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‘THE HISTORY OF CONTRACT LAW’
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INTRODUCTION

1. We often think of contracts as the staple of modern commerce. So it may come as a surprise to some of you that the law of contract has, in no uncertain terms, been pronounced dead.¹ Now, of course, this provocative announcement is not intended to convey that we no longer have a law which enforces mutual agreements, rather, it forces us to question what defines and distinguishes “contract” from the primordial soup of civil obligation and private law from which it emerged.
2. Patrick Atiyah, an English lawyer and academic, is famous for his revolutionary thesis on the law of contracts.² He urges that “the time is plainly ripe for a new theoretical structure for contract, which will place it more firmly in association with the rest of the law of obligations”.³ To that end, this history is also an exercise in definition – an attempt to orient contract in relation to its associated fields of private law. By looking at how it has emerged, borrowed and sought to distinguish itself from neighbouring fields of law, and what gaps it has attempted to plug throughout its development, we can better understand what the law of contract is. Specifically, I am going to focus on three formative relationships in this speech: first, contract’s “birth from the rib of *tort*”;⁴ second, the influence of *equity* in regulating enforcement of the naked promise; and third, the transition from *proprietary* notions of immediate exchange to the wholly executory contract. But before diving into those tantalizing topics, some context is required in the form of an outline of the medieval forms of action.

* I express thanks to my Judicial Clerk, Ms Bronte Lambourne, for her assistance in the preparation of this address.

¹ Grant Gilmore, *The Death of Contract* (Ohio State University Press, 1974) 3.

² See especially Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979).

³ *Ibid* 778.

⁴ Peter A Alces, ‘The Death of Consent?’ in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press, 2016) 32, 32.

3. The temptation of expounding a history is to continue retreating further and further into the past. Each time you find an originating concept, there is an origin behind that which demands explanation. It is common in these lectures to begin with the civil law of Ancient Rome, which has managed to infiltrate almost every area of the modern common law. Where it comes to the law of contract, however, legal scholars such as John Salmond maintain that “Perhaps in no other part of the law have Roman principles been so prominently introduced, only to be so completely rejected”.⁵ No doubt we will hear some opposition to that declaration by Emmett AJA in the next session. But, in the absence of that protest, I think we may be fairly safe to begin our story in the original *praecipe* writs of the 12th and 13th centuries; those being the writs of covenant, debt, detinue and account.
4. The *praecipe* writs were, in essence, commands of the King. The writ directed the sheriff to command the defendant to comply with the plaintiff’s demand or else come before the King’s justices to answer the plaintiff’s claim.⁶ In other words, the relief was stated in the writ itself.⁷ To bring a claim, the plaintiff was required to frame his action in the special language of one of these writs; an element of procedural formalism that is often blamed for shackling the conceptualisation of a substantive doctrine of contract law.⁸
5. The original *praecipe* writs are significant less for their contribution to modern legal principles than for the vacuum in legal doctrine they created. For our purposes, we need only focus on two of the *praecipe* writs which may, at first glance, appear to cover some of the terrain of modern contract law.
6. The writ of covenant is undoubtedly the most purely contractual of the early forms of action. It commanded the defendant to keep an agreement with the plaintiff and was the only way of enforcing a defendant’s bare promise to do something in the future.⁹ The concern, however, that covenant would become co-extensive with agreements led to the imposition of one of two material restrictions on its operation.¹⁰

⁵ John W Salmond, “The History of Contract” (1887) 3 Law Quarterly Review 166, 166.

⁶ J H Baker, *An Introduction to English Legal History* (Butterworth, 4th ed, 2002), 57; N Manousaridis, ‘The Common Law Courts: Origins, Writs and Procedure’ in J T Gleeson, J A Watson and R C A Higgins (eds) *Historical Foundations of Australian Law – Volume I: Institutions, Concepts and Personalities* (The Federation Press, 2013) 28, 33.

⁷ J A Watson, ‘A Sketch II: Praecipe to Negligence & Contract’ in J T Gleeson, J A Watson and R C A Higgins (eds) *Historical Foundations of Australian Law – Volume II: Commercial Common Law* (The Federation Press, 2013) 1, 1.

⁸ See, eg, Warren Swain, *The Law of Contract 1670-1870* (Cambridge University Press, 2015) 14, 16.

⁹ W T Barbour, *The History of Contract in Early English Equity* (Clarendon Press, 1914) 17.

¹⁰ Salmond, above n 5, 170.

This first restriction was evidentiary; a plaintiff could not bring an action for covenant without evidence of the agreement in writing under seal. This restriction was more burdensome than it might be considered today as the condition of “writing under seal” required the action of the royal clerks. This left the field of simple parol agreements without legal recognition. The second restriction was that covenant did not lie for a sum certain. If the defendant had promised to pay the plaintiff a particular sum of money, the common law’s disdain for concurrent remedies required the action to be brought in debt.

7. The writ of debt commanded the defendant to return to the plaintiff moneys unjustly detained. This formulation reveals the proprietary origin of the action; it was a demand by the plaintiff for what was his own.¹¹ The first limitation of the action of debt – that the claim must be for a sum certain – can be explained on this basis. A plaintiff who had sold goods could not claim in debt for the value of the goods unless a precise figure had been agreed.¹² The second limitation was the requirement of *quid pro quo*. Unlike covenant, debt could not be used to enforce executory agreements, it required part performance. It was the performance of a thing, not a promise to do it, that supported the debt.¹³ The third limitation was again a question of evidence. To prove the debt, a plaintiff could produce a deed or witnesses to the transaction, but if there was no deed, the defendant had the option to wage his law. A wager of law was a defence available to the defendant whereby he would swear an oath of non-liability and would bring eleven others to court to swear that they believed his oath. The availability of wager of law was “a glaring defect of the action”,¹⁴ it left claims for oral debts liable to easy defeat and prevented actions against executors, since the deceased did not have the opportunity to wage his law.
8. What we are left with is a legal system that gives insufficient protection to oral agreements – a significant failure in a society where few could write and a trip to the royal clerks could hardly be justified for every transaction in day-to-day commerce. And so the scene is set for the arrival of ...

TORT(?)

¹¹ Barbour, above n 9, 26; F Pollock and F W Maitland, *The History of English Law Before the Time of Edward I, Volume 2* (Cambridge University Press, 2nd ed, 1968) 204-7; *Contra* A W B Simpson, *A History of the Common Law of Contract* (Clarendon Press, 1975) 75-80.

