MEDIEVAL ROOTS, MODERN INSIGHTS: THE ORIGINS OF COMMON LAW CONTRACT

MATTHEW J. BAKER*

Common law contract is described as the body of law dealing with legally enforceable promises, with its basic principles originating from judicial decisions. What underpins this method of lawmaking is an understanding of the past, such that prior judicial decisions guide the resolution of present legal disputes. Yet despite this ostensibly historical process serving as a vehicle for legal development, there is a general absence of recognition among lawyers, scholars, and students of the origins of this body of law in medieval English law.

This Article posits that understanding the origins of common law contract, particularly as it developed around the writs of debt and covenant during the medieval period, provides lawyers and students with a more nuanced and contextualized view of a body of law that has gradually, but significantly, expanded its scope since its inception a millennium ago.

An understanding of early common law contract forces one to go back to first principles of contract dispute resolution. While modern contract law tends to focus on substantive rules and doctrines, the early history of common law contract is primarily based on formal and procedural rules. The shift in focus to substantive rules raises questions about the fundamental aspects of contract law and its purpose. Such questions are liable to be ignored if one does not consider how early common law contract arose, and why formal rules and requirements once dominated a lawyer's thinking about how to best resolve contract disputes.

INTRODUCTION

"[T]he English law of contract has not evolved lineally . . . ."[1]
–John Baker

A basic narrative of modern contract law begins with the proposition that a contract is "a promise or a set of promises for the breach of which the law gives

---

* Visiting Assistant Professor of Law, University of Mississippi. J.D., University of New South Wales; B.A., Delta State University. The Author would like to thank Tyler Baker and Professors William W. Berry III, Martin Edwards, and Almas Khan for their generosity and time spent reviewing and discussing earlier drafts of this Article. The Author would also like to thank the University of Mississippi Faculty Colloquium Series attendees for their insightful comments on an earlier draft of this Article. Special thanks must also be given to the editors of the *Indiana Law Review* for their thoughtful suggestions and editorial work. Each subsequent version of this Article was significantly better than the last because of each of you. Any remaining errors are the Author's alone.

1. JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 338 (5th ed., Oxford Univ. Press 2019) (1971).

a remedy, or the performance of which the law in some way recognizes as a duty."[2] Beyond this proposition sits a series of formal and substantive rules which buttress and clarify an otherwise circular starting point. The prime vehicle for the creation and formation of these rules, at least traditionally, is the common law. In this system, judicial decision-making and the concept of precedent provide a "body of accumulated wisdom and a system of thought" regulating contractual transactions.[3] In essence, this idea of precedent is simply that it "has always been usual for one court to yield to the customs of another" earlier court when dealing with similar cases.[4] Since the nineteenth century, lawyers and commentators have generally viewed these processes as evolutionary in nature.[5] The body of knowledge stemming from these processes incentivizes lawyers and judges to have some understanding of what has come before.

From these remarks one can see that an understanding of what has preceded—of history—is necessary to understanding modern contract law. If this is true, can an understanding of the inception and early development of common law contract provide insights for modern contract law? Did the institutional frameworks, rules, and available remedies of medieval contract law influence modern contract law? Such questions are important, particularly if one accepts that (a) modern contract law evolved out of medieval contract law following the Norman Conquest,[6] (b) these medieval beginnings had direct and indirect impacts on modern contract law, and (c) that modern accounts of contract law largely ignore these early developments.

This Article seeks to answer these questions by looking at three aspects of medieval contract law and its relevancy today. The first aspect is conceptual. In other words, have lawyers always conceptualized contract law in the same way? This aspect shows that the concept of contract, and therefore contract law's potential scope, expanded significantly following the transition from Latin to English as the language of learning. Secondly, this Article will provide an overview of early contract at common law, principally through a selection of primary sources. These sources show a body of contract law that relied far more on formal rules, which obviated the need for complex substantive doctrines that

2. RESTATEMENT (SECOND) OF CONTS. § 1 (A.L.I. 1981).

3. BAKER, *supra* note 1, at 207.

4. Slade v. Morley (1602) 4 Co. Rep. 91 (KB), *reprinted in* JOHN H. BAKER, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 470 (John H. Baker & S.F.C. Milsom eds., 2d ed. 2010).

5. This approach begins with the contributions of Henry Maine, whose seminal work in legal history was published in 1861, only two years after Charles Darwin's *On the Origin of Species* was published. *See* HENRY S. MAINE, ANCIENT LAW 113–170 (1st ed. 1861).

6. There is debate whether English law before the Norman Conquest had a body of law which we would recognize as 'contract law.' *See, e.g.*, FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 26 (James F. Colby ed., 1915) (questioning whether Anglo-Saxon contract law was really contract law at all).

arose as contract law later evolved into a more modern guise.[7] Finally, this Article will give an account of the extraneous factors, such as rules of pleadings and the methods of court reporting, which explain why early common law contract developed as it did.

Taken together, these stages of analysis bring several fundamental issues to the fore. For instance, the modern Restatement definition[8] that contract at law is essentially enforceable promises sits in tension with the fact that such a broad definition did not exist in early contract law, and the concept of a promise did not feature prominently in recorded litigation or treatises on the common law until the sixteenth century.[9] Moreover, if common law contract relies on the accumulated wisdom of judges passed down to later generations of lawyers, then what impacts do changes in the means of transmission have on how well that wisdom is captured and transferred?[10] In an age of artificial intelligence and digital communications, these are hardly idle questions.

These issues and aspects of early common law contract are explored in this Article in six parts. Part I explains why simply ignoring the origins of contract law and its development in the medieval period is a problem. Part II explains the conceptual development of key concepts in contract law, particularly the notion of 'contract' itself, between the eleventh and sixteenth centuries.[11] This conceptual landscape was one of two important factors which framed how lawyers viewed legal disputes. The second of these factors was the writ system, which provided a means to enliven a common law court's jurisdiction and remedial enforcement. This system is discussed in Part III, and sets the scene for Part IV, which looks directly at the main common law contractual actions in

---

7. For instance, while there were notions of quid pro quo in medieval contract law, and the common law never recognized mere promises, even in the sixteenth century there did not exist the complicated doctrine of consideration. *See, e.g.*, Sidenham v. Worlington (1585) 2 Leon. 224, pl. 286, *reprinted in* BAKER, *supra* note 4, at 530–31.

8. *See* RESTATEMENT (SECOND) OF CONTS. § 1 (A.L.I. 1981).

9. *See* Pykering v. Thurgoode (1532) K.B. 27/1083, m. 20., *reprinted in* 93 PUBLICATIONS OF THE SELDEN SOCIETY 4 (John H. Baker ed.,1977); *see also* CHRISTOPHER ST. GERMAIN, DOCTOR AND STUDENT 174–75 (William Muchall ed., 1874) (1518).

