2 pp 353, 364-367 and with the deed as conveyance at vol. 4 pp. 453-455, state, following Blackstone, “The maxim of the common law was taken from the civil law, in which the doctrine of consideration is treated with an air of scholastic subtlety” (vol. 2 p. 364) and refers to Blackstone’s mention of *do ut des, do ut facias* etc. Note that, in anticipation of later developments, he insists that the consideration must not be immoral or illegal (see VII/3/a below).

⁴⁹ Thus in Chitty (note 40 above) we find “sufficient consideration or recompense for making ... the promise upon which a party is charged” (p. 24-25): this is retained in the 13th ed. by J.M.Lely, 1896. Likewise William R. Anson, *Principles of the English Law of Contracts* (7th ed. 1893, the last edited by Anson himself) p. 73: “Consideration therefore is something done ... by the promisee in respect of the promise. It must necessarily be *in respect of the promise*, since consideration gives to the promise a binding force.”

⁵⁰ Although Addison (note 47 above) is much longer, with its 1161 pages, than the contemporary editions of Chitty, consideration is treated rather cursorily (pp. 3-10). ...

⁵¹ Henry John Stephen, *Commentaries on the Laws of England* [1841], 4th ed. 1858 (and many thereafter). The term consideration appears here and there but is never treated systematically: there are only four references to it in the 83 pages of the General Index in the fourth volume.

⁵² In both England and on the continent the theories of causation from the scholastics through philosophers such as Schopenhauer received occasional attention from jurists. For references to the Late Medieval period and scholastics such as Aquinas see Reinhard Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition* (1990), pp. 549-560, and also his “Vertrag und Versprechen” in *Festschrift Heldrich* (Munich 2005) p. 468. – See also Schopenhauer’s dissertation *Über die vierfache Wurzel des Satzes vom zureichenden Grund* (1813).

vacuous in the romanistic languages as denoting “whatever” – any *thing*.⁵³ The idea of *causa* as the reason for a legal effect has caused confusion among jurists for two thousand years, and the ensuing futile discussion has rarely conduced to greater clarity.

In Roman law the word *causa* simply denotes the reason, whatever it may be, for certain legal acts and effects.⁵⁴ It is also used in civil procedure, as in the phrase *causae cognitio*, the preliminary investigation of the facts prior to an *actio in factum*. Its most prominent application was in the law of enrichment where a disposition could be undone by a *condictio* if there were no valid reason (*causa*) for it.⁵⁵ The provision in the French Code civil, Art. 1108, that in order to be valid a contract must have *une cause licite dans l’obligation* (as well as an *objet certain*), comes from rather loose formulations by Domat (1625-1696) and Pothier (1699-1772)⁵⁶ rather than from any well-established tradition in France. The *cause* is the purpose of the parties respectively in entering the contract, the *objet* is the content of their promises. But the sole effect of Art. 1108 is exclusionary⁵⁷, namely to render contracts invalid if the *cause* is unlawful: a good *cause* is not a precondition of validity, and the one or two decisions which hold a contract invalid for want of a *cause* merely illustrate the indefiniteness and flexibility of the concept.⁵⁸

The view that there is any connection between *causa* and consideration can safely be ignored: at the very most it is possible that the partial enforceability of *pacta* and *promissiones* in canon law sometimes depended on there being an acceptable *causa*,⁵⁹ which might render it comparable with the effect consideration was later to have.

IV. Procedural Roots of the Requirement of Consideration

Having seen how the requirement of consideration arose in practice before the term itself was used and long before the emergence of any doctrine or theory, we now, for those with an interest in legal history, note briefly the way these stages are presented in the major historical writings,⁶⁰ how it was through the labyrinthine byways of civil procedure and after covert and tentative arguments that contractual claims became enforceable.

⁵³ *Cosa* in Spanish and Italian, *coisa* in Portuguese, *chose* in French.

⁵⁴ A gratuitous transfer is said to be effective *causa donationis*, not further explained, and *causa* is also given as the justification for a transfer of property pursuant to an agreement not amounting to a contract, but generating an *actio in factum*.

⁵⁵ The assumption, due in part to misunderstandings in the law of reason, that no disposition could be valid in law unless there was a good *causa* for it is fairly recent. Note the current misleading formula in the Swiss Code of Obligations art. 62(2), allowing restitution (condiction) “whenever a person has received an asset without any legal ground.”

⁵⁶ Jean Domat, *Les Loix Civiles dans leur ordre naturel* (1689) I,1, 5 and 6; Robert-Joseph Pothier, *Traité des Obligations* (1761) note 42 ff.

⁵⁷ *Cause* is exclusionary in that it denies the validity of contracts in which the *cause* (*cause illicite*) is unlawful. A bad cause infects the contract, but the corollary that a contract is valid only if it has a good cause is nonsense and has no statutory basis either in France or elsewhere, “good” here meaning only “not bad”.

⁵⁸ See Cass. 2 February 1973 (D.S. 1974.32), adduced by Thomas Kadner in 2005 *Zeitschrift für Europäisches Privatrecht* 523-540 in support of his view of the need for unified contract law. In that case the plaintiff, an employee about to retire, agreed to recommend the defendant as her successor and did so effectively. The reason given for rejecting the claim for the promised remuneration – absence of *cause* – has no basis in the Code (or indeed in Domat or Pothier), since there was nothing immoral about the arrangement. The decision surprises the foreigner, perhaps also the French jurist. There is an obvious parallel with consideration here, but the English courts would doubtless regard what was promised by the claimant (especially as it was successful) as good consideration.

⁵⁹ See the references in Stephan Meder, *Rechtsgeschichte* (2nd ed. 2005) p. 145 ff.

⁶⁰ The following have been consulted: Pollock/Maitland (note 26 above); William Holdsworth, *A History of English Law* [1925] 2^d ed. 1937, vol. 7, pp. 1-148; Harold Potter, *An Historical Introduction to English Law* [1932] 4th ed., by A.K.R. Kiralfy [1958] (1970), Part One; C.H.S.Fifoot, *History and Sources of the Common Law* (1949); G.C. Cheshire/C.H.Fifoot, *Law of Contracts* ((1945), and many subsequent editions (Part I – Historical Introduction); S.F.C.Milsom, *Historical Foundations of the*

1. The Original Position: Consensual Claims are not Actionable

a) Contractual Claims Inadmissible in the Common Law Courts

Law in England is what the courts decide, yet to begin with the royal courts could not decide claims arising from private contracts at all. This was already fully described by Glanvill: *Praedictos vero contractus qui ex privatorum consensu fiunt breviter transigimus, quia ut praedictum* est privatae conventionis non solet curia domini Regis tueri, et quidem de talibus contractibus qui quasi privatae conventionis censerentur se non intromittit curia domini Regis.*⁶¹ For many centuries the development of the law of contract was dominated by the need to get round this obstacle and discover procedural means of making contractual claims actionable.