¹² J B Ames, “The History of Assumpsit” (1888-9) 2(2) *Harvard Law Review* 53, 58 fn 1.

¹³ Barbour, above n 9, 35; Salmond, above n 5, 167; Simpson, above n 11, 80.

¹⁴ Barbour, above n 9, 39.

9. No, it's not the intuitive answer and you wouldn't be the first to question its suitability for the task. As American legal historian Willard Barbour notes:

The vitalizing force for agreement came from an unexpected source, from an action which sounded originally purely in tort ... That the chief contract remedy of the common law should be a delictual action perverted to another use has excited the curiosity and indeed astonishment of many students".¹⁵

10. Echoing this sentiment, Ian Jackman SC states: "it is one of the great oddities of English legal history that the obvious gaps in the medieval law pertaining to consensual or voluntary transactions were filled by what we would now regard as the law of tort".¹⁶ But perhaps we shouldn't be surprised, Atiyah argues that the line between tort and contract is too sharply drawn. "It is not true", he contends, "that consent, intention, voluntary conduct is irrelevant to tort liabilities",¹⁷ and equally, "many of the obligations recognised by the law of contract cannot be realistically thought of as self-imposed".¹⁸
11. So let us turn to the early 14th century where these twin fields of law were born. At this time, the writ of trespass, though of ambiguous origin, was an established remedy.¹⁹ By contrast to the *praecipe* writs, it was a writ *ostensus quare*. These were writs which ordered: first, an inquiry into a transgression or wrong; and second, a determination of damages arising from that wrong. The *ostensus quare* writs were not designed to compel performance but to assess compensation for a wrong. We might think of this in modern terms as a distinction between specific performance and compensatory damages.
12. It has been proposed, unsurprisingly, that trespass was criminal in origin. While this has been the subject of debate,²⁰ a less controversial observation is that the wrongs alleged in the writ of trespass had a public aspect to them. As James Watson describes, "the earliest ones, such as assault and battery, intrusion onto land..., or the taking of someone else's goods was something that could be witnessed and known by good people living nearby".²¹ For this reason, the methods of

¹⁵ Barbour, above n 9, 40-41.

¹⁶ I M Jackman, "Why the History of Restitution Matters" in J T Gleeson, J A Watson and R C A Higgins (eds) *Historical Foundations of Australian Law – Volume II: Commercial Common Law* (The Federation Press, 2013) 234, 239.

¹⁷ P S Atiyah, "Contracts, Promises and the Law of Obligation" (1978) 94 *Law Quarterly Review* 193, 221; see also Barbour, above n 9, 41.

¹⁸ P S Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5th ed, 1995) 2.

¹⁹ C H S Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons Limited, 3rd ed, 1960) 44; Watson, above n 7, 2-3.

²⁰ See, eg, Fifoot, above n 19, 44-56; Watson, above n 7, 3.

²¹ Watson, above n 7, 1.

proof were different from those available in cases grounding the *praecipe* writs. Whilst a debt was likely to arise in private, and thus without evidence, the early trespasses could be witnessed in public. Wager of law was deemed necessary in the former, while the principle “all that which lies within the notice of the country shall be tried by the country” applied to the latter.²² And so the method of trial by jury developed in one strand of the civil law.

13. The general writs of trespass covered the standard categories of trespass to person, land and goods, but soon the general writs of trespass came to be distinguished from the special writs of trespass, known as trespass on the case. Trespass on the case was a kind of residual category in which the plaintiff pleaded the special circumstances that made the defendant’s action wrong. Unlike trespass, which required a direct and unauthorised interference with goods,²³ trespass on the case could be brought where injury was consequential²⁴ and where a plaintiff had submitted himself or his goods to the defendant’s care.
14. In the mid-14th century, a special variant of trespass on the case arose, which later came to be recognised as the action of assumpsit.²⁵ “Assumpsit”, loosely meaning “an undertaking”, was brought where there had been negligent performance of an undertaking. Two famous cases of the 14th century are regularly cited to demonstrate the scope of the action.
15. *The Humber Ferry Case* of 1348 is widely regarded as the first case in which the development of this action can be traced. In that case, it was reported that John de Bukton complained that Nicholas Tounesende “had undertaken to carry his mare in his boat across the River Humber safe and sound, and yet the said [Nicholas] overloaded his boat with other horses, as a result of which overloading his mare perished, wrongfully and to his damage”.²⁶

²² Ibid 2; see, eg, *Stratton v Swanlond* (1374) YB Hil 48 Edw III, fo 6, pl 11: “This is an action of trespass for something which lies in the knowledge of the countryside, in which case wager of law is not grantable” in Sir John Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (Oxford University Press, 2nd ed, 2010) 403.

²³ See, eg, *The Oculist’s case* (1329-30) Lincoln’s Inn Manuscript, Hale 137(1), fo 150 in Baker and Milsom, above n 22, 381.

²⁴ See, eg, *Bernardeston v Heighlynge* (1344) YB 16 Edw III, Rolls Series, p 235 pl 6 in Baker and Milsom, above n 22, 381-2.

²⁵ Simpson and Jackman have highlighted that the cause of action did not carry the label of assumpsit at this time: Simpson, above n 11, 199; Jackman, above n 16, 239.

²⁶ *Bukton v Tounsende* (1348) 22 Lib Ass, pl 41 in Baker and Milsom, above n 22, 399.

16. Sticking with an equine theme, the second well-reported case is that of *Dalton v Mareshchall*,²⁷ or in its modernised form, *Waldon v Marshall*, which was heard in 1369. In that case, William de Dalton brought a writ against John Mareschal – a marshall being a horse-leech or veterinary surgeon – alleging that John had undertaken to cure his horse of an illness but had so negligently applied his treatment that the horse died.²⁸
17. Now I said before that the success of these actions depended on proving the negligent performance of an undertaking. Importantly, it was the combination of these two elements – negligent performance and an undertaking – that distinguished assumpsit from both covenant and trespass. In the early days of the action, defendants would complain that the presence of an undertaking meant that covenant was the appropriate action and the absence of a deed condemned that action to failure.²⁹ Equally, they would argue that since there was no unauthorised interference with property or person, trespass could not succeed.³⁰ But “the breach of undertaking was not itself the source of liability”, rather, the undertaking turned the negligence into a wrong, or, in the words of the medieval lawyer “a covenant was converted *ex post facto* into a tort”.³¹
18. This action is the kernel from which our modern laws of negligence and contract have sprung. So what does this shared history tell us about the relationship between these fields of law? British legal historian, Brian Simpson, notes that “unlike those who beat or assaulted or imprisoned or maimed”, those liable in assumpsit “had *not* done what they ought to have done” as distinct from “doing what ought not to be done”.³² This, he says, raises “the issue which modern lawyers call breach of duty”.³³ But it provokes the question, what reason was required “for saying that a person must either do something for another or be called a tortfeasor”?³⁴ In the action of assumpsit it was the element of “undertaking”. While this element was admittedly subject to a degree of fictionalisation and creativity, it reveals a willingness to impose liability where there is voluntary conduct as well as wrongful conduct – perhaps Atiyah’s observations start to ring true.