10. For example, the relatively arduous task of transcribing and distributing the outcomes of cases may, in part, explain why Year Book cases seem so foreign to a contemporary lawyer's eyes (even after accounting for translation from the original Latin). To the modern eye, these Year Books have a conspicuous absence of judicial reasoning, which as I shall discuss in this Article, is also partly attributable to civil procedure rules. In a practical sense it seems difficult to believe that the ubiquity (or lack thereof) of means to transmit legal knowledge does not bear some relationship with its substantive development, although this is an argument best left for other historical legal scholars better versed in such things. For a discussion on the changing role of court reporting, *see, e.g.*, THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 268–84 (Little, Brown & Co. 1956) (1929).

11. What is also fascinating about this development is that it shaped how lawyers practically approached and compartmentalized the law. For instance, it was not until the late-eighteen century, long after the conceptual changes in an understanding of contract, that one sees a treatise that deals exclusively with contract law. *See, e.g.*, *id.* at 363; *see also* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 134–36 (1991).

this writ system, namely, the actions of covenant and debt. This Part examines some more notable cases to show how courts resolved contractual problems in the early common law and provides some specific lessons for today. Part IV raises some fundamental questions about the form and substance of contract law. For example, how is it that early common law contract operated with so few substantive legal rules and principles? Why is it that the factual basis of problems presented to courts seem essentially familiar, and yet the record of their adjudication contains little or no evidence of judicial reasoning? The remaining two parts of this Article provide answers to these issues.

Part V shows how litigation procedure and processes reinforced a reliance on formalism over substance, and how a balance between these two aspects of contract law shifted—just as today the legal system grapples with the pressures of formalism in automated and standardized contractual transactions. Finally, Part VI explores the relationship between early contract law development and its transmission through the Year Books, which were akin to a professional newspapers that combined cases and matters of technical interest with the lighter side of lawyering.[12] Their changing use shows both a constant sentiment in contract law that accepted principles ought not outweigh individual opinions, but also the enduring difficulties that courts face when this sentiment meets a judicial reluctance to repeat past errors.

I. DEFINING THE PROBLEM

A. The Absence of Early Common Law Contract

As one first-year contract law textbook puts it, the "[c]ommon law is judge-made law" and "contract law is predominately judge-made."[13] Implicit in this simple description of contract law is the idea that contract law is contingent on historical processes. Yet the text in this example does not mention the origins of contract in the common law. And this example is hardly unique; even some of the more voluminous introductory texts on contract law only mention early common law contract in passing—if it is discussed at all.[14] While one can recognize that accounts of contract law can, and do, leave out the origins and early developments of that body of law,[15] a problem with that approach is that

12. PLUCKNETT, *supra* note 10, at 273.

13. ROBERT A. HILLMAN, CONCISE HORNBOOKS: PRINCIPLES OF CONTRACT LAW 12 (4th ed. 2019).

14. *See, e.g.*, ARTHUR L. CORBIN, CORBIN ON CONTRACTS (Joseph M. Perillo ed., rev. ed. 2013). For a text that is perhaps exceptional in this regard, see EDWARD A. FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 1.01 (4th ed. 2020).

15. The tendency to see greater relevancy in more recent developments has always existed in the common law—just as it exists in many other areas of inquiry. For instance, the early Year Books, which were quasi-journalistic in nature, tended to prefer more recent cases over earlier ones that established rules and principles. A result of this approach meant that an early case establishing a particular rule might be forgotten, despite continued retention of the rule. For a discussion on such matters, see, e.g., PLUCKNETT, *supra* note 10, at 273.

it leaves one liable to forget how or why contract law developed as it did, and why it operates the way it does today. As philosopher Alisdair MacIntyre observes, if one deprives "rules of their original context . . . they at once are apt to appear as a set of arbitrary prohibitions."[16]

One sees this even when it comes to defining the subject itself as legally enforceable promises[17] because a promise was peripheral rather than central to early contract law.[18] The point here is not to say that in early common law contract parties did not make promises to one another when forming contracts. As a purely factual matter, parties did make promises to one another when contracting.[19] The tension stems from using this concept to describe the essence of the subject and the starting point for legal liability in contract when "the shift toward liability based on promises" took place in the sixteenth century.[20] This tension also flows into other key doctrines associated with contract law, such as consideration. After all, if a court's attention focuses more on the substantive agreement and promises exchanged to determine liability, then there must be a greater emphasis on the criteria through which courts can distinguish promises that are binding from those that are not. A substantive doctrine of consideration provides one such criterion.

One further issue is that, if one adheres to the proposition that promises are central and essential to contract law and contractual liability, one is either left questioning whether the modern definition needs to be rethought, or alternatively whether medieval common law contract is even contract law at all.[21] However, what the historical record shows is a relationship that is evolutionary, and the distinctions between modern contract law and medieval contract law based largely on incremental rather than categorical changes over time.[22]

The absence of early common law contract in discussions of contract law is not limited to matters of doctrine. For example, consider the proliferations of

---

16. ALASDAIR MACINTYRE, AFTER VIRTUE 112 (3d ed. 2007).

17. This notion is not only contained in the RESTATEMENT (SECOND) OF CONTS. § 1 (A.L.I. 1981). One can also see it doctrinal and theoretical literature as well. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE (2d ed.2015).

18. *See* 93 SELDEN SOCIETY, *supra* note 9, at 4–6; *see also* Warren Swain, *Contract as Promise: The Role of Promising in the Law of Contract—An Historical Account*, 17 EDINBURGH L. REV. 1, 8 (2013).

19. DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 141–42 (1999).

20. *Id*.

21. Contemporary legal historians take the view that the writs of debt and contract are appropriately categorized as 'contract law.' Simpson, for example, denies "the ridiculous conclusion that no law of contract then existed." *See* ALFRED W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 5–6 (1st ed. 1975).

22. The idea that there are categorical differences between these writs and modern contract law would, for example, make it more difficult for this Article to argue that there are common threads in common law contract that can be traced back to the early common law. As Simpson notes, if this line of reasoning is correct, then historical inquiry into early common law contract would be perfectly futile. *See id.* at 6.

new theories of contract law over the past several decades.[23] Of these, there are the more well-known promissory theories,[24] reliance theories,[25] transfer theories,[26] and critical theories that exist.[27] There are also important distributive justice theories,[28] theories about the death of contract,[29] and even theories used to explain contract theories.[30] Yet none of these theories, as far as this author is aware, accounts for the development of early common law contract out of the writ system. It is perhaps unsurprising then that there is no universally agreed theory of contract given these theories fail to account for the practice of contract law over a five-hundred-year period.[31]

II. DEFINING CONTRACT

A. Modern Concepts of Contract

To the modern lawyer, contract law conjures up notions of agreement supported by consideration, involving promises of some kind, and within which the idea of an agreement is analyzed in terms of offer and acceptance.[32] While some writers have speculated that there are perhaps almost as many definitions of contract as there are writers on the subject,[33] defining such a ubiquitous area of law is a difficult task. As one leading introductory text notes when discussing the idea that contract law is essentially the law of legally enforceable promises:

> This definition is not particularly useful, and may be positively misleading. It, along with definitions such as "legally enforceable agreement," attempts to squeeze, often with a shoehorn, and sometimes

---

23. For a recent example, *see, e.g.*, PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW (2019). For a discussion on the growth of contract law theory generally, *see* Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990).