The passage to which the word *praedictum* refers (Book X, note 8) is concerned with delivery of goods (in particular by way of security) and there Glanvil states that obligatory agreements are not considered by the royal courts, unlike the claims mentioned in the following Note, those for the restitution of pledged goods (with the *Breve de summonendo creditore de vadio restituendo*, the form of action by which the creditor summoned the pledgee).⁶² These two texts indicate the boundaries which limited the development of the law for centuries: judicial protection was afforded to real claims (the demand for the return of items pledged or lent) whereas contractual claims to have property transferred fell outside the jurisdiction of the courts of common law. Real claims for the delivery of property were actionable, but the only obligatory claims which could be heard were those arising from delict.

b) Historical Background

We need to clarify the historical background of the fact that the royal courts refused to hear contractual claims. Given that “It is not commercial law but the law of delict in which the law of obligations arises”⁶³ one might suppose that the situation described by Glanvill occurred elsewhere as well, and that the way contractual claims developed out of the tort claim of *assumpsit* in England was merely a local variant of something universal. The reality is quite different. Outside England the step from delict to a general law of obligations, that is, the association of contractual with delictal claims, was taken very early. As Mitteis reports, contractual claims, already well established in classical Roman law, were not displaced to any extent in vulgar law and their scope was extended in the Germanic tradition when it abandoned the Roman view that contracts had to be of a certain type. In England, on the other hand, it was not until the fifteenth and sixteenth centuries that the development of *assumpsit* permitted the hearing of claims in contract (see section 2 above), and their camouflaged acceptance de facto took place against the background of a prohibition which remained formally in force, whereas contractual claims had been openly admitted elsewhere for over a thousand years, and indeed

Common Law (Toronto, 1981); J.H. Baker, *Introduction to English Legal History* (4th ed. 2002); J.H. Baker/S.F.C. Milson, *Sources* (note 21 above); P.S. Atiyah, *Introduction to the Law of Contract* (5th ed. 1995); P.S. Atiyah, *Essays* (note 20 above), especially pp. 179 ff., no. 8 (Consideration, A Restatement); A.W.B. Simpson, *History* (note 42 above).

⁶¹ At the end of his Book X on Obligations Glanvill (note 27 above) states at n. 18: “As we have said above, the contracts agreed upon by private individuals are considered only briefly, since the royal court does not entertain them; the royal court does not hear claims on contracts which can be said to be arrangements between private persons (subjects).” – According to Cheshire/Fifoot (note 60 above) p. 1 note 2: “By the Constitutions of Clarendon, 1164 ch. 15, the Courts were forbidden to offer a remedy for contract”, referring to Holdsworth (note 60 above) vol. 3, p. 410.

⁶² The real claim for the return of the item pledged was actionable, but not the personal claim based on the pledgee’s obligation.

⁶³ 2 Mitteis (note 39 above) ch. 40, p. 124

even in Britain prior to the Norman invasion and for a period thereafter. It was only in the *Curia Regis*, the court of the Norman kings⁶⁴ which came into being alongside the existing jurisdictions and only gradually eclipsed them,⁶⁵ that contract claims were excluded. Whatever the reason for this exclusionary rule – it is impossible now to say what it was – this peculiarity remained in force for nearly a thousand years and constitutes the background of the rise of the requirement of consideration. Even today the common law declines to order promises to be performed *in specie*, though “specific performance” may be granted in certain cases “in equity”: in normal cases of non-performance the creditor can only claim damages, a remedy rooted in delict law – another indication of the continuing effect of a rule dating from the eleventh century.

2. First Moves towards Granting Claims in Contract

Since any legal system is bound eventually to recognise claims arising from contracts, attempts were naturally made in England to find ways round the exclusionary rule. One such way was *assumpsit*, but as this form of action was designed for claims in tort, it was a difficult and complicated task to rejig it so as to make it cover claims arising from contract. We must return, however, to the origins.

The first forms of action were *Detinue* (from the Latin *detinere*, to withhold) and *Debt* (from *debere*, to owe, and *debitum*, a debt), apparently of common origin. *Detinue* can be compared with the *vindicatio* on the continent (for the return of goods lent, pledged or taken away) and *Debt* lay for the things owed. *Debt* could thus occasionally serve to enforce an obligation, though in the absence of any clear distinction between real and personal claims this was far from amounting to the admission of contractual claims generally. As the law developed the distinction between *detinue* and *debt* virtually disappeared.

Another very early form of action was *covenant* (from the Latin *conventio*, agreement), but here a *deed* was required, a formal document, signed, sealed and delivered, occasionally also witnessed (a deed being also optimal in claims of *debt*, though there were other possibilities, provided that the claim was for a sum fixed in advance).⁶⁶ Certainly mere oral agreement was never enough, though it might be possible to prove a transaction, such as the delivery of goods pursuant to a contract of sale and so on, from which one could infer the existence of a claim; Glanvill had already indicated that if debts had such a *causa* a claim might lie in *debt*.⁶⁷ If there were no sealed deed, only the claim in *debt* lay, but this form of action was lumbered with the old-fashioned defence of *wager of law*, the oath of purgation, whereby the

⁶⁴ This can be discerned in the works of Glanvill and Bracton already cited in notes 27 to 34 above. The conditions they mention for the validity of contracts are not fully consistent with the rule against their actionability, for they regard some claims as valid though they could not be heard in the *Curia Regis*. The reason is that the barons retained some of their previous jurisdiction, which is an indication of how loose the conception of law was at the time; since law was regarded not as stemming from royal command only but as a *continuing tradition*, their global view was justified. See Pollock/Maitland (note 26 above) vol. 1 ch. 3, p. 65, ch. 4 pp. 79, 88, 108; also Holdsworth and Potter (note 60 above)

⁶⁵ This is also the origin of the phrase “common law”, the law that was common to the whole Norman realm, as contrasted with the particular local laws, much as on the continent the phrase *Gemeines Recht* referred to the general law stemming from the Roman tradition, to the exclusion of special local variants.

⁶⁶ If a sum were fixed by deed, *covenant* was excluded and *debt* must be used; see Cheshire/Fifoot (note 60 above) p. 6.

⁶⁷ Glanvill (note 27 above) Book X, 3 (para. 2): *Aut enim debetur quid ex causa mutui, aut ex venditionis causa, aut ex commodo, aut ex locato, aut ex deposito, aut ex alia iusta debendi causa* (Obligations arise from loan, or sale, or hire, or deposit, or any other legal causa). – Bracton (note 31 above), in his chapter *De Acquirendo rerum dominio*, p. 64, gives a more extensive version of the same thought by citing a traditional rhyme – *Re, verbis, scripto, consensus, traditione – Iunctura, vestes sumere pacta solent*, though here he is not considering *debt* as grounding a claim, but rather the actionability of *pacta*.

defendant could defeat the claim by swearing to his innocence with the backing of compurgators or oath-helpers.⁶⁸

These remarks give at least some impression of the complex procedural situation as regards the enforcement of contracts in England at the end of the Middle Ages. Given the inadequacy of the writs available when there was no deed every attempt was made to resort to other forms. At the end of the fourteenth century the King's Chancellor, in his *equity jurisdiction* began to afford protection to agreements not under seal (originally to prevent *laesio fidei*, the breach of faith reprobated by canon law), and there was good reason for the common law courts to go in the same direction.⁶⁹ But since it was impossible for contract claims to be heard in the courts, the writs already mentioned being immutable, they had to be brought under the cover of the available writs for torts. Contractual claims had somehow to be dressed up as claims in tort.