²⁷ (1369) YB Mich 43 Edw III, fo 33, pl 38 in Baker and Milsom, above n 22, 400.

²⁸ *Ibid* 401.

²⁹ See, eg, *Dalton v Mareschall* 401 (1369) YB Mich 43 Edw III, fo 33, pl 38: “Since he has [counted] that the defendant undertook to cure his horse of an illness, he should in that case have had an action on covenant” in Baker and Milsom, above n 22, 401.

³⁰ See, eg, *The Farrier’s Case* (1372) YB Trin 46 Edw III fo 19, pl 19 in Baker and Milsom, above n 22, 384.

³¹ Barbour, above n 9, 46.

³² Simpson, above n 11, 204.

³³ *Ibid* 205.

³⁴ *Ibid*.

19. Given this implicit recognition of liability for duties *not* fulfilled, it is surprising that the law upheld a strict but slippery distinction between cases of misfeasance and cases of nonfeasance. That is, a builder would be liable if he undertook to build your house and did so negligently, but not if he failed to build it at all. It is this development that is missing before assumpsit starts to become an action that is recognisably contractual. In other words, promise was not the foundation of liability, and despite repeated attempts by plaintiffs to frame their claim in such a way, the courts held out for just under a century. Indeed, the reluctance to uphold bare promises is a recurring theme throughout this history and a question that has attracted renewed interest in the modern age. So for the first time this evening, though certainly not the last, we may question: what is the basis for liability in contract? promise, consent, benefit and detriment, expectation, consideration or is it something more like reliance?³⁵
20. One of the first attempts to bring an action in assumpsit for nonfeasance occurred in 1400 when Lawrence of Wootton brought a writ against Thomas Brygeslay, a carpenter, who had undertaken to build Lawrence's house within a certain time, and yet, had failed to do so. Counsel for the carpenter argued that this was purely an action in covenant, to which Brencheley J responded: "So it is. If perhaps he had counted, or if it had been mentioned in the writ, that the work had been started and then by negligence not done, it would have been otherwise".³⁶ The bench was unanimous in upholding that the failure to produce a deed meant the action failed.
21. By 1425, there were some stirrings in the judiciary. In *Watkins' Case*,³⁷ a writ was brought against Watkins of London, a mill-maker, who, it was alleged, took upon himself to build a mill and promised that it would be ready by Christmas the following year. The mill was not built, which ended up costing the plaintiff ten marks. A discussion ensued between the members of the bench. Martin J propounded the orthodox position that an action could not lie for pure nonfeasance. Babington CJ disagreed, he offered the following scenario: "Suppose someone covenants with me to roof my hall in a certain house, within a certain period, and he does not roof it on time, so that for want of roofing the timber of my house is rotted through by the rain".³⁸ In that situation, he suggested that the combination of inaction and damage could impose liability. Cokayne J, agreeing with Babington CJ, proposed a further

³⁵ See Atiyah, above n 2, 1-3.

³⁶ *Wootton v Brygeslay* (1400) YB Mich 2 Hen IV, fo 3v, pl 9 in Baker and Milsom, above n 22, 422-423.

³⁷ (1425) YB Hil 3 Hen VI fo 36, pl 33 in Baker and Milsom, above n 22, 425.

³⁸ *Ibid* 426.

example: “Suppose someone covenants to clean out ... certain ditches which are near my land, and he does not do it, so that through his default the water which should have run in the ditches floods my land and destroys my corn: I say that I shall have a good writ of trespass for this nonfeasance”.³⁹ But Martin J, staunch in his refusal to allow the claim, raised an issue that went to the heart of the problem stating: “But truly it seems to me that, if this action should be maintained upon the present facts, then a man would have an action of trespass for every broken covenant in the world”.⁴⁰ The parties joined on a separate issue and the outcome of the case is not reported.

22. So again, as with the writ of covenant, the development of the oral contract is stifled by a fear that the action will become coextensive with bare promises. A limiting principle was required. It is at this stage that plaintiffs start to become more creative. In the case of *Somerton v Colles*,⁴¹ in 1433, it was alleged that William Somerton retained John Colles to assist him in the purchase of a manor, but instead, John Colles colluded with John Blount and schemed wickedly to defraud William, maliciously revealing William’s confidential information to John Blount and purchasing the manor for John Blount instead. By this time, Babington CJ appears to have been swayed by Martin J, holding “If I retain a man to purchase a manor for me and he does not do it, I shall not have any action against him unless I have a deed ... But if he becomes of counsel⁴² with another in this matter, I shall have an action on my case, because he has deceived me”.⁴³ Cottusmore J, agreeing, stated: “that matter which lies wholly in covenant may by matter *ex post facto* be converted into deceit. For even if I warrant to you that I will purchase a manor for you, and you repudiate this, I shall not have any action against you on this bare word ... nevertheless when he becomes of counsel with someone else this is a deceit ... and for this deceit he shall have an action on his case.”⁴⁴

23. And so the strategy for a plaintiff to bring a case of non-feasance in assumpsit was simply to add allegations of falsity and deceit,⁴⁵ even where these claims were somewhat of a fiction. In *Shipton v Dogge (No 2)*,⁴⁶ a case in which the defendant had promised to convey land to the plaintiff and instead conveyed it to someone else, counsel for the

³⁹ Ibid

⁴⁰ Ibid 427.

⁴¹ (1433) YB Pas 11 Hen VI, fo 25, pl 1 in Baker and Milsom, above n 22, 427.

⁴² ‘Counsel’ was not used in this context to refer to a lawyer but to all manner of defendants see Baker and Milsom 427 fn 24

⁴³ YB Hil 11 Hen VI, fo 18, pl 10 in Baker and Milsom, above n 22, 430.

⁴⁴ Ibid.

⁴⁵ Watson, above n 7, 13.