24. *See, e.g.*, PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 405–08 (1979); *see also* FRIED, *supra* note 17, at 22–23.

25. *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 274–76 (1986); *see also* STEPHEN A. SMITH, CONTRACT THEORY 78 (2004).

26. *See* SMITH, *supra* note 25, at 97.

27. *See, e.g.*, Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803 (2022).

28. *See, e.g.*, Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

29. *See, e.g.*, GRANT GILMORE, THE DEATH OF CONTRACT (2d ed. 1995).

30. *See e.g.*, Steven P. Croley, *Libertarianism as Critical Theory*, 1 MICH. L. & POL'Y REV. 179 (1996).

31. The failure in theoretical discussions on even defining contract law is problematic in the sense that it limits one theoretician's ability to engage with another. However, the doctrinal and practical implications appear to be more limited than one might otherwise imagine. As Corbin observes, the theoretical disagreement about defining contract only "occasionally leads to an unjust decision and to uncertainty in the law." CORBIN, *supra* note 14, at § 1.3.

32. *See* SIMPSON, *supra* note 21, at 5.

33. Another prominent use of the concept of a 'contract' is to refer to the written document which provides a record of the parties' agreement. *See, e.g.*, CORBIN, *supra* note 14, at § 1.3.

> with a crowbar, the complexity of the topic into the pigeonholes of "promise" or "agreement." There are at least two difficulties with equating contract with promise. First, much of contract involves judicial imposition of solutions to problems the parties have not addressed or which they have addressed in illegal or unconscionable ways . . . . Another difficulty with the equating of contract with promise is that it ignores the array of consensual transactions that can be termed "executed contracts." The notion that a contract must be a promise stems from the old writ of assumpsit under which the making of a promise was a necessary allegation. But assumpsit is not the sole progenitor of contract.[34]

For present purposes, one interesting aspect of the above excerpt is that the remaining parts of the treatise largely do not account for common law contract.[35]

As Stephen Smith points out, defining a 'contract' is also difficult for theorists.[36] To circumvent this definitional difficulty, "[c]ontract law theorists rarely discuss this issue" of what key concepts mean.[37] Even where a theory does discuss the issue, the early common law is invariably overlooked. This author is not aware of any major contract theory which accounts for early common law, which is perhaps less surprising when one considers that the main philosophical influences for these theories are Enlightenment or post-Enlightenment figures who lived in periods characterized by a rejection of the medieval world in which early common law jurisprudence developed. For example, Charles Fried relies on David Hume and Immanuel Kant to say that contract and contract law is fundamentally about obligations arising from promises.[38] Richard Posner relies on Thomas Hobbes and Adam Smith to provide an economic analysis of contract law.[39] Peter Benson relies on John Rawls to say that contract (or at least contract formation) is about "transactional acquisition."[40] Patrick Atiyah relies on Samuel von Pufendorf as a basis for reliance theory of contract.[41] Jay Feinman relies on critical theorists to say that contract law as it developed during this post-Enlightenment period is artificial.[42] These are of course not the only examples available, but they show how both doctrinal and theoretical discussions about what contract law is and how to define it can easily overlook early common law contract.

---

34. *Id*.
35. *Id.*
36. SMITH, *supra* note 25, at 4–6.
37. *Id.* at 9.
38. FRIED, *supra* note 17, at 1, 134.
39. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 n.9, 94 (7th ed. 2007).
40. BENSON, *supra* note 23, at 13, 20.
41. For a discussion on this, see, e.g., LARRY A. DIMATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT 8–9 (1998).
42. *See* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 831–32 (1983).

Why does this matter? For one, defining something when the thing to be defined is the product of drawn-out historical processes requires recourse to those processes. Secondly, early common law contract is instructive because it does not contain the contemporary difficulties both in doctrine and theory of defining contract law. This second point stems partly from the expanded scope of contract law today based on broad conceptual definitions that are put forward, which are then supplemented with reference to substantive (rather than formal) legal criteria. In this context, a 'formal' requirement is simply a procedure or practice under which litigation can be commenced and pursued,[43] and which typically does not permit evaluative judgments or the weighing of factors as a substantive rule would.[44] For example, a rule that required a written contract—without regard to the substance of that written contract—as a precondition to enforceability would be one example of a formal rule.[45]

A rule of 'substance,' by way of contrast, refers to the body of abstract rules flexibly applied to the various of factual circumstances presented to courts.[46] In this sense, there is a degree of evaluation and discretion in the application of such rules not present in formal rules. For example, the rule that a court should take a plain reading of the words in a signed written agreement, with limited recourse to parol evidence to clarify ambiguity, would be an example of a substantive rule.[47] In this example, the courts are going beyond the formal requirement mentioned above, where the formal rule serves more like a jurisdictional consideration.

As Atiyah observes,[48] there are different types of reasoning involved with questions of form versus substance in contract law:

> [A] contract required to be in writing, may be declared void or unenforceable if the formalities are not observed. In such cases we do not stop as a rule (though there may be exceptions) to ask whether the failure to comply with the formal requirements is outweighed by some other substantive reason in favour of giving legal force to the will or contract. Once the legal rule of ineffectiveness for lack of form is clearly established, the application of that rule shuts out from consideration the substantive arguments in favour of validity or enforcement.[49]

The line between form and substance can, of course, blur at times. For instance, the doctrine of precedent could fall into either category, depending on how

---

43. *See, e.g.*, BAKER, *supra* note 1.

44. PATRICK S. ATIYAH, ESSAYS ON CONTRACT 94 (1986).

45. Plea Roll of the Berkshire Eyre of 1248 (Esthanney v. Drayton), *reprinted in* 90 PUBLICATIONS OF THE SELDEN SOCIETY 119 (M. T. Clanchy ed., 1973).

46. *See, e.g.*, ATIYAH, *supra* note 44, at 93.

47. *See, e.g.*, Codelfa Constr. Pty. Ltd. v St. Rail Auth. of New S. Wales (1982) 149 CLR 337, 352 (Austl.) (Mason J.).

48. *See* ATIYAH, *supra* note 44, at 93.

49. *Id.* at 93–94.

strictly a judge sought to apply the precedent.[50]Nonetheless, there is a difference between rules of form and substance, and it is the former which was the focus for the concept of contract in the early common law. It is the focus on the latter in modern contract law which coincides with definitional confusion. If this is the case, is there anything in early common law contract's emphasis on form over substance which might explain why there is no universally agreed definition of contract law today?

B. Pre-Modern Use of the Term 'Contract'

In the earliest accounts of common law contract, a contract "did not mean a mere consensual agreement or an exchange of promises, but denoted a *transaction*—such as a sale or loan—which transferred property or generated a debt."[51] John Baker points out that the "word 'contract', in particular, possessed a more confined meaning for medieval common lawyers than it now does."[52] This meaning is closer to the Latin *trahere*, which when combined with the prefix *con*, simply means a drawing together of multiple parties.[53] In this sense, the concept retained a closer affinity to its Latin roots when Latin was the language of learning and the law.[54] A broader use of the term, away from its etymological origins, coincided with the increasing use of English in common law jurisprudence and the consequent abandonment of Latin.