3. Assumpsit - the Form of Action which gave rise to the Requirement of Consideration

a) The Stages of Development

The old-established form of action in tort was the *Action of trespass*. It was originally restricted to cases where there had been an attack *vi et armis* (armed violence), but by the end of the fourteenth century it had been greatly extended, and *actions on the case* included *conversion* (theft), *nuisance*, *words*, *negligence*, *deceit*, and above all *assumpsit*. It was this last-named variant which was pressed into service for enforcing contractual claims. Of all the actions on the case *assumpsit* seemed the one best suited for sanctioning harm (originally to property) occurring between contractors and so it was *assumpsit* whose particularities provoked the development of the requirement, and eventually the doctrine, of consideration. Reported cases include that of the ferryman who caused the loss of the claimant's mare by overloading his ferry – here there was *misfeasance*, since it was the contractor's misperformance which damaged his customer's property – and then that of the builder who, having promised to erect a sturdy house, deviated from the plans and produced a really ramshackle building.

Non-performance proved trickier to deal with than misperformance, in that the debtor who does nothing at all can hardly be said to have done anything wrong so as to interest the law of tort. This is why there was an occasional attempt to deploy another of the *actions on the case*, namely *deceit* (*Doig's case*, 1442⁷⁰). Nevertheless it was *assumpsit* which eventually provided the path to a general contractual claim for non-performance.⁷¹ A leading instance of nonperformance is failure to pay a debt. Suppose that a debtor subsequently undertook to pay? Could he be sued in *assumpsit* on that undertaking (for which the antecedent debt might rate as consideration), even though he could have been sued in *debt* (at the risk to the claimant of the debtor's waging his law)? In 1600 a dispute between the royal courts on this issue was resolved in *Slade's case* in favour of allowing the claim in *assumpsit*, the court also holding that the undertaking which was pleaded need not be proved, thus opening the way for enforcement of all contractual claims, without the drawbacks of either debt (wager of law) or covenant (deed),

⁶⁸ Wager of law as an institution was an old Germanic tradition which can be shown to have existed on the continent as well: see Gerhard Kegel, *Vertrag und Delikt* (Cologne, 2001) p. 5 with reference to Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (1985).

⁶⁹ This is emphasised by Cheshire/Fifoot (note 60 above) p. 7 (at B: The Development of Assumpsit).

⁷⁰ Extracted in J.H.Baker/S.F.C.Milsom (note B above) p. 391.

⁷¹ *Assumpsit* comes from *assumere/adsumere*, to undertake, adopt, take upon oneself, promise and so on. Simpson (note 42 above) deals with the meaning of the word at p. 215 ff.

and even extending ‘to recover a reasonable compensation for goods supplied or services rendered, provided that the parties had clearly contemplated the creation of a legal nexus’.⁷²

A great deal more abstraction was required before the rule formulated in 1600 became the rule in force today. Without going into the detours of court procedure and practice, we can say that it has been established since *Pinnel’s* case that promises, whether unilateral or contractual, are actionable if, but only if, the promisor is to have some advantage by undertaking the obligation.

b) Consideration and Delict?

Assumpsit was a tort form of action, so that to acknowledge the defendant’s obligation was to admit to a *liability in tort*. This being so, the emergence of the requirement of consideration seems inexplicable: why should the defendant’s duty be actionable only if he obtained some advantage in recognising it? But if one sees consideration not as the advantage obtained by the defendant but as the disadvantage or detriment suffered by the claimant, the promisee, this will seem less eccentric. At the outset, to say that liability in tort requires consideration comes close to requiring that the claimant have suffered some harm: a promise is only a binding acknowledgement of liability if the promisee has suffered some perceptible harm or a restriction of his rights. Later, when it was admitted that the liability was contractual, the idea that detriment to the promisee could amount to consideration survived, given that in contracts involving the exchange of performances what one party gets the other loses – a zero-sum game in fact.⁷³ The promisor is bound not just by reason of the advantage to himself but because of the corresponding burden on the promisee. Even at this early stage we are close to seeing consideration as a contractual counterperformance and to finding in the promise supported by a consideration and its acknowledgement by the promisee the consensual elements of contract itself.

V. England focuses on the promise not on the contract

1. Contract Outside England

Lawyers on the continent long ago abandoned the practice of treating private agreements as unilateral dispositions or undertakings, though actually even these depended on consent (see above at III/3). Jurists throughout the world, except English-speaking common lawyers, regard the law of debts and obligations as self-evidently a matter of *contract*: it is the contract which determines the obligations of the parties. Thus the French Code civil contains the famous formula: *Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*.⁷⁴ The duties of the parties depend on the contract, based on the so-called *consensus* of the parties.

It was during the Enlightenment that this view became established. The concept of *consensus* was admittedly present in Roman law, but it was only in the eighteenth century that it was treated as the determinant of rights and duties.⁷⁵ Actually the idea that parties have a

⁷² Cheshire/Fifoot (note 60 above) p. 15, with reference to *Warbrooke v. Griffin* (1609) 123 Eng.Rep. 927.

⁷³ Consideration can be “benefit to the promisor or a detriment to the promisee” (*Currie v. Misa* [1875] L.R. 10 Ex. 153, 162, cited by Atiyah (note 20 above) p. 187).

⁷⁴ The formula can be found already in Domat (note 56 above) vol. 1/1/1/VII: “*Les conventions étant formées, tout ce qui a été convenu tient lieu de loi à ceux qui les ont faites*.” (p. 22 VII, of the Paris edition, 1767).

⁷⁵ The word *consensus* in the Roman sources designates either the unilateral declaration of agreement (the contract being formed by the several consensuses of the two parties), or the absence of dissent, *dissentire*. *dissensus* applying when there is a refusal to agree and also a joint decision to

“common intention” is wholly unrealistic: intentions are entertained by individuals, not by groups. It is not the intention of either individual contractor which counts, and it cannot be their common intention or consensus,⁷⁶ for consensus has no rational basis and is merely a shorthand designation of a complex set of facts. Nevertheless the legal tradition on the continent of Europe focuses on the idea of contract and the “consensus” which engenders it. By contrast, relatively little attention is paid to the obligational utterances of the individual parties.⁷⁷

2. English Law focuses on the individual’s promise

It is quite different in England and other countries of the common law. The historical background of “consideration” shows us that it attaches to the undertaking of an obligation or promise (which the German-speaking lawyer would call a “pflichtbegründende einseitige rechtsgeschäftliche Erklärung”). On this approach the concept of contract recedes into the background or even disappears: it is the two declarations made by the respective parties which constitute the contract and its effects result from the duties and concomitant rights emanating from these declarations.