⁴⁶ (1442) YB Trin 20 Hen VI, fo 34, pl 4 in Baker and Milsom, above n 22, 434.

plaintiff argued “Suppose I retain a man who is learned in the law to be of counsel with me in the Guildhall of London on such a day, and on the day he does not come, so that my cause is lost; he is liable to me in an action of deceit, and yet he did nothing. But because he did not do what he had undertaken to do, whereby I am damaged, that is the cause of my action”.⁴⁷ And so it appears that being stood up by your lawyer was sufficient to bring an action on the case. By drawing together *assumpsit* and deceit, the plaintiff was able to enforce a simple contract.⁴⁸

24. Finally, around the turn of the century, there was a breakthrough in the law of *assumpsit* and in the Year Book of 1506, it was recorded: “Note, if a man makes a covenant to build me a house by a certain date, and does nothing about it, I shall have an action on my case for his nonfeasance as well as if he had built badly, because I am damaged by it”.⁴⁹ While an element of deceit or misfeasance was no longer required, a limitation remained in the form of detriment. In this way, Barbour claims “the delictual origin of the action overshadowed its development”.⁵⁰ Similarly, Salmond maintains that “the limitation now imposed upon *assumpsit* was the necessary result of the fact that it was an action *ex delicto* perverted into a contractual remedy”.⁵¹ On Salmond’s thesis, it is the strong analogy that this limitation bore to the doctrine of consideration which facilitated that doctrine’s entrance into the action of *assumpsit*.⁵²
25. While developments in the law such as those relating to privity,⁵³ abatement⁵⁴ and the calculation of damages⁵⁵ saw the fields of contract and tort peel away from one another, “to the end [contract has] retained certain indelible marks of its delictual origin”.⁵⁶ Defendants may still find themselves liable concurrently in both tort and contract, such as where an employee is injured in a workplace accident,⁵⁷ where a solicitor is

⁴⁷ Ibid 435.

⁴⁸ Watson, above n 7, 13.

⁴⁹ Dictum in Gray’s Inn (1499) Trin 14 Hen VII Fitzherbert’s Abridgment, *Action sur le case*, pl 45 and YB Mich 21 Hen VII, fo 41, pl 66 in Baker and Milsom, above n 22, 442; see also Fifoot, above n 19, 353.

⁵⁰ Barbour, above n 9, 59.

⁵¹ Salmond, above n 5, 171.

⁵² Ibid 172-3.

⁵³ See, eg, *Jordan v Jordan* (1594) Cro Eliz 369, 849; *Taylor v Foster* (1600) Cro Eliz 776, 807.

⁵⁴ See, eg, *Wirral v Brand* (1666) 1 Levinz 165.

⁵⁵ See, eg, *Hadley v Baxendale* (1854) 9 Ex 341.

⁵⁶ Barbour, above n 9, 41.

⁵⁷ See, eg, *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 57.

professionally negligent or where there is misrepresentation in the course of pre-contractual negotiations.⁵⁸

26. Many scholars have attacked the distinctions between imposition and voluntary assumption of liability, between nonfeasance and misfeasance and between expectation and reliance, arguing that torts and contracts are once again converging.⁵⁹ Perhaps this history helps to shed some light on the reason for that phenomenon and indicates that the convergence isn't that surprising after all.

EQUITY

27. However, that is not the end of the story, for as Peter Young, former judge of this Court, urges: "It is inadequate to view the history of contract merely by tracing the history of assumpsit. When looking at the activity of the equity courts, a more complete picture emerges".⁶⁰ And so, returning to the 15th century and the repeated attempts to expand the action of assumpsit from misfeasance to nonfeasance, but shifting our focus to the courts of Chancery, we begin to understand the motivations underpinning such an expansion.
28. Disgruntled litigants who found their parol contracts unenforceable at common law would instead turn to the equitable jurisdiction, which was hospitable to plaintiffs who had incurred detriment on the faith of the defendant's promise.⁶¹ In *Diversite de Courts*, a law treatise written in the 14th century, it was stated: "a man can have remedy in the Chancery for covenants made without specialty [that is, without a deed] if the party has sufficient proof of the covenants, since he is without remedy at the common law".⁶²
29. It is this encroaching jurisdiction that the common law courts sought to absorb in extending assumpsit to nonfeasance.⁶³ In 1481, Fairfax J urged pleaders to pay more attention to action on the case so that that jurisdiction might be built up and the resort to chancery diminished.⁶⁴ When finally the jealous grip on jurisdiction was secured at the turn of the century, Fyneux CJ proclaimed that where a man covenants to make

⁵⁸ See, eg, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Hill (t/as R F Hill & Associates) v Van Erp* (1997) 188 CLR 159.

⁵⁹ See, eg, Atiyah, above n 2; Gilmore, above n 1; Jane Swanton, "The Convergence of Tort and Contract" (1989) 12(1) *Sydney Law Review* 40

⁶⁰ Peter W Young, "Equity, Contract and Conscience" in Simone Degeling and James Edelman (eds) *Equity in Commercial Law* (Lawbook Co, 2005) 489, 489.

⁶¹ J B Ames, "The History of Assumpsit" (1888) 2(1) *Harvard Law Review* 1, 14; Barbour, above n 9, 48-9.

⁶² Salmond, above n 5, 173.

⁶³; Ames, above n 61, 14; Watson, above n 7, 14.

⁶⁴ Salmond, above n 5, 173; Ames, above n 61, 14; see *John Sarger's Case* (1481) YB Pas 21 Edw IV, fo 22, pl 6 in Baker and Milsom, above n 22, 565.

an estate to me for 20 pounds and does not make an estate “I shall have an action on my case”, triumphantly adding “and [I] need not sue out a subpoena”.⁶⁵ A subpoena was, at the time, a writ of the Court of Chancery.