One surprising aspect of early common law contract for a modern reader is that courts and commentators never expressly define contract law in a universal or abstract sense—no such attempts appear until the sixteenth century. Prior to that time, the situation was similar to Roman law, in which jurists and commentators view 'contract' as an umbrella term denoting a group of fixed types of "transaction[s]—such as a sale or a loan—which transferred a property or generated a debt."[55] In other words, the notion of 'contract' was more like a genus with particular transactions forming species underneath that genus. One reason for this state of affairs is that early common law lawyers were "practical administrators . . . not given to metaphysical speculations." [56] As such, "[t]welfth-century lawyers in the King's Court . . . proposed no theory of obligation; they said nothing about mutual grants, consent, consideration or any other theory of contract."[57] The residual effects of this aversion to theorizing are still evident in Christopher St. Germain's description of contract in the sixteenth century: "[I]t is not much argued in the laws of England what diversity is

50. *See id.* at 94.

51. BAKER, *supra* note 1, at 338.

52. *Id*.

53. *Trahere*, CASSELL'S LATIN AND ENGLISH DICTIONARY 583 (J. R. V. Marchant & Joseph F. Charles eds., Funk & Wagnalls Co. 1959).

54. *See, e.g.*, BAKER, *supra* note 1, at 94–95.

55. *Id.* at 338.

56. PLUCKNETT, *supra* note 10, at 363.

57. *Id*.

between a contract, a concord, a promise, a gift, a loan, or a pledge, a bargain, a covenant, or such other. For the intent of the law is to have the effect of the matter argued, and not the terms."[58] At one level this should not be surprising. The absence of an all-encompassing coherent system of contract law (or even attempts to create one) is less obvious if one is impervious to its absence.[59] As the history of Roman law shows, legal systems can function even for more than a millennium without expressly needing to provide a comprehensive or broad theoretical conception of contract and contractual obligations.[60]

Why did early common law contract think about the very notion of a contract in this way? The similarity in the early common law's approach relative to Roman contract law is perhaps less surprising if one looks at the writing of Ranulf de Glanvill, the author of the earliest extant treatise on the laws of England.[61] Glanvill's notion of contract is far more constricted than modern ideas of legally enforceable promises. In his view, when the law of contract is considered, it is in the context of debt actions.[62] The approach of Glanvill at this point is analogous to the approach in Roman law, where one catalogues sets of fixed obligations actionable at law. This is rather different than a conceptual understanding of what a contract is in universal terms.[63] Ibbetson describes Glanvill's treatment of contract as one where "[t]here was no such general principle in the earlier Common law, typified by Glanvill's treatise, where there was a limited list of named contracts that generated debts."[64]

The next major treatise in the early common law that deals with contract is Bracton.[65] Bracton's thirteenth century notebook of cases also provides a window into the meaning of contract in early common law jurisprudence.[66] As with Glanvill, Bracton focuses on remedies and means of relief through writs rather than substantive aspects of contract. To the extent that something we might call contract law comes up at all, it is only through brief references to a convention or agreement (*conventus*) or pact (*pactum*).[67] The language used reflects Ibbetson's point that the "common features of contractual liability may

58. GERMAIN, *supra* note 9, at 174–75.

59. *See* BAKER, *supra* note 1, at 8.

60. *See, e.g.*, HERBERT F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW (2d ed. 1961) (reprt. 1967).

61. *See* RANULF DE GLANVILL, TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE (John Beames trans., John Byrne & Co. 1900).

62. *Id.* at bk. X.

63. *Id.*

64. IBBETSON, *supra* note 19, at 82.

65. A four-volume scholarly translation of this work was undertaken by Samuel Thorne in the mid-twentieth century: HENRY DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans., 1997).

66. *See* 2 HENRY DE BRACTON, BRACTON'S NOTE BOOK: A COLLECTION OF CASES DECIDED IN THE KING'S COURTS DURING THE REIGN OF HENRY THE THIRD, ANNOTATED BY A LAWYER OF THAT TIME, SEEMINGLY BY HENRY OF BRATTON 284–85 (Frederic W. Maitland ed., William S. Hein & Co. 1999) (1887).

67. *See* BRACTON, *supra* note 65.

have existed, but each remedy had its own rules, each had its own conceptual underpinning. The technicalities of each form of action reflected back onto the situations in which they applied, progressively remoulding the way in which common situations were analysed."[68]

The concept of 'contract' in the early common law was therefore ancillary. The starting point was the system of writs and actions. In one Year Book example from the reign of Eward III,[69] the plaintiff argued that part of a claim for debts owed could be satisfied by the existence of a bond, and the remainder by a form of proof known as a suit (because the written bond could only establish part of the claim). The written evidence of the bond is mentioned, but at no point in the recorded pleadings or judgment do the parties look to the substance of what was agreed. Instead, the record shows a technical discussion on procedure and whether the action can be made out partly by relying on the written bond and partly by another form of proof.[70] In other words, the court's focus is exclusively on questions around formal rules rather than the substance of the agreement. This, in turn, precludes consideration of whether a broader conceptual and more coherent understanding of contract was required to resolve the matter as pleaded. In this regard, Ibbetson is right to observe that "it was a long time before the Common law could begin to generate any coherent theory" on the nature of contract.[71] As Pollock states in his history of the common law:

> We have seen how in the ancient view no contract was good (as indeed no act in the law was) unless it brought itself within some favoured class by satisfying particular conditions of form, or of evidence, or both. The modern view to which the law . . . has now long come round is the reverse, namely that no contract need be in any particular form unless it belongs to some class in which a particular form is specially required.[72]

Given that 'contract' really served as an umbrella term for sale of goods and debt transactions, Stroud Milsom suggests 'covenant' is a better approximation of what we would now call 'contract.'[73] The use of 'covenant' in the early common law did emphasize consent and agreement to a greater degree than 'contract.' For instance, in a 1543 case, Judge Bromley stated that each "covenant impl[ies] agreement."[74] Ibbetson looks to earlier sources and notes

---

68. IBBETSON, *supra* note 19, at 31.

69. Canon Warren's Case, (1343) Y.B. 17 & 18 Edw. III, Rolls Series, at 73 (Eng.), *reprinted in* BAKER, *supra* note 4, at 234.

70. *Id*.

71. IBBETSON, *supra* note 19, at 36.

72 . FREDERICK POLLOCK, PRINCIPLES OF CONTRACT: A TREATISE ON THE GENERAL PRINCIPLES CONCERNING THE VALIDITY OF AGREEMENTS IN THE LAW OF ENGLAND 143 (10th ed. 1936).