The view that the parties to a contract are bound and obliged by their individual promise and not by the concurrence of the reciprocal promises is still prevalent in England today. This emphasis on the unilateral undertaking to be bound as separate from its counterpart was determinative throughout all the changes in the forms of action and remained unquestioned when *assumpsit* finally became the appropriate form of action.⁷⁸ Even today one speaks more readily of promises than of contracts: a breach of contract is commonly called a breach of promise.⁷⁹ In considering particular agreements judges and authors ask, just as in *Pinnef’s Case* (above III/2), not about the contract formed by the parties but about the promise given by the party in question: this is what counsel and judges argue about. This is both appropriate and realistic, because after all a claim is not based on the effect of the contract as a unit but on whether the defendant was under a duty to perform and is in breach of it. This concentration on the *promise*, that is, the specific right/duty relationship (the obligation itself), is conceptually superior to the method of thinking in terms of contract, which sometimes distracts one from realising that the problem may turn on the rights and duties of the individual parties.⁸⁰

3. Doctrine

abandon an agreement, so that an *absence* of consensus shows a lack of intention. – The contracts described as consensual (*consensu obligatio*, Inst. 3.22) are those where nothing more is required than the expression of agreement (as in sale, lease, partnership and mandate), with no mention of the fact that consensus is equally essential in the other contracts (where delivery, oral exchange or writing is required – *re, verbis, litteris*).

⁷⁶ Indeed to speak of even an individual as having *an* intention (and only one) is perhaps self-contradictory (since, as Goethe says, “Zwei Seelen wohnen, ach, in meiner Brust”) in that it cannot be identified or ascertained. For the purposes of contract law it is not part of the *forum internum* but of the *forum externum*, a social rather than an individual/psychological phenomenon. In law what is relevant is only the *expression* of the intention: a common intention can mean only a readiness to bind oneself to a specific (negotiated) outcome, but of course normally the two partners will have different outcomes, each beneficial to themselves, in mind.

⁷⁷ It is true that they continue to figure in the codes as “offer” and “acceptance”.

⁷⁸ See Zimmermann (note 52 above) pp. 554ff.

⁷⁹ See, among others, Beale/Bishop/Furmston (note 21 above) p. 3: “Contract law is most obviously the law relating to agreements or promises”, and further pp. 93, 518 ff. and elsewhere.

⁸⁰ Issues related to one party only such as lack of contractual capacity or excessive burdens should not have the effect of invalidating the contract for that would allow the creditor to invoke matters designed to protect the debtor. See Bucher, “Für mehr Aktionendenken”, 186 *Archiv für die zivilistische Praxis* 1-73 (1986)..

This focus on the obligation undertaken by the individual, so obvious in Pinnel's case and determinative of the development of the requirement of consideration (above IV⁸¹), is especially evident in the case of the formal deed: it is normally treated just as a contract, whereas in fact it consists simply of the unilateral promise of the party delivering it.⁸²

The doctrine of consideration today offers powerful evidence of the current mindset in the common law whereby the individual promise of performance is highlighted and the contract of which it forms part is relegated to the background:

Consideration is the precondition of the validity of a *promise*, that is, the partner's undertaking to perform, and the two promises together generate all the obligations contained in the contract. It is not that there is consideration for the contract itself: that makes no sense at all. Consideration attaches to the individual promise. At the most one can speak of there being two considerations in a bilateral contract, one for the promise of each party. In litigation the contract reduces into the promises given by the parties respectively, for each of which independently consideration must be present.⁸³

To say that consideration is a condition of the validity of a *contract* is correct only in a figurative sense, while explanatory of the result where one of the promises is invalid for want of consideration. Then the other promise also fails, for it also lacks the consideration, which was the counterpromise, so that in the end the contract as a whole collapses.

It follows from the requirement of consideration that in England there can be no such thing as a binding offer, unless perchance some consideration is given specially for it. On the continent, by contrast, a binding offer is not a promise at all and generates no obligation, an obligation arising only when the offeree issues his acceptance so that a contract is formed. Thus whether an offer can be withdrawn or not is a matter of the formation of contract, not of whether or not it is binding. The notion that consideration is required to make an offer binding makes no sense for the continental jurist, since he concentrates on the eventual contract, but it makes good sense if one concentrates on the individual promise of performance made by the offeror. Taken by itself an offer is a *promise to perform as offered, provided that the offer is accepted* – the offer is a conditional promise. The requirement in England that an offer requires consideration in order to be binding is comprehensible if one focuses on the utterances of the parties respectively: when consideration is sought for an offer it becomes binding by reason of the fact that it then constitutes an obligation to perform on condition it is accepted.⁸⁴

Another indication of the fact that concentration on the individual promise puts the contract itself rather in the background is that when writers are discussing consideration, they often equate individual promises with consensual agreement between the two parties: thus deeds, which are formal unilateral binding declarations, are often treated as contracts (see above text to note 82); likewise unilateral promises are treated contractual. Contrariwise, bilateral agreements are treated as two unilateral promises. For centuries now writers have

⁸¹ Glanvill admittedly starts out by considering *contractus*, but his solution of the cases invariably deals with the possibility of bringing an action and hence turns on the *promises* which would render that possible. This was true right up till *assumpsit* was accepted (see above IV/1 and note 67).

⁸² A deed may be drawn up without any participation on the part of the beneficiary, indeed even against his will. The requirement of “delivery” of the deed does not call for knowledge or acceptance by the beneficiary, for it is only the irrevocable declaration of the author of the deed to be bound by it. – If, as may happen, there are several parties to the deed, one speaks of *deed inter partes* (or *indenture*) whereas the unilateral deed is properly called a *deed poll*. On this see Addison (note 40 above) p. 45, and G.H. Treitel, *The Law of Contract* [1962] (7th ed. 1987) p. 121 f.; Atiyah (note 60) p. 42 no. 2.

⁸³ A person sued for performance can invoke as a defence the absence of consideration for his promise, but he cannot impugn the validity of the contract on the ground that he gave no consideration to the claimant.

⁸⁴ Offers stated to be subject to withdrawal are not treated as conditional promises because they cannot be seen as amounting to an undertaking. This is not the case when an offer is binding where it depends on the offeree whether or not the obligation to perform arises and the offeror can do nothing to prevent this.

equated promises lacking consideration with *pacta nuda*,⁸⁵ given their common feature that neither is actionable.⁸⁶

The emphasis on the utterances of the individual parties is part of a long tradition, but it also demonstrates the characteristic English preference for ascertainable and objective facts over abstract constructs such as *consensus*, with which English lawyers feel uncomfortable and therefore tend to avoid.