30. Now at the time of this development, the need to maintain doctrinal purity from covenant remained a concern, and while the miscellany of deceit, misfeasance or detriment plugged the gap,⁶⁶ the search for an appropriate test for limiting the enforceability of promises continued. It is argued convincingly by Salmond, Barbour and Simpson that this test was imported from equity. The fact that an equitable doctrine of consideration was already fully formed and was probably applied to contracts in the chancery, that the development of assumpsit was prompted by “a desire to absorb the equitable jurisdiction” and that a resemblance existed between the pre-existing limitation of detriment and the doctrine of consideration all provide reasonable support for their contention.⁶⁷
31. So where did the equitable doctrine of consideration begin? The term “consideration” was originally used in association with legislation. The “considerations” were “the factors which Parliament or the King was supposed to have in mind in legislating, and which moved or motivated the enactment”.⁶⁸ So, in the famous dialogues of 16th century lawyer St Germain, *Doctor and Student*, the student defines the popular sense of the term stating: “the said statute was well and lawfully made, and upon a good reasonable consideration”.⁶⁹ What we can derive from this is that consideration in its early form was what we might loosely call a “motivation”.
32. Consideration first enters the legal lexicon in connection with the revocation of uses – uses being the forerunners of the modern trust. In 1452, a case was brought which threw up the question of whether a settlor could revoke a use once he had declared it. In that case, a father declared to the feoffee of his land that after he died, one of his daughters should have the land. The daughter later refused to be married off by her father and so he attempted to revoke the use and granted it in favour of his other daughter instead. The man died and the

⁶⁵ Dictum in *Gray's Inn* (1499) Trin 14 Hen VII Fitzherbert's Abridgment, *Action sur le case*, pl 45 and YB Mich 21 Hen VII, fo 41, pl 66 in Baker and Milsom, above n 22, 442.

⁶⁶ Jackman, above n 16, 240-1.

⁶⁷ Salmond, above n 5, 175-176.

⁶⁸ Simpson, above n 11, 331.

⁶⁹ Salmond, above n 5, 174.

court had to determine which daughter should have the land.⁷⁰ A line of reasoning developed that “only by investigating why the original declaration of will was made, and why it was revoked, could one determine the validity of revocation”.⁷¹ Fortescue proclaimed: “we are not arguing the law in this case, but the conscience, and it seems to me that he can change his will for a special reason, but otherwise not”.⁷² No decision is recorded, but the case demonstrates the beginnings of an equitable principle that investigates “causes” or “considerations” in the passing of uses.

33. By 1504, a legal principle is developed that makes explicit reference to consideration. In *The Duke of Buckingham's Case*,⁷³ the Duke, in order to encourage a marriage between his younger brother and the Dame of Wiltshire, declared that certain manors should revert to the lady after his and his brother's death. However, after the marriage he purported to revoke the use and declared a use in favour of his brother and the lady jointly for life. Counsel for the Duke argued: “if in this case there had been any bargain between the Duke and [his younger brother] or other consideration, then the grant would change the use and it would be executed in the grantee at once, but ... because there is no bargain or consideration for the grant ... it is reasonable that the Duke can change the grant”.⁷⁴ Opposing counsel argued that the declaration of use “was made on good consideration, for the older brother is bound by the law of nature to aid and comfort his younger brother”.⁷⁵ And so, by this time, it was accepted that consideration was necessary to pass a use and the remaining question was, what constituted good consideration?
34. In a case arising in 1522, consideration was held to be the determining factor in whether a third party, who takes a conveyance from the feoffee, is seised of the land to his own use or is seised to the use of the original feoffor. Justice Pollard held that if the conveyance to the third party was made with consideration and without notice, the third party would hold the land to his own use.⁷⁶ We may now recognise this as an embryonic form of the bona fide purchaser for value without notice rule.
35. In 1566, we see the first application of the doctrine of consideration to assumpsit. In *Sharington v Strotton*,⁷⁷ Henry Sharington brought an

⁷⁰ Simpson, above n 11, 337; Nicholas Statham, *Statham's Abridgement of the Law* (Margaret Center Kingelsmith trans, Lawbook Exchange Ltd, 2007) 392 [trans of: *Epitome Annalium Librorum tempore Henrici Sexti* (first published 1495)].

⁷¹ Simpson, above n 11, 337-8

⁷² Statham, above n 70, 393.

⁷³ YB 20 Hen VII Mf 10, pl 20; see Simpson, above n 11, 340-1.

⁷⁴ Simpson, above n 11, 340-1.

⁷⁵ *Ibid* 341.

⁷⁶ *Ibid* 360-1.

⁷⁷ (1565) Plowd 301 in Baker and Milsom, above n 22, 524.

action of assumpsit against Thomas Strotton for entering the wood in Bremhill and cutting and carrying away 200 cartloads of timber worth 40 pounds. Strotton argued that the woods formed part of the land of Edward Baynton and that he had taken the timber as a servant of Edward. The issue for the court was whether a covenant made by indenture passing the land from Andrew Baynton to his brother Edward, “for the good will and brotherly love which he had borne towards [him]”,⁷⁸ was effective. Counsel for Sharington argued that “if upon consideration that you are on terms of great familiarity or acquaintance with me, or that you are my brother, I promise to pay you 20 pounds at such a day, you shall not have an action on the case or an action of debt for it, for it is but a naked and barren pact”.⁷⁹ The Court found against Sharington holding that “the considerations of continuance of the land in the name and blood, and of fraternal love, were sufficient to make the uses as limited”.⁸⁰

36. By 1586, the requirement of consideration in assumpsit was solidified with the court propounding the principle that “in every action upon the case upon a promise, there are three things considerable: consideration, promise and breach of promise”.⁸¹ What is notable, however, is that consideration does not accord precisely with our conception of it today. As Simpson points out, to a modern lawyer, it is difficult to understand how natural love and affection might be deemed good consideration, however, “when ‘consideration’ meant no more than ‘reason’ or ‘motive’ what better consideration could there be?”⁸²
37. While the doctrine of consideration in equity and at common law both “serve[d] to deprive a naked expression of will of legal significance”,⁸³ what we begin to see is the evolution of two competing reasons for refusing to enforce naked promises. On the one hand, consideration is required to show that there is a valid cause or reason to place someone under an obligation. This reflects the Roman notion of ‘*causa*’, without which an agreement was considered a naked pact. Where, however, there was a cause, there was an obligation and an action lay. The equitable conception of consideration as a “reason” or “motive” is often said to derive from the Roman civil law.⁸⁴ *Causa* and its equitable descendent encompass considerations both moral and valuable.

⁷⁸ Ibid 524.

⁷⁹ Ibid 525.

⁸⁰ Ibid 527.

⁸¹ *Golding’s Case* (1586) 2 Leon 72; see Simpson, above n 11, 406.

⁸² Simpson, above n 11, 365.

⁸³ Ibid 374.

⁸⁴ Salmond, above n 5, 176-178; Simpson, above n 11, 375-405.