73. S.F.C. Milsom, *Law and Fact in Legal Development*, 17 U. TORONTO L.J. 1, 6 (1967).

74. JACQUES DYER, REPORTS DES DIVERS SELECT MATTERS & RESOLUTIONS DES REVEREND JUDGES & SAGES DEL LEY 57 (1688).

that 'covenant' in medieval jurisprudence began as shorthand for an agreement.[75] There is one (extra-judicial) source from the fourteenth century which says 'covenant' and 'contract' are largely indistinguishable.[76] However, where the terms are clearly distinguishable is that 'covenant' was also a form of writ which enlivened the court's jurisdiction. This points to a general epistemological problem Alasdair MacIntyre points out, namely, that understanding a concept cannot occur "apart from its exemplifications."[77] Therefore, approximating covenant with contract in a modern sense creates difficulties because a covenant came to be understood at law in relation to the forms and procedures which developed around that action. When those procedures ossified and restricted who may bring an action in covenant (discussed in detail in Part IV below), litigating contractual matters was largely done through framing the action as one of debt up until the sixteenth century.[78] In other words, a contract involved transactions which may be actionable either through the action of debt or covenant (or, potentially, detinue where specific goods were concerned).

When lawyers started to use the concept of contract in a broader and more modern sense in the sixteenth century, courts turned to etymology. Consider for instance the judgment of Judge Peryam (with whom Judge Rodes agreed) in *Sidenham v. Worlington*.[79] The plaintiff had promised to act as surety and provide bail for a third party for £30.[80] The plaintiff was forced to pay the £30, after which time the defendant promised he would repay the plaintiff.[81] The defendant argued that there was no consideration at the time of the agreement, and therefore the action could not be maintained.[82] At the time the judgment was handed down, assumpsit was becoming (but had not fully become) the popular contractual action it would later be, and the notion of a promise began to play a more prominent role in common law contract because it was an element of assumpsit when that action was being used for contractual claims.[83] The detailed history of assumpsit is beyond the scope of this Article, but for present purposes it is necessary to say that assumpsit was effectively a tort claim, and as part of an assumpsit claim a breach of promise was necessary.[84] By the mid-sixteenth century, assumpsit claims were increasingly used as a means to bring what were ostensibly contractual claims. It was in this context that conceptual shifts in the concept of a contract and contract law accelerated. Courts, trying to grapple with

---

75. IBBETSON, *supra* note 19, at 18–22.
76. *Id.* at 22.
77. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 10 (1988).
78. *See, e.g.*, BAKER, *supra* note 1, at 346.
79. BAKER, *supra* note 4, at 530–31.
80. *Id.* at 530.
81. *Id.* at 530–31.
82. *Id.* at 531.
83. 93 SELDEN SOCIETY, *supra* note 9, at 4–6.
84. *See, e.g.*, Charles W. Fornoff, *Actions in General Assumpsit*, 23 OHIO ST. L.J. 401, 407 (1962).

this shift, turned to etymology, as the following judgment of Judge Peryam indicates:

> For there is a great difference betwixt contracts and this case. For in contracts upon sale the consideration and the promise and the sale ought to meet together; for a contract is derived from *con-* and *trahere*, which is a drawing together, so as in contracts everything which is requisite ought to occur and meet together.[85]

In *Slade v Morley*, a later sixteenth-century assumpsit case (and one of the most important contract law cases of all time), the etymology of 'contract' also arose.[86] *Slade's Case* involved the plaintiff grain merchant claiming that the defendant had bargained with him to purchase £16 worth of the wheat and corn—then growing on the plaintiff's land—but later reneged on the agreement.[87] The case ran over five years, by which time the matter had been referred to all the justices of England and the Exchequer Chamber.[88] John Dodderidge, who appeared with Francis Bacon against Edward Coke, traced sources as far back as the thirteenth-century treatise writer, Bracton, to plead that the matter was contractual rather than tortious, that the contract involved a bare stipulation, that "the stipulation is the contract, which is said of *contraho,*" and that this would not give rise to a wrong requisite to successfully argue assumpsit.[89]

What is interesting in Doddridge's argument is that the section of Bracton relied upon is not Bracton's note books, which contain the relevant jurisprudence from the thirteenth century, but rather his general treatise on the laws of England.[90] Moreover, the passage cited discusses the Roman law of *stipulatio* (i.e., a unilateral contract created through a formal question and affirmation),[91] which was never favored in English contract law.[92] This undoubtedly was not lost on Dodderidge. As Blume notes in his discussion of Bracton:

> [A]n oral stipulation . . . never was a contract in vogue in England . . . . He took the law on the subject [of contract] from the Roman law—much of it from Azo. He did not, however, succeed in fastening his system

85. BAKER, *supra* note 4, at 531.
86. *Id.* at 466.
87. *Id.* at 460.
88. *Id.*
89. *Id*. at 466.
90. 2 BRACTON, *supra* note 65, at 284–85.
91. *Id*.; *see also* GEORGE MOUSOURAKIS, FUNDAMENTALS OF ROMAN PRIVATE LAW 214 (2012).
92. Fred H. Blume, *Bracton and His Time*, 2 WYO. L.J. 43, 52–53 (1947).

> upon the common law. Part of it did not fit at all. Oral stipulations have already been mentioned.[93]

Consider also the following words in the seventeenth century from barrister William Sheppard, in a treatise where he seeks to comprehensively explain English law: "a contract, taken largely, is an agreement between two or more concerning something to be done, whereby both parties are bound to each other. But more strictly it is taken for an agreement between two or more, for the buying and selling of some personal goods, whereby property is altered."[94] Sheppard's words, written when assumpsit had expanded substantive contract law to a more recognizable form, show that the profession recognized the shift in the meaning of 'contract' from the historically more constrained sense to a modern broader sense.

This Part shows that the early common law had a concept of contract in law different from modern contract law in at least three respects. First, the concept of contract in the early common law was constrained and more closely aligned with the term's etymology. Secondly, the concept's use primarily related to questions of form rather than substance. Thirdly, when the notion of a contract was used in legal discussions, it was primarily used as a label for transactions described as contracts. There was no broad conceptual definition or all-encompassing theory of what a contract is, which meant that there was less room to dispute the contours of that definition. Yet observing these differences still begs the question only partly answered by the above analysis: Why was contract law originally so confined? One answer, as Theodore Plucknett observes, is that the "formulary system was too rigid to take in the whole field [of contract], and the only contracts which were furnished with appropriate forms of action were of such a simple nature that speculation was unnecessary."[95] In other words, it is necessary to consider the context of the early common law system further—particularly the system of writs.

III. THE ORIGIN AND DOMINANCE OF THE WRIT SYSTEM

It is impossible to understand the early common law without an understanding of the writ system. Writs shaped the scope of a court's jurisdiction and remedial powers, and therefore molded proceedings from beginning to end. One can see the centrality of writs to the early common law in two of the earliest treatises on the common law—Glanvill's *Tractatus de legibus et consuetudinibus regni Angliae*, cited above,[96] and Bracton's *De*

---

93. *Id*.