4. A mere Promise is not binding.

In the high Middle Ages canon law and moral theology had a profound impact on the conception of contract not only on the continent but also in England.⁸⁷ with their mandate *pacta sunt servanda* they conduced to the defeat of the Romanistic notion that contracts had to be of a certain type in order to be enforceable. On this principle all agreements (including pacts which did not fulfil the requirements of a contract) were binding since failure to perform as promised constituted *mendacium*, that is, a lie.⁸⁸ The notion of lying naturally takes one away from contract towards the undertaking of the individual promisor for it is in that, and not in the pact itself, that the lie consists. Even so promises did not automatically become binding in England. It was not only Roman law that inhibited the treatment of unilateral promises as binding, but also the inherited Germanic tradition and practice, going back to pre-Christian times (see III/5 above). Furthermore, even the canonists were influenced by ancient Roman law, which held that while the formal *stipulation* engendered an obligation on the promisor, the informal unilateral undertaking called the *pollicitatio* in principle did not.⁸⁹ The view that unilateral

⁸⁵ See Beawes (note 44 above); Blackstone (note 15 above) p. 445: “A *consideration* of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum* or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it”. See also Chitty in his 5th ed. (note 40 above) and the references given there; in his 28th edition (note 8 above) no. 23-004 we read: “A mere parol release, whether oral or in writing, without valuable consideration amounts to a *nudum pactum* and is normally insufficient...”

⁸⁶ The term *pactum nudum* has taken on a new meaning and now designates a promise unsupported by consideration, whereas in Roman law *pacta* are consensual, depending on the intention of both parties. This is also the understanding on the continent today. *Pacta* are by no means without legal effect, for they can generate a defence, known in England as estoppel.

⁸⁷ The influence of the church was very strong in the British Isles, as the law of succession in the twelfth to fourteenth century shows. There the estate was a *hereditas jacens* (*hängende Erbschaft*) managed by an executor or administrator until the heir acceded by an act on his part or his taking over the position of the successor, this in contrast to the principle of *universal succession* whereby the estate passed automatically to the heirs on the death of the testator. As is well known, the former applies in English-speaking lands, in Portugal and a few local laws in Spain, and also, in principle, in Austria under the ABGB (1811) and in the lands previously part of the Austrian Empire. All other parts of Europe adhere more or less to the principle of universal succession. That was the position in Roman law (at least as regards members of the family) but was also in line with Germanic tradition and was followed everywhere in the early Middle Ages. It was the church and canon law that introduced in the countries mentioned the other model of the *hereditas jacens* which made it easier for the church to secure the legacy commonly bequeathed to it (the *Seelteil*). On this see Bucher, “Rechtsüberlieferung und heutiges Recht”, [2000] *Zeitschrift für Europäisches Privatrecht* 492 ff., with further references.

⁸⁸ The crucial text in the *Corpus Iuris Canonici* is Decretal Gregor. IX, Lib. 1 Tit. XXXV *de pactis* cap. 1: *Pacta quantumcunque nuda servanda sunt: Dixerunt universi: Pax servetur, pacta cutodiantur*, or cap. 3 *Iudex debet studiose agere, ut promissa adimpleantur*, then Aquinas *mendacium est, si quis non impleat, quod promisit*. Reference in Zimmermann, *Festschrift Heldrich I* (note 52 above), and see also Stephan Meder (note 59 above) 6/IV/2, p. 141 f. – A basic text for the background to the historical development of consensual obligations in Lothar Seuffert, *Zur Geschichte der obligatorischen Verträge – Dogmengeschichtliche Untersuchungen* (Nördlingen, 1881).

⁸⁹ See D. 50, 12, *De pollicitationibus*, which admittedly contains a fairly extensive list of exceptions to the principle, assumed and obvious, that no action lies on such a promise. – Similarly C.5.11: *De dotis promissione vel nuda pollicitatione* prior to the creation of the dowry, a principle which lives on in the English as in the continental literature. -- On C. 5.11 see also Azo in *Summa* where he deals with the concepts of *promissio* and *pollicitatio*. The traditional meaning of the former is the promise given in response to a *stipulation*, but Azo (note 38 above) proceeds to say (at §1) *fiat autem*

undertakings were not in themselves actionable in the absence of additional circumstances such as a formality, the delivery of property and so on, was maintained for centuries despite the demands of moral philosophy and theology, whose only effect on the law of contracts was the secondary one of freeing it from the Roman view that they had to be of a certain type.

VI. The Primary Function of Consideration: Connecting the two Promises

Contracts normally involve duties on the part of both parties: each promises to perform only because the other does likewise. The parties act in accordance with the proverb: “Give me meat and I shall give you drink”. (*Gibst Du mir die Wurst, so löscht ich Dir den Durst*), more tersely in the Latin *do ut des*, the essence of all trading from earliest times to the present day.⁹⁰

Now to split up a contract into two unilateral utterances giving rise to rights and duties creates a problem unknown on the continent, since there must be some way of bringing the two undertakings into a relationship of interdependency, as the notion of contract automatically does. The task of linking together the two rights and duties, originally seen as separate, is performed by the device of consideration:⁹¹ if the obligation of one party is or becomes invalid so that he is freed from liability, the consideration for the other party’s promise disappears and he too is relieved of his obligations because he made his undertaking only in relation to the first party’s promise, now invalidated.⁹² This occurs not only when a consideration originally present later fails, but also when one party refuses to make the counterpromise requested by the original promisor. The essential function of consideration as linking the individual promises is so obvious that English lawyers seem appear to be unconscious of it, as is shown by repeated proposals that the requirement of consideration be dispensed with (not that they have been taken very seriously).

It is less surprising that comparatists on the continent do not draw attention to the function of consideration in linking the two promises, for they tend to regard consideration as a condition of the validity of contracts rather than of the individual promises it comprises.

promissio ...etiam sine praecedenti interrogatione (in other words, a *promissio* may take the form of a formal promise without any previous request for it). Then he says *Sed pollicitatio nihil aliud est quam solius offerentis promissio*, thereby equating *promissio* and *pollicitatio*, at any rate in the context of promises of dowry and other exceptions.

⁹⁰ Early societies perhaps had more alternative, non-economic mechanisms than we do today for the protection within the family or tribe of weaker parties such as clients, or the need for prestige and so on. There is a good deal of relevant material for ancient Roman law, as in D. 50, 12 *de pollicitationibus*.