38. On the other hand, consideration is required to ensure that there is reciprocity, in the sense of bargain or exchange. In this light, consideration is viewed in terms of benefit and detriment.⁸⁵ Both these concepts that were familiar as conditions for enforcing an agreement: detriment from the original tortious limitation on assumpsit and benefit from the requirement of *quid pro quo* in debt. Under this model, only valuable consideration is sufficient.
39. In this way, equitable and tortious influences each came to bear on the theoretical underpinnings of the doctrine of consideration in contract. As commercial activity began to occupy the realm of assumpsit over family land arrangements, consideration grew to be understood as “a price for a promise” rather than “a reason for a promise”,⁸⁶ but not before some serious attempts were made to dismantle the concept of consideration altogether. The assault on consideration came in two waves: the first under the leadership of Lord Mansfield, the second under the guise of the will theory.
40. Lord Mansfield was Chief Justice from 1756 to 1788 and is often lauded as a revolutionary jurist and the founder of English commercial law. In *Pillans v Van Mierop*,⁸⁷ he made his first attempt to derail consideration from its prevailing trajectory, pronouncing that “the ancient notion of want of consideration was for the sake of evidence only”.⁸⁸ But evidence of what? Lord Mansfield’s judgment rested on the premise that consideration was evidence of intention: “If the intention of the parties to bind themselves could be discovered by other means, such as the presence of writing, [consideration] was superfluous”.⁸⁹
41. In 1778, the House of Lords in *Rann v Hughes* decisively rejected the notion that writing could be used as a substitute for consideration.⁹⁰ While Lord Mansfield’s attempt to demote consideration from elementary to evidentiary status failed, the case remains important for what it says about the basis of contractual liability.⁹¹ With the focus now on intention, we see three competing philosophies which attempt to describe the need for consideration. First, a promise is binding only if it represents an

⁸⁵ See, eg, *Thomas v Thomas* (1842) (1842) 2 QB 851, 859: “Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some detriment to the plaintiff or some benefit to the defendant, but at all events it must be moving from the plaintiff.”

⁸⁶ Simpson, above n 11, 446.

⁸⁷ (1765) 3 Burr 1663.

⁸⁸ *Ibid* 1669.

⁸⁹ Fifoot, above n 19, 408.

⁹⁰ (1778) 7 Term Rep 350.

⁹¹ See Atiyah, above n 2, 216; Gerard McMeel, “*Pillans v Van Mierop* (1765) in Charles Mitchell and Paul Mitchell (eds) *Landmark Cases in the Law of Contract* (Hart Publishing, 2008) 23, 43.

exchange. This theory, the most narrow of the three, is grounded in commerce and might be thought to derive from tortious notions of detriment and reliance. Second, a promise is binding because there is a good reason for enforcing it, whether that be due to moral or legal obligation. This line of thinking is equitable in origin, focusing upon the conscience of the parties. Third, a promise is binding because it was seriously intended. This is the most purely contractual theory, looking only at the validity of the promise itself.

42. Having failed in his first attempt to reduce contract to a question of serious intent, Lord Mansfield, famous for borrowing from the equitable jurisdiction, attempted to revive the equitable notion of consideration. In *Hawkes v Saunders*,⁹² in 1782, he took issue with the exchange theory of consideration declaring: “what is or is not a good consideration in law, goes upon a very narrow ground indeed; namely, that to make a consideration to support an assumpsit, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. I cannot agree to that being the only ground of consideration sufficient to raise an assumpsit.”⁹³ Instead, Lord Mansfield argued, “the ties of conscience upon an upright mind are a sufficient consideration”.⁹⁴ Buller J, agreeing with Lord Mansfield, stated the principle as such: “The true rule is, that whenever a defendant is under a moral obligation, or is liable in conscience or in equity to pay, that is a sufficient consideration”.⁹⁵
43. The moral obligation theory survived until the mid-nineteenth century when Lord Denman CJ exposed the artificial line between a moral obligation and a bare promise. In *Eastwood v Kenyon*,⁹⁶ he declared that “the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it”.⁹⁷ And so the exchange theory of consideration took centre stage once again.
44. It was at this time, however, that the second and more pervasive threat to consideration started to gain traction in the form of the will theory. Throughout the eighteenth and early nineteenth centuries, natural law principles, popular in continental Europe, began to infuse English contract law literature. In particular, the ideas of Pufendorf and Grotius, popularised by Pothier and translated into English, had a significant influence on contractual theories. Pufendorf, in a vein not dissimilar to

⁹² (1782) 1 Cowp 289.

⁹³ Ibid 290.

⁹⁴ Ibid.

⁹⁵ Ibid 294.

⁹⁶ (1840) 11 Ad & El 438.

⁹⁷ Ibid 450.

the moral obligation theory of consideration, posited that “a contract was binding because it arose from an agreement formed by promising”.⁹⁸

45. Through the work of writers of the Scottish enlightenment such as Lord Kames, the focus on ‘promise’ turned to ‘consent’,⁹⁹ and within a century, the will theory was the prevailing justification for contractual liability. Under the will theory, a contract is formed by the meeting of wills and it is consent that provides the binding force. It was in this environment that the notion of freedom of contract flourished.
46. But where a contract is formed by the meeting of wills, what role can consideration play?¹⁰⁰ While still described in terms of exchange, the benefits or detriments alleged to constitute the consideration became increasingly fictitious. At its high watermark, forbearance to sue on a void guarantee was treated as good consideration.¹⁰¹ From the will theory, “the entire conceptual apparatus of modern contract doctrine – rules dealing with offer and acceptance ... and especially canons of interpretation – arose”.¹⁰² While consideration was not dismissed, it was artificially forced into a framework that focused solely on the intention of the parties.
47. But as we know, an unfettered freedom of contract was not sustainable. As Sir Anthony Mason and Gageler J point out in their joint essay on “The Contract”, even at the height of the classical period, “the overwhelming focus of the courts was not on the subjective intentions of the parties to a contract but on their imputed intention as appearing from their words and conduct”. Once again, the ameliorating influence of tort and equity return to shift the focus from pure subjective intention to objective intention; a shift that drew upon the doctrine of estoppel in pais.¹⁰³
48. The common law doctrine of estoppel finds its origins in the equitable doctrine of forcing parties to make good their representations.¹⁰⁴ So, for instance, In *Hobbs v Norton*,¹⁰⁵ Mr Hobbs sought to contract with the younger brother of Sir George Norton to purchase an annuity of 100 pounds per year. Mr Hobbs asked Sir George Norton if his younger

⁹⁸ See Swain, above n 8, 35.

⁹⁹ Ibid 38-9.

¹⁰⁰ Ibid 186.

¹⁰¹ *Haigh v Brooks* (1839) 10 Ad & E 309.