94. WILLIAM SHEPPARD, FAITHFUL COUNCELLOR: OR THE MARROW OF THE LAW IN ENGLISH 93 (1651).

95. PLUCKNETT, *supra* note 10, at 649.

96. GLANVILL, *supra* note 61.

legibus et consuetudinibus Angliæ.[97] These texts are, in large part, discourses on writs and the procedures related to them. For example, Glanvill's Book I begins, following some introductory remarks, with a discussion on a writ of summons as the basis to discuss the common law.[98] Bracton, writing in the mid-thirteenth century, summarizes the writ system as follows:

> A writ is formed in the likeness of a rule of law, since it briefly and in a few words expounds and explains the *intentio* of him who puts it forward . . . Some writs are formed on specified cases and are of course. They are granted and approved by the counsel of the whole realm and can in no way be changed without their consent and agreement. There are also writs following from them, called judicial writs, which are often varied according to the variety of pleas of the propounder, the demandant, and the variety of answers of the respondent, the exceptor. There are also writs called magistral, which are often varied according to the various kinds of cases, deeds and plaints. Actions are different and diverse, for some are personal, some real and some mixed, there will be as many formulas for writs as there are kinds of actions, for no one may sue without a writ, since without a writ the other is not bound to answer, unless he wishes to do so.[99]

This passage raises several points worth reflecting on. First, the reference to approval "by the counsel of the whole realm" alludes to the fact that the writ system was common to the whole realm,[100] and that the common law was an exceptional system to the local laws and customs which preceded the common law. Secondly, "since without a writ the other [party] is not bound to answer,"[101] the writs functioned as a commission on a court to respond to the writ's command (e.g., by hearing a case). Thirdly, the role of damages as a remedy in lieu of specific performance traces its origins to the summons or demand in the writ; some writs and actions related to matters "personal, some real and some mixed."[102] Finally, while in certain limited circumstances a party could rely on an alternative mechanism to obviate the need for a writ, even in those circumstances the logic of the writ system influenced how parties framed their arguments to common law courts.

---

97. BRACTON, *supra* note 65.
98. GLANVILL, supra note 61, at 5.
99. 2 BRACTON, *supra* note 65, at 285–86.
100. *Id*. at 285.
101. *Id*. at 286.
102. *Id.*

A. The Exceptional Nature of Early Common Law

Nineteenth century English legal historian Henry Maine summarized the history of legal progress as the gradual triumph of contract.[103] In English law, what preceded this development was expansion of the common law itself. This is evident in the name—the 'common law.' What made the common law 'common' at first was as much a geographic point as it was a jurisdictional one. That is to say, the common law distinguished itself from local means of obtaining justice; the 'common' law applied across the realm following Norman Conquest in 1066.[104] Here, the differences between common and local law were not primarily around different applications of substantive law. Rather, it was more a question of who was best placed to determine the matter.

Glanvill, writing in the century after the Norman Conquest, alludes to such factors in the preface to his *Tractatus*, when he states that the laws and customs of the realm have their origins in reason, have been maintained for a long time, and that in such a system the monarch needs to be carefully guided by his most learned subjects as to when and how to exercise his jurisdiction.[105] What appears to be key here is that the monarch needed to at least provide a veneer of stability and continuity as means to maintain legitimacy, and in this context a monarch's interest in exercising jurisdiction should be limited to matters that impact the monarch and the realm as a whole. It therefore is unsurprising that common law contract first appears as an aspect of common law which will only apply in exceptional circumstances within a jurisdiction that is itself enlivened exceptionally. As Book X of Glanvill states, the monarch has no interest in determining disputes about private or quasi private agreements.[106]

An additional factor here is that when the Normans arrived, there already existed an alternative to adjudicate such disputes, namely, the Anglo-Saxon county courts.[107] Given that the monarch's jurisdiction, at least initially, was more likely to be personally exercised, as a practical administrative matter it made sense to have a more restricted common law. Only over time, as commissions to administer the monarch's justice expanded, would it make sense for plaintiffs to go to the Common Pleas or King's Bench.[108]

This origin of the common law as an exceptional avenue for obtaining justice shaped its trajectory. For instance, as the royal courts expanded the sorts of disputes they would hear, they limited their jurisdiction through the system of writs (i.e., a 'breve' in Latin or 'brief' in French).[109] In addition to setting up

---

103. MAINE, *supra* note 5, at 319. Note that, as with any generalization, Maine's thesis is open to criticism. *See, e.g.*, Katharina Isabel Schmidt, *Henry Maine's Modern Law: From Status to Contract and Back Again*, 65 AM. J. COMP. L. 145 (2017).

104. *See, e.g.*, BAKER, *supra* note 1, at 15.

105. GLANVILL, *supra* note 61, at xxxvii.

106. *Id.* at 208–09.

107. *See, e.g.*, BAKER, *supra* note 1, at 61.

108. *Id.* at 60–61.

109. 4 BRACTON, *supra* note 65, at 285; *see also* BAKER, *supra* note 1, at 64.

the system of writs, the early common law courts encouraged resolution of contractual disputes elsewhere—both privately and through the local courts. Consequently, fewer cases were heard in the royal common law courts, and there were fewer opportunities for the development of substantive common law contract. As Kevin Teeven observes:

> The contract jurisdiction of Medieval English courts was spread over a variety of forums. Although the royal courts were the courts in which a modern form of contract law ultimately took shape during the later Tudor period, the greatest volume of contract litigation during the Medieval period was in the non-royal courts. The local courts were preferred because of these courts' greater flexibility as contrasted with the rigidity of the royal courts' writ system.[110]

As the monarch's jurisdiction expanded to cover a larger range of disputes, including in matters of contract, the courts frequently borrowed from the two sources of law best known: Anglo-Saxon and Roman law. As Ibbetson notes, both common law contract and tort law are examples of bodies of law that arose "out of the intermingling of native ideas and sophisticated Roman learning."[111] Roman and Anglo-Saxon law simultaneously provided a basis to expand the common law and conceptually how far such expansion could occur. The limits of using Roman and Anglo-Saxon stem from the fact that both bodies of law approached legal issues with an emphasis on questions of form over substance. For example, Anglo-Saxon law (and early common law) did not view a written will as a contract; the will was not dispositive of a party's intentions. Rather, a will merely recorded pre-existing intentions and agreements.[112] This was also the original position in Roman law.[113] By way of contrast, a modern contract is dispositive in that it attempts to capture the agreement of parties. On sees this difference reflected in distinctions in grammatical structures; while modern contracts (including wills) use present tense to express the intention of the parties, Anglo-Saxon wills used past tense as the written document serves only to solemnize an earlier oral will.[114]

So why do these points about the origins of the common law as a jurisdiction of exception matter when it comes to discussing writs? What this section seeks to demonstrate is that the legal and conceptual framework provide the context and historical basis for issuing writs in the first place. It was the exceptional

---

110. Kevin M. Teeven, *The Contract Jurisdiction and Procedure of Medieval Courts*, 5 GLENDALE L. REV. 35, 49 (1983).

111. IBBETSON, *supra* note 19, at 1.

112. Burton F. Brody, *Anglo-Saxon Contract Law: A Social Analysis*, 19 DEPAUL L. REV. 270, 288 (1969).

113. *See* JOLOWICZ, *supra* note 60. The Greeks provide a rare exception to this approach in ancient legal systems. It was Greek influence that caused later Roman to adopt a dispositive understanding of some written agreements.