⁹¹ This point, inherent in the notion of consideration, is not expressly formulated in the books, nor really questioned. If a valid promise lapses, so also does the corresponding counterpromise, for want of consideration. The point is raised only in problematic cases, the view being that if one of the undertakings is invalidated by an objective rule of law, the counterpromise fails only if that is required by the rule invalidating the first promise. Thus Treitel writes “Mutual promises are generally consideration for each other, but difficulty is sometimes felt in treating a promise as consideration for another is the first promise suffered from some defect by reason of which it was not legally binding” (Treitel (note 82 above), and already in the 5th edition (1979), Part 3, Consideration, section 8 and 7; the text is the same but for the ending in Chitty (note 8 above) no. 3-153. As examples of *promises defective by statute* Chitty instances those struck at by s. 4 of the Statute of Frauds 1677 or s. 34 of the Matrimonial Causes Act 1973 (no. 3-156). So far as maintenance agreements are concerned it is perfectly sensible that one party may remain bound though the other is not, since here we are not dealing with arrangements freely negotiated.

⁹² It cannot be inferred from the doctrine of consideration whether it is the other party’s promise or the performance of that promise which constitutes consideration. Of course the promisor makes his promise in the expectation of receiving the actual counterperformance not the mere assurance that it will be forthcoming. So if the counterpromise remains unperformed this might seem to be a failure of consideration which would invalidate the first promise (and therefore the contract) and justify a refusal to perform it, just like a defence *non adimpleti contractus* *that the claimant himself had not performed). This is not, however, the dominant view, for breach of contract or promise is not regarded as bringing the contract to an end but as opening a choice to the innocent party.

If one concentrates on the individual promises as English lawyers do, consideration is indispensable for it is the only thing that makes the two individual promises coalesce into the indiscernible unit, the contract. Since there is nothing else to perform this function, consideration could not be done away without abandoning the traditional and current emphasis of English contract lawyers on the promise. This is the first matter that must be attended to in any attempt to produce a law of contract common to both sides of the Channel.

VII. The Extension of the Function of Consideration

1. The Reasons for it

Save in the special case of contracts under *seal*, *specialties*, commonly *deeds* or *covenants*, every valid contract must contain consideration. In the nineteenth century the requirement which had theretofore been treated almost casually achieved greater prominence and in the twentieth it developed into a concept relevant to almost all problems of contract law. Indeed a leading writer in England started out his treatment of current contract law with the statement “The essence of the common law of contract is the doctrine of consideration”.⁹³ This proposition, unlike those relating to frustration, is true not only in England but also in large parts of the United States.⁹⁴

As the institution of consideration became more important there was a simultaneous rise in the number of court decisions on the topic. This inevitably made the prevailing rules less clear and comprehensible, so it is no surprise to find the writer of a leading monograph on the English law of contract warning his readers at the outset of his treatment of consideration that “The law relating to the doctrine of consideration’ is difficult, confusing, and full of paradoxes”.⁹⁵ The continental jurist daring enough to embark on the English law of contract will readily agree, but it should be remembered that although the number of court decisions has extended its scope and rendered an overview of it more difficult, the applications since the last war do not really affect the core of the doctrine and are not of fundamental importance.

The reason for the extension in function and importance of the consideration requirement and the increase in the number of cases is its openness and flexibility. Consideration has never been a feature defined by formal elements: its application in particular cases gives the judge room for discretion, for he is to decide in each case whether the undertaking of the party, be it part of a contract or free-standing, is to be treated as legally binding – as it increasingly is – given the context and the position of the claimant.

2. Differing Effects

The increasing importance of consideration in the last hundred years has had two distinct effects.

First, questions which had theretofore been related to the contract, such as legality and privity, were now related to consideration, and consideration thus became the hinge on which

⁹³ S.F.C. Milsom (note 60) p. 356.

⁹⁴ See, for example, Arthur von Mehren/J.R.Gordley, *The Civil Law System* (ed. 2, 1977) p.984:“Consideration stands, doctrinally speaking, at the very center of the common law’s approach to contract law”, a remark which applies not only in the United States but across the whole English-speaking world. Although the doctrine of frustration, as we have indicated, is a peculiarity of English law, barely recognised in the United States, consideration is important throughout, though there are dissentient views (thus Grant Gilmore, *The Death of Contract* (1974) who cites many English decisions but speaks only for the United States; see also the authors cited in Bucher (note 2 above) and those cited by them. Note however that the clear and increasing differences in legal practice as between the United States and England are bound to influence the understanding of consideration.

⁹⁵ P.S. Atiyah, *Introduction* (above note 60) p. 62

the solution of the major problems of contract law turned. This change of legal technique started at the end of the nineteenth century and was virtually complete by the middle of the twentieth. It will be considered briefly (below 3) since the new way of looking at old restrictions on the actionability of contracts indicates the current practice regarding consideration. There follows a short discussion of two features which have always been related to promises. (below 4).

Secondly, the discretionary element in deciding whether or not there is consideration for a promise has encouraged the courts to embark on new paths, by setting limits to the kind of contracts that could be made by denying, at least in marginal cases, the presence of consideration, and by exercising patchy control over the way contracts could be formed. This development is evident in the last three decades. Some observers suggest that this has brought established principles of private autonomy into question and others lament the possible loss of legal certainty. All that can be done here is to note the increase in the number of judicial decisions.

The extension of judicial control over the formation, and sometimes the contents, of contracts, effected in England by enlarging the role of consideration, has occurred on the continent as well. We are not going to go into these *spontaneous parallel developments*. In the past twenty-five years the law of contract on the continent has become increasingly fissiparous, relatively simple and comprehensible rules which had been established for centuries have been disapplied or even subverted by rules applicable only in special cases. "Contracts of adhesion" and "consumer protection" come to mind in this context as topics where new law is in the process of developing. It is not possible to say whether this trend towards increasing detail in the rules of contract law is good or bad overall: one must balance the advantage of greater justice in individual cases as against the loss of ascertainability and predictability in the application of law and the increase in transaction costs, and that is not a matter of logic. The way judicial control of contracts was effected by widening the requirement of consideration is no doubt specific to England, but then the development mentioned has occurred in different forms in the various continental jurisdictions. The individual phenomena are manifestations of a basic tendency which is the same or similar everywhere: the wind of change may vary from place to place, but it blows in the same direction. So far as contract law is concerned it is assumed that the welfare state can and should put up with the economic and intellectual demands of ensuring greater justice in individual cases. This background is apparently common to the evolution of contract law in England and on the continent.

3. It is the validity of consideration rather than of the contract itself which is critical.

a) Legality of consideration.