¹⁰² Morton Horwitz, “The Historical Foundations of Modern Contract Law” (1974) 87(5) *Harvard Law Review* 917, 918.

¹⁰³ The Hon Sir Anthony Mason and S J Gageler, “The Contract” in P D Finn (ed) *Essays on Contract* (The Law Book Company Limited, 1987) 1, 5.

¹⁰⁴ Michael Lobban, “Contract” in Cornish, Anderson, Cocks, Lobban, Polden and Smith (eds) *The Oxford History of the Laws of England: Volume XII* (Oxford University Press, 2010) 295, 367.

¹⁰⁵ (1682) 1 Vern 136.

brother had good title to the annuity, which Sir George confirmed and then proceeded to encourage the transaction. In fact, Sir George had the title himself. Since Hobbs did not have a contract with Sir George, only with his brother, he brought a bill in equity to have the annuity decreed. Lord Keeper decreed the payment of the annuity on the basis of the encouragement Sir George gave Hobbs to proceed with the purchase.

49. A similar principle entered the common law through actions of trover in tort:¹⁰⁶ “in these cases, it was considered as a form of fraud for the party making the representation to go back on it”.¹⁰⁷ Finally, this principle was translated into contract, as demonstrated in the case of *Smith v Hughes* in 1871 where Blackburn J held: “If whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms”.¹⁰⁸
50. And so from estoppel grew the doctrine of imputed intention, once again calling into question the true basis of contractual liability. Sir Frederick Pollock, who wrote *The Principles of Contract* in 1876, stated that the promisor is bound “not merely because he has expressed a certain intention but because he has so expressed himself as to entitle the other party to rely on his acting in a certain way”.¹⁰⁹ In contemporary times, Atiyah’s central thesis is that reliance is a more stable foundation for enforcing contracts than promise or consent.¹¹⁰ It is for this reason that consideration vies with promissory estoppel for continuing relevance.¹¹¹
51. Today, in Australia, the exchange theory of consideration prevails; a position that was affirmed by the New South Wales Court of Appeal in *Beaton v McDivitt*.¹¹² In that case, consideration was defined as “a price in return for the exchange of the relevant promise or a quid pro quo”.¹¹³ But as Lindsay J has described: “taken collectively, the four judgments published in *Beaton v McDivitt* demonstrate a conceptual grey area, between contract and the extra-contractual concept of estoppel,

¹⁰⁶ See, eg, *Pickard v Sears* (1837) 6 Ad & El 469 at 473.

¹⁰⁷ Lobban, above n 104, 367.

¹⁰⁸ (1871) LR 6 QB 597, 607.

¹⁰⁹ See Mason and Gageler, above n 103, 6 fn 33.

¹¹⁰ Atiyah, above n 2.

¹¹¹ Mason and Gageler, above n 103, 26-27.

¹¹² (1987) 13 NSWLR 162.

¹¹³ *Ibid* 168.

historically occupied by an evolving concept of ‘consideration’ in contract law”.¹¹⁴

52. The internal developments within the field of contract that have been prompted or inspired by equitable principles are also mirrored by the external interactions between contract and equity that continue with increased prominence. As Sir Anthony Mason and Gageler J highlight, the objective theory of contract provided “a platform for equity to intervene to adjust the rights of the parties for the protection of legitimate interests in cases where actual agreement is absent”.¹¹⁵ The role of equity in providing relief against unfairness and exploitation in contracting seeks to attenuate the harshness of contract in the same way that the doctrine of consideration and the objective theory of contract sought to do so. And so we say that equity follows the law but sometimes it seems the law also follows equity!

PROPERTY

53. So turning finally – and briefly you’ll be relieved to hear – to our final relationship: that between the law of property and the law of contract. In the 1970s, Morton Horwitz, a professor at Harvard Law School, propagated a rather controversial thesis that viewed the development of contract law through the lens of market economies and class oppression. In his paper “The Historical Foundations of Modern Contract Law” he states: “To modern eyes, the most distinctive feature of eighteenth century contract law is the subordination of contract to the law of property”.¹¹⁶ To understand what prompted this statement, we need to return to the writ of debt.
54. As I mentioned at the beginning of this speech, debt was originally conceived of as a real rather than personal action. The remedy for a plaintiff in debt was recovery of “the debt”, regarded as a “res” – a substantive or concrete thing – rather than damages which compensated for loss.¹¹⁷ Pollock and Maitland, who famously authored *The History of English Law before the time of Edward I*, wrote: “The bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific lands or goods. To all appearance, our

¹¹⁴ Geoff Lindsay SC, “Understanding contract law through Australian legal history: Whatever happened to assumpsit in New South Wales?” (2012) 86 Australian Law Journal 589, 597.

¹¹⁵ Mason and Gageler, above n 103, 9

¹¹⁶ Horwitz, above n 102, 920.

¹¹⁷ Ames, above n 12, 55; Simpson, above n 11, 76-7.

ancestors could not conceive credit under any other form. The claimant of a debt asks for what is his own".¹¹⁸

55. The result of this is that debt did not contemplate a future relationship. A seller of goods could only bring a claim for the price once he had delivered the goods and a buyer did not have to pay until the goods were delivered.¹¹⁹ A claim for debt arose upon execution. It is in the context of debt that the word "contract" was initially used, and thus the word contract was limited to transactions which transferred physical property.¹²⁰ As Simpson notes, "the medieval concept of contract at common law was of a transaction which passed an immediate interest, in sharp distinction to a covenant which bound the covenantor to performance in the future."¹²¹ Enforceable agreements and contracts were not synonymous,¹²² rather, the two concepts merged later in the piece.
56. It is perhaps for this reason that the eighteenth century literature on contract law is largely viewed through the prism of property. Sir William Blackstone, famous for his systematisation of the law, classified contract under "the rights of things", describing it as a method "of acquiring a title to property in things personal".¹²³ He was in turn influenced by Grotius, the famous natural law jurist, who posited that "the right to bind oneself by promise or contract necessarily followed from the power to dispose of property. For to bind oneself by a promise was to dispose of a right, to give the promisee here and now a right over the promisor's liberty or future assets".¹²⁴ In this way, contract was either a species of personal property or a mode of transferring title to specific property.¹²⁵
57. Despite literature to this effect in the eighteenth century, the crystallisation of the executory contract is widely dated to the early seventeenth century with the decision in *Slade's Case*.¹²⁶ Prior to this case, if a party promised to pay a certain sum of money in exchange for a *quid pro quo*, they could not bring an action in assumpsit. This type of claim was confined to an action in debt.¹²⁷ The courts were reticent to allow the same set of words to ground both an assumpsit and a debt and

¹¹⁸ F Pollock and F W Maitland, *The History of English Law Before the Time of Edward I* (2nd ed Cambridge University Press, 1968) 204-7.