114. Brody, *supra* note 112, at 288.

nature of the common law which initially limits its scope, despite in theory being the only law common to the realm. As litigants increasingly seek relief from the monarch, the monarch must delegate to what would later become expert judges, who must then resolve disputes and do so based on the two legal traditions known best to them—native Anglo-Saxon law and Roman law. In doing so, they rely on a body of law which constrains common law contract, in particular, because such sources of law focus more on questions of form rather than substantive considerations. Writs, particularly originating writs, provide the basis on which to focus on questions of form over substance, as these writs categorize the types of claims the royal courts recognize as actionable.

B. Originating and Other Writs

There are several ways one can try to categorize writs. One way is through the types of disputes they seek to address. At a higher level, one can also categorize writs based on which part of the litigation process they regulate. Originating writs, for instance, commenced court proceedings. Plaintiffs sought intermediate (i.e., 'mesne') writs to ensure the appearance of a defendant in court. Finally, there were judicial writs used to execute judgments. In this way, writs set the tone for each stage of the litigation process.

In addition to questions of when a writ should be sort, it was also important for litigants (and their lawyers) to know who could issue each type of writ. In the early stages of the common law, originating writs came from Chancery, which had not yet developed a jurisdiction of its own.[115] Chancery therefore still played an integral function to the system of writs in the early common law, and functioned as an administrative department of state with the power to issue originating writs with the great seal. These originating writs operated like a pass that permitted a plaintiff to seek justice in the common law courts.[116] The development of Chancery in this manner is analogous to the way in which the praetor in Roman law originally operated as a jurisdictional gatekeeper, and only later morphed into an independent potential source of relief to counterbalance rigidity in the law.[117] It is in the context of discussing originating writs that Bracton speaks of them being "granted and approved by the counsel of the whole realm and can in no way be changed without their consent and agreement."[118] These originating writs, emanating from Chancery, could be distinguished with the intermediate writs and judicial writs, as the royal courts (and not Chancery) issued the latter species of writs to the sheriff, who then had responsibility for enforcement.[119]

---

115. PLUCKNETT, *supra* note 10, at 675–707.
116. *See, e.g.*, BAKER, *supra* note 1, at 61.
117. *See generally* JOLOWICZ, *supra* note 60.
118. 4 BRACTON, *supra* note 65, at 285.
119. *See, e.g.*, BAKER, *supra* note 1, at 71–72.

After a plaintiff obtained an originating writ from Chancery and it was returned into the Court of Common Pleas or King's Bench, the next question was what to do if a defendant refused to attend court. In such a situation, a judicial officer could issue a writ by the mesne process, returnable in the respective court, to the sheriff to seize a defendant's goods or even the defendant's person.[120] The intermediate and judicial writs, in particular, relied heavily on the discretion of the sheriff, and this reliance was also a source of weakness.[121] The lack of accountability on the sheriff was such that he could not be examined as to whether he complied with the writ. [122] This limited the means for punishing a delinquent sheriff. Moreover, the sheriff could not claim compensation complying with the writ,[123] and could be liable if a mistake was made (e.g., the wrong person was apprehended). [124] These factors hardly incentivized the sheriff to execute the writ, which could in turn cause considerable delay. Another problem for plaintiffs was that writs were returnable only one day a week for much of the medieval period, and even during the sixteenth century the courts at Westminster only sat 99 days in a year.[125] These factors exposed plaintiffs to the risk of significant delays for reasons out of their control. A plaintiff could wait more than a year before a defendant would even appear for the first time, after which a timetable could be set to bring the matter to a full hearing.[126]

Even after the hearing, further writs were sometimes necessary to enforce judgment, which risked further delays for many of the same reasons.[127] The delay with these processes meant that, until the sixteenth century, the local city and borough courts were used chiefly by tradespeople seeking swift remedies for local (typically smaller) trade disputes that they would not obtain through the common law courts.[128] Local courts, such as those which arose during local fairs, applied the 'law merchant' and could provide same-day decision-making.[129] While Gladstone may have been the first to expressly state the maxim "justice delayed is justice denied" in the nineteenth century,[130] many plaintiffs in the early common law felt the truth of this statement first-hand.

---

120. *See, e.g.*, *id.* at 72. It should be noted that for seizures of persons this only applied through a series of statutes that came into effect after 1351 (in actions of debt) and 1531 (in cases of covenant).

121. *Id.*

122. *Id*.

123. Which could be expensive depending on how far the sheriff had to travel to comply with the writ.

124. BAKER, *supra* note 1, at 72.

125. *Id.* at 73.

126. *Id*.

127. *Id.*

128. *Id.* at 30.

129. *Id.*

130. *Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service, no. 954*, BARTLEBY, https://www.bartleby.com/lit-hub/respectfully-quoted/william-ewart-gladstone-180998-4/ [https://perma.cc/HTN5-PME7] (last visited Sep. 25, 2025).

While writs were relevant at each stage of litigation, originating writs were most important in shaping the trajectory of the law because they were the executive passes which framed how plaintiffs would present their claims. Of these originating writs, those which ordered someone to do something (*praecipe* writs) and those which demanded inquiry (*quare* writs) are worth of further consideration.

C. Praecipe and Quare Writs

While the previous section focused on categorizing writs, this section focuses on categorizing originating writs. At a high level, originating writs allowed a plaintiff to either claim something one was entitled to as of right, or redress a wrong. This distinction is seen in the differences between *praecipe* and *quare* writs, which respectively derive from the Latin *praecipere* (meaning 'to instruct or command')[131] and *quare* (meaning 'wherefore' or 'why').[132] The early *praecipe* writs in particular tended to read like executive commands of a final nature—final in the sense that they read as though there was already a decision made on a matter before the matter arrived at a court.[133]

The *praecipe* writs sought primarily to claim some entitlement rather than compensation for conduct.[134] These *praecipe* writs were prospective rather than retrospective, and therefore grammatically were in the subjunctive rather than indicative mood and present rather than past tense.[135] The remedial effect of this language is that, where a plaintiff was successful relying on a *praecipe* writ, the result was a specific recovery by a writ to hand over a thing demanded or to allow what was asked.[136] This language differed from the *quare* writ, which ordered someone to do something 'justly.'[137] The implication of this command was that something more was required; courts needed to determine 'justness,' which was "first established by due enquiry."[138]

Within this bifurcation, originating writs could be used to seek relief in a wide range of matters. Those types of matters came to be known as forms of action.[139] For example, debt and covenant were forms of action for which there were specific writs available. Bracton, talking about the relationship between writs and type of action, states that the "writ must agree with the action and must be impetrated in an appropriate case, otherwise it will be valueless . . . . A writ also falls if it is impetrated as to the means and quality of an act, where it ought

131. CASSELL'S LATIN AND ENGLISH DICTIONARY, *supra* note 53, at 430.
132. *Id.* at 461.
133. BAKER, *supra* note 1, at 61, 65.
134. *See, e.g.*, *id.* at 65.
135. *Id*.
136. *Id.*
137. *Id.* at 61.
138. *Id*.
139. BAKER, *supra* note 1, at 64.

to be impetrated as to the act itself."[140] In other words, the task of the lawyer bringing a claim for a plaintiff required a task analogous to the biologist finding a new organism, who must fit the particular into a broader classification system of species and genus. One can see how in such a system the concept of contract could be secondary, as 'contract' was not its own form of action with its own type of writ. Rather, 'contract' was a transaction which could be the basis of a legal dispute that could fit into one of a number of writs and actions (e.g., debt or covenant).