It is a rule acknowledged everywhere that contracts are unenforceable if they conflict with law or good morals. This has long been accepted in England, but recently the question of lawfulness or morality has been related to consideration rather than to the contract. It is no longer the contract that must be lawful: *the consideration must be legal*. It was only in the twentieth century that the requirement of legality (or, rather, the prohibition of illegality) came to be treated as a matter of consideration: the nineteenth century authors we have quoted treat the question of legality as appertaining to the contract.⁹⁶

This new way of looking at the matter is neither very convincing nor helpful. Usually it is only one of the performances which is illegal or immoral (delivery of drugs, violence against third parties or other forms of wickedness), whereas the agreement to pay for it, in itself neither

⁹⁶ See Addison (note 50 above); Anson (note 5 above); Chitty (note 5 above).

illegal nor immoral, can only be treated as objectionable if the two duties are interconnected. Losing sight of the contract leads to oddities: the monetary promise, in itself innocuous, is avoided because the consideration (e.g. supply of drugs) needed to render it actionable is itself illegal, and the promise to supply the drugs fails to bind only because the promise of payment, not being binding, cannot constitute consideration for it. This is a strange way of looking at the matter, not as simple and convincing as the previous view that the contract was illegal and that its illegality affected both parties.

b) Consideration must move from the promisee

The formula of *privity of contract* which obtained already in the nineteenth century expressed the traditional rule that obligations arising from the contract bind only the parties to it.⁹⁷ Today the rule is sometimes put as being that *consideration must move from the promisee* (the consideration which validates the promise must come from the other party and not from a third party). This may seem just another way of putting the point, but it hardly adds clarity to the rule that third parties are unaffected by contracts, extensive and uncertain as that rule may be.⁹⁸ The version *consideration must move from the promisee* first came into prominence at the end of the nineteenth century, and the change can be seen in the way Anson altered his language in just a few years.⁹⁹ This new way of looking at the matter in terms of consideration wins out when one no longer concentrates on the contract but on the individual promises of the two parties.

4. Further aspects of consideration

To complete the picture two further aspects of the requirements of consideration should be mentioned. Unlike the two features we have just considered, these features always (and necessarily) related to promises rather than contract, but they have recently become more evident. In these cases also there have been developments regarding consideration which inevitably lead to a loss of predictability of outcome and legal certainty.

a) Past consideration and executed consideration

The rule may be put in the form *Consideration may be executory or executed, it must not be past, or indeed past consideration is, in effect, no consideration at all.*¹⁰⁰ The requirement of consideration is not satisfied by a benefit conferred on the promisor in the past, even if still subsisting; consideration must in principle be *executory* (yet to be provided), as is obviously the situation in the commonest case where what is given in exchange for one *promise* is another *promise*. But sometimes *past consideration* was treated as valid and was called *executed* (or sometimes *present*) consideration. Thus a service which had been rendered in the

⁹⁷ The Index to Addison (note 40 above) offers many references to *Privity of Contract* but does not deal with it in connection with consideration, saying only that performance to a third party, if requested by the promisor, may serve as consideration: "Any service, benefit or advantage rendered to a third person at the request of the promisor is a sufficient consideration for the promise". Chitty (note 5 above) deals with the matter on pp. 40-42 "Of the Plaintiff being a Stranger to the Consideration".

⁹⁸ For one of many examples, see *Dunlop Pneumatic Tyre v. Selfridge* [1915] A.C. 847.

⁹⁹ The technical formula "consideration must move from the promise" does not appear in the third or earlier editions of Anson (note 5 above) but does appear in the eighth edition, the last edited by himself. Cheshire/Fifoot (note 60 above) in their first edition (1945) distinguish the two principles which they do not see as quite congruent, for they devote barely a page to it in connection with consideration (p. 51 f.) but have 68 pages on the *Doctrine of Privity of Contract* (280-347). This imbalance is also to be found in the 13th edition, ed. M.P.Furmston (pp. 79-82, 462-517). As to Chitty (note 8 above) *Consideration must move from the promise* is at 3-035 to 3-043, *Third Parties* in Ch. 19.

¹⁰⁰ Anson (above n. 5) ed. 19 by J.L.Brierly 1945, pp. 106, 108.

past without any expectation was ineffectual *past consideration*, whereas it was *executed consideration* and effectual if the service had been rendered to the knowledge of, and with the consent of, if not actually at the request of, the promisor. If the parties were of the view that the service should be paid for, a subsequent promise of remuneration was binding, since in law there was consideration enough. It was accepted quite early that work done without any actual agreement for pay constituted consideration for a subsequent promise of remuneration, provided that the work was done at the previous request of the promisor.¹⁰¹ These exceptions were not very important in the nineteenth and earlier twentieth century,¹⁰² but more recently the list of what may constitute executed consideration has grown. The reasoning may vary but the conclusion usually is that there was a connection between the earlier service and the subsequent promise to pay for it. Thus Lord Scarman described the situation as follows: “An act done before the giving of the promise...can sometimes be consideration for the promise. The act must have been done at the promisor’s request, the parties must have understood that the act was to be remunerated further by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit must have been legally enforceable had it been promised in advance.”¹⁰³

b) Sufficiency: peppercorn or some value?

While there must always be some advantage sought by the promisor or some detriment undertaken by the promisee, it has always been an open question how significant they must be. The general rule, obtaining probably also today, is that “Consideration need not be adequate to the promise, but must be of some value in the eye of the law.”¹⁰⁴ But the eye of the law does not always see straight; sometimes it squints. To say that the value of the consideration is irrelevant can conflict with the concern for equivalence, even if unstated, and different situations produce different results. The peppercorn theory, under which anything, however trivial, was regarded as sufficient, is no longer accepted, but neither is the theory of adequacy, that there must be some realistic equivalence in economic terms between performance and counterperformance. Some decisions, however, come close to one or other of these positions. While *adequacy* is not required, nominal or inadequate consideration may or may not be treated as sufficient.¹⁰⁵ One has to be an expert to predict which view will be adopted in a particular case. One factor may be whether the promise was part of a real negotiated deal between the parties or exacted by the promisee. Further room for manoeuvre is afforded by the question whether family or personal feeling constitutes consideration sufficient to validate a promise. In earlier days such a personal relationship was a model form of consideration, called *good consideration*,¹⁰⁶ but more recently it has been held that things done for family reasons or as an *office of friendship* do not count as consideration.¹⁰⁷

¹⁰¹ *Lampleigh v. Braithwait* (1615) 80 Eng.Rep. 255, cited in Cheshire/Fifoot/Furmston (note 60 above) p. 78 f.; the decision was confirmed in *Re Casey’s Patents, Stewart v. Casey* [1892] 1 Ch. 104, and Chitty (note 8 above) at 3-028 refers to *Southwark LBC v. Logan* (1996) 8 Admin. L.R. 292

¹⁰² So also Addison (*loc.cit.*) Chitty (*loc.cit.*) and Anson (*loc.cit.*).

¹⁰³ *Pao On v. Lau Yiu Long* [1979] 3 All E.R. 65, 74, cited in Cheshire/Fifoot/Furmston (*loc.cit.*) 78 f., with further references. See also Chitty (*loc.cit.*) 3-028ff; Treitel (note 82 above) 62 ff.

¹⁰⁴ Anson (note 100 above) p. 88

¹⁰⁵ Chitty (note 8 above) N. 3-019.

¹⁰⁶ See Blackstone (note 15) “The consideration may be either a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded in motives of generosity, prudence and natural duty...” (p. 297). Good consideration in this sense is no longer accepted: see Hanbury/Maudsley, *Modern Equity* (note 12) “Good consideration meant natural love and affection, but little effect seems to have been given to it” (p. 331, footnote 12, and *Re Eichholz* [1959] Ch. 708.