¹¹⁹ S J Stoljar, *A History of Contract at Common Law* (Australian National University Press, 1975) 16.

¹²⁰ Barbour, above n 9, 43.

¹²¹ Simpson, above n 11, 349.

¹²² Barbour, above n 9, 44.

¹²³ Sir William Blackstone, *Blackstone's Commentaries* (17th ed Richard Taylor, Red Lion Court, Fleet Street, 1830) 440.

¹²⁴ Atiyah, above n 17, 213.

¹²⁵ Lindsay, above n 114, 595-6.

¹²⁶ *Slade v Morley* (1602) 4 Co Rep 91 in Baker and Milsom, above n 22, 460.

¹²⁷ Ames 55

so it was considered that the words agreeing to pay a certain sum of money were “spent in creating the debt”.¹²⁸ If a claimant wanted to bring an action in assumpsit – which many did in order to avoid the availability of wager of law – they had to show that there was an additional promise on behalf of the defendant to actually discharge the debt. The Common Pleas insisted that the plaintiff had to prove this secondary undertaking on the evidence. By contrast, the Queen’s Bench implied the secondary undertaking, regarding it “merely as a fiction introduced to give colour to the suggestion of assumpsit”.¹²⁹

58. It was this dispute that *Slade’s Case* resolved. John Slade had bargained and sold to Humphrey Morley the ears of wheat and corn currently growing on his land in return for Morley paying him 16 pounds on the 24th of June. Morley failed to pay and the jury found that while the bargain had taken place, “there was no undertaking or promise ... besides the bargain”. In allowing the action, it was determined, on a hearing before all the justices of England, that “every contract executory imports in itself an assumpsit. For when one agrees to pay money or to deliver something, he thereby assumes or promises to pay or deliver it”.¹³⁰

59. The significance of this finding is that what was previously only viewed in terms of immediate exchange was now actionable as a promise to do something in the future. While executory agreements had previously been enforceable in assumpsit, difficulty arose where the agreement was to pay a certain sum of money in the future – a transaction that is the bread and butter of the modern economy. Horwitz breaks this development down into three stages:

*In the first stage, all exchange is instantaneous ... Each party becomes the owner of a new thing, and his rights rest, not on promise, but on property”. In [the] second stage, [e]xchange first assumes a contractual aspect when it is left half-completed, so that [only] an obligation on one side remains. The ‘third and final stage in the development occurs when the executory exchange becomes enforceable’.*¹³¹

60. In this we see a transition from property to debt to modern contract. It is at the final stage, as contract eschews its proprietary origins, that Horwitz marks the rise of expectation damages in place of restitutionary remedies or specific performance.¹³²

¹²⁸ Ames, above n 12, 55.

¹²⁹ Jackman, above n 16, 242.

¹³⁰ Baker and Milsom, above n 22, 478.

¹³¹ Horwitz, above n102, 919.

¹³² Ibid.

61. But is this such a clean break? Are contract and property really so antithetical? Simpson argues that expectation damages actually reflect a proprietary view of contract pointing to the analysis of Fuller and Perdue who state:

*The essence of a credit economy lies in the fact that it tends to eliminate the distinction between present and future promised goods. Expectations of future values become, for purposes of trade, present values. In a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of the promise as an injury to that property.*¹³³

62. Equally but in reverse, Atiyah contends that the law of property is actually quite well-versed in conceiving of future rights and expectations. The doctrine of estates for instance was developed in order to conceive of a future interest as having a present existence,¹³⁴ much like a promise to do something in the future has a present existence in the form of a contractual right.

CONCLUSION

63. And so we return to the primordial soup. But we need not go so far as Grant Gilmore who suggests that we are witnessing the reabsorption of contract into the mainstream of the common law.¹³⁵ What this history shows is that the boundaries between the various fields of law are porous – that the underlying rationales that drive our system of justice are common and borrowed. It is in this way that we might explain some of the recent developments in contractual theory. Looking to the future, the interrelationship between the fields of private law continues to throw up new questions: is there a place for the implied duty of good faith in Australian contract law? A question that is beleaguered by the tortious-contractual divide between duties imposed by law and duties imposed by voluntary conduct;¹³⁶ What is the future of the doctrine of penalties in post-*Paciocco* Australia? An inquiry that involves an evaluation of the continuing role of equity in alleviating the harshness of unfettered contract; Where does the law of restitution fit in our conceptual matrix?

¹³³ L L Fuller and William R Perdue Jnr, "The Reliance Interest in Contract Damages" (1936-1937) 46 *Yale Law Journal* 52, 59; see A W B Simpson, "The Horwitz Thesis and the History of Contracts" (1979) 46(3) *The University of Chicago Law Review* 533, 549.

¹³⁴ Atiyah, above n 2, 105-6.

¹³⁵ Gilmore, above n 1, 87.

¹³⁶ See E Peden, "Contract Development through the Looking-Glass of Implied Terms" in J T Gleeson, J A Watson and R C A Higgins (eds) *Historical Foundations of Australian Law – Volume II: Commercial Common Law* (The Federation Press, 2013) 201.

A conundrum that some have urged requires a re-examination of benefit-based obligations in this country.¹³⁷

64. And overriding each of these questions we have the gradual eclipse of the common law by statute, with the looming prospect of contract codification threatening to foreclose all inquiry into the values and guiding principles of the common law. As I stated in a submission to the Attorney-General's inquiry into the possible codification of Australian contract law in 2012:

*"The common law allows for the development of nuanced rules 'fashioned in light of experience'. It also allows for reference to the historical development of certain areas of law, which often point to the underlying logical or ethical principle or factual catalyst that led to the development of a given rule, providing principled guidance to determining present disputes."*¹³⁸

It is part of this historical development that I have sought to trace today and, in the process, hopefully shed some light on the guiding principles of the common law that will help us solve the challenges facing the law of contract in the future.

¹³⁷ See generally, Atiyah, above n 2; Peter Birks, *Unjust Enrichment* (Oxford University Press, 2003).

¹³⁸ The Hon T F Bathurst, Submission No 55 to Attorney-General's Department, Review of Australian Contract Law (2012).