¹⁰⁷ Cheshire/Fifoot/Furmston *Law of Contracts*, 13th ed. 1966) p. 79, with reference to *Re Casey’s Patents, Stewart v. Casey* [1892] 1 Ch. 104. For earlier works, see Addison (note 40 above) who early in

VIII. In Conclusion

1. In law as in everything else one must distinguish form and content. The English law of contract as presented here differs from that on the continent more in form than in content, in the way the legal system is viewed and how it is presented in words and concepts. The actual results and outcomes in England and the continent are much closer than the way they are conceived and presented. In the law of contract more than elsewhere pressures of fact point in the same direction and lead to similar outcomes, rather than notionally possible variants; there is therefore a large area of agreement on the two sides of the Channel, as we have seen in the convergence and spontaneous parallelism of recent developments (above VII/1,2).

2. But if the results are much the same, the viewpoints of lawyers and their method of argument are as different as can be imagined. This is not a matter of occasional peculiarities on minor issues such as can be found in comparing any legal systems. It goes to the very elements: in one place lawyers focus automatically on the contract, in the other the foreground is occupied by the individual obligation or promise contained in it, given that no obligation arises unless some counterpart or consideration is provided. Consequently in England there is none of the conceptual apparatus which, coming from ancient Rome, was developed on the continent and is now used everywhere else.

3. *Consideration* attaches to the individual promise, not to the contract as a whole, contrary to the normal supposition on the continent. Concentration on the individual duties undertaken enables them to be treated independently, inevitably linked though they are by the presence of consideration (See V above). But it is not because of the requirement of consideration that the contract is split into the two undertakings of the parties, as the continental observer might suppose, for this view goes back to the very earliest times. Of course there are two ways of considering the matter –one looking to the contract as a composite whole and the other focussing on the promises it comprises – and there is some tension between the two models which can be kept separate only with difficulty. But the fact is that in England the emphasis is on the promises of the individual parties and we have been dwelling on this because it is often overlooked on the continent.

4. The effect of the requirement of consideration today is to serve as a limit to the extent to which private persons can bind themselves, as has been seen in the situations where its range has been extended (above VII/2). Originally, however, it was the very opposite, a device used in the struggle to make contracts and promises actionable despite the jurisdictional ban on contract claims, the background to its development being the fact that contractual claims could not be brought before the royal courts (above VI/1) after the Norman invasion of 1066 and as described a century later by Glanvill. (note 61).

5. The tortuous paths taken by the English law of contract are characterised by the aim of getting contract claims to courts which in principle could not hear them. Contractual claims had to be turned into claims in delict (*assumpsit*, above IV, especially at 3). But delictal claims *ex hypothesi* result from the individual act of the defendant, and any question of consent on the part of the plaintiff had to be ignored since it would, on the principle *volenti non fit iniuria*, be prejudicial to a claim for damages. This concentration on the act of the defendant and finally his promise had to be maintained until, eventually, contract claims could be heard as such. It is therefore no surprise that a thousand years of focussing on the unilateral promise has left its mark on the Englishman's view of contract law and that even today the common law sanction for non-performance is damages and not specific performance – damages, not an order to perform, being the characteristic of tort law.

his treatment of consideration has a paragraph entitled *Nugatory considerations* where he writes "neither 'love and affection' nor 'blood and relationship' nor 'friendship' ... constitute a sufficient cause or consideration..." (p. 5).

6. The comparatist often has difficulties with the fact that for centuries in England one could bring a claim only if there were an available *form of action* or *writ* (directed to the sheriff); it is true that the forms of action were formally buried by the Judicature Acts of 1873-1875, but as Maitland said, they still rule us from their graves. Contract law presents a different difficulty: the problem was not to find the right writ, since no writs were available at all. Access to the royal courts was wholly barred, and the fact that obligations arising from private arrangements were not actionable as such determined the law of contract for nine hundred years. The accidental fact that immediately after the Battle of Hastings the royal courts declined jurisdiction over the private trading arrangements of the conquered people has resulted in a law of contract in the English speaking world which is wholly cut off from that obtaining elsewhere and whose fundamental differences provide the comparatist with a topic of great fascination.

7. The law of contract is an essential and central part of private law, affecting many other areas. The peculiarities we have been discussing stem from the reluctance of the Norman conquerors to impose, indeed even to recognise, rules of law. The fact that the king had little interest in law in general and did very little for the creation of a legal order is of great significance: it was not just that the conquerors detached the law of contract from the previous law and that of the continent, they created a new and different conception of law overall. Whether this change was deliberate and planned is an open question, but it is manifest that the existing legal tradition in England was displaced by the practice of the *curia Regis* installed by the Norman conquerors, a new jurisdiction which was not subject to pre-existing norms. Law ceased to be a pre-societal set of rules which bound the courts, and became simply the practice of the royal courts free from rules. The courts were less interested in the application of substantive rules than in whether the procedure leading to the judgment was correct (*due process*). Thinking in terms of norms and theories was excluded, as was legal science as it was understood on the continent, at least until quite recently,. All that could be done was to consider the decisions already rendered by the courts and try to predict the outcome of the case in hand, something as uncertain as a weather forecast and hardly productive of very reliable rules. The view that law and order can do without preexisting rules helps to explain how it is that Great Britain, unlike the rest of the world in the tradition of continental Europe and even the United States, still has no written constitution.

8. The distinctive conception of law in the English-speaking world is increasingly noticeable in all areas of life. In England, and even more the United States, principles of law which are regarded as being of central importance on the continent are simply lacking. The difference is perceptible in many areas, especially in international law, and even in international politics. The absence of what is regarded on the continent as self-evident is here noted simply as a fact, coolly and without evaluation. Maitland, however, wrote:¹⁰⁸

The Norman Conquest is a catastrophe which determines the whole future history of English law. We can make but the vaguest guesses as to the kind of law that would have prevailed in the England of the thirteenth century had Harold repelled the invader. We may for example ask, but we shall hardly answer, the question, whether the history of Law in England would not have closely resembled the history of law in Germany, whether a time would have come when English law could have capitulated and made way for Roman jurisprudence.

He then amplifies by saying:

The Normans in England are not numerous. King William shows no desire to impose upon his new subjects any foreign code. There is no Norman code. Norman law does not exist in a portable, transplantable shape.

The Norman conquerors bring no law with them but they do destroy the existing local traditions and thereby cut England off from Roman law, from the way that law was rendered

¹⁰⁸ Pollock and Maitland (note 26 above), vol. 1 ch. IV: *England under the Norman Kings*, p. 79

scientific on the continent, from the influence of the Enlightenment and the thorough codification of law to which it led. This distinctiveness of the law in English-speaking countries is manifest not only in private law, on which we have concentrated, but in many other areas as well. It is, indeed, of global significance. But this is not the place to deal with that.