Up until the time of Bracton, there was still an apparent push for new writs from Chancery to allow new types of claims to be brought. However, it was not long after Bracton that the liberal approach to issuing new writs began to receive considerable pushback. Baker suggests that there is evidence of this pushback in the reference to "the law of the land" in the due process provision of Chapter 39 of Magna Carta—the point being that changes to the common law of the realm should not result from Chancery's discretion in issuing new writs.[141]. A further example comes from a case from 1267, where the defendant argued that unless a new writ sought is approved by Parliament, then he (i.e., the defendant) did not have a case to answer.[142] Whether intentional or not, the defendant's argument in this case effectively challenges Chancery's exercise of discretion.

Once this system began to solidify around fixed writs and forms of action, novel claims became more difficult to bring to court. Plaintiffs then instead sought to shoehorn their claims within the scope of an existing writ, which explains why later medieval contract law saw contractual claims brought in the form of torts.[143] A paradox of this development is that it gave the common law stability and regularity which made it attractive to parties, however it did so in a fixed framework that is intolerably inflexible to modern eyes. The writs, over time, became a kind of precedent, and with an increase in record keeping there came both an increased reliance on existing writs and a reluctance to depart from that precedent. In this context, selecting the right writ became key and the profession developed its educational system and literature around these writs.

The next logical step from this development was that the originating writ effectively established whether a claim could be made and, if it could, its terms. Take for example the writ of detinue: "The king to the sheriff of *N*., greeting. Command *A*. that justly and without delay he render to *B*. one box marked with the seal of the aforesaid *B*., with three written bonds contained in the same box, which he unjustly detains, as he says. And if he will not do so etc."[144] There is little substance to the terms of the writ. There is no requirement to get to the bottom of the 'facts' of a case, and as such 'facts' and substantive law play a far less prominent role in the early common law than they do in modern litigation.

---

140. 4 BRACTON, *supra* note 65, at 284.
141. BAKER, *supra* note 1, at 60, 63.
142. *Id*. at 63 (citing Hide v. Flavel (1267) K.B. 26/180, m. 24).
143. *Id.* at 64.
144. BAKER, *supra* note 1, at 583.

While the lawyer is required to consider the matter with some level of abstraction, the purpose of such abstraction is to enable the lawyer to fit the problem within the system of classification.

The formal logic required from a plaintiff meant that lawyers thought more in terms of this kind of reasoning. Lawyers for defendants, likewise, challenged a claim more on technical grounds in pleadings rather than on factual disputes. Take for instance how little is said of the factual basis of the claim in the writ referred to in the preceding paragraph. It is simply asserted, in the broadest terms possible, that the defendant detains the specified item unjustly. While circumstances may be implied from the writ, the writ does not argue or persuade the court of the plaintiff's case; the assertion in the writ is more administrative than argumentative in nature. Milsom notes that the reason for the absence of persuasion in writs was that "there was no one to be persuaded."[145] In other words, the assertion is formal, administrative, and procedural in nature. It does not put forward a substantive argument.

It follows that because the writ was primarily an administrative document, it did not need to answer the substantive question of, for example, what constitutes a contract, or a covenant, or a debt, or any other such fundamental conceptual principle. While exposition of such concepts may not have been the purpose of writs, that would have been less of an issue for substantive development of the law if there were other available mechanisms that permitted such considerations. But such mechanisms were few and far between in the early common law. As Baker states, concepts like contract or "[o]wing could only become a legal concept when the circumstances of a transaction were looked into in order to establish whether they resulted in a debt."[146]

As the writs and actions became more rigid, so too did processes which developed around them. This in turn meant that making a mistake on aspects of formality (such as confusing matters of form on one writ with another) could be fatal for a party and determinative for the court.[147] These differences also meant that if a plaintiff's lawyer selected the wrong writ in commencing a claim, even if another writ was available, the plaintiff would have to start the litigation process again. For example, a protracted case from 1315 between Thomas Hothwait and Hugh de Courtenay disputing a church vacancy largely centered around whether the originating writ was appropriate or not.[148] The record of proceedings shows a certain Stonore (presumably the then-advocate but soon-to-be judge Sir John Stoner) argued that "the original writ is the foundation in law. Therefore since [the plaintiff] has no foundation in law in his count, it seems to us that he ought not to be received."[149] Form and formality framed the

145. Milsom, *supra* note 73, at 3.

146. BAKER, *supra* note 1, at 79.

147. *See, e.g.*, *id.* at 63.

148. Pleas of the Term of St. Michael in the Ninth Year of the Reign of King Edward the Son of King Edward (Hothwait v. Courtenay) Y.B. Mich. 9 Edw. II, pl. 2 (1315) (Eng.), *reprinted in* 45 PUBLICATIONS OF THE SELDEN SOCIETY 1, 2–9 (1935).

149. *Id.* at 5.

dispute, and failure to adhere to these requirements was frequently fatal to plaintiffs. Relying on the right writ was key, for if nothing else the wrong writ poisoned the plaintiff's entire claim.

D. An Alternative to Writs

Writs were the primary, but not the only, way in which a plaintiff could commence litigation in some royal courts. If a justice was on a traveling circuit, known as a justice in eyre,[150] or the King's Bench sat in a county, the sheriff of that county was in attendance.[151] In such circumstances, there was no need to first go off to Chancery and seek a writ ordering the sheriff to initiate proceedings.[152] While this procedure was convenient and more flexible for a plaintiff, it was limited. For instance, in addition to the geographic requirements of the bill procedure, the procedure was not available for the Court of Common Pleas due to Chapter 11 of Magna Carta (which required the Court of Common Pleas to remain at Westminster).[153]

Where it was available, a bill had significant advantages for plaintiffs from a procedural standpoint. Although writs were the far more common originating process, a bill's flexibility meant that it could be used to test the scope of actions and key concepts to a greater degree than writs allowed. This factor explains why several cases referred to in the remainder of this Article involve a plaintiff commencing litigation on a bill rather than a writ. One such advantage is that it gave plaintiffs relative flexibility in describing their claim. Unlike originating writs, which largely fixed the plaintiff's action from the moment the writ was sought (and hence why using the wrong writ proved fatal), the bill allowed the plaintiff to hold off on precisely forming the nature of the claim until after the defendant was arrested and a bail application took place.[154] Another benefit here with the bill process is that the plaintiff could use this to work out whether financially the matter was worth pursuing.[155]

Notwithstanding the greater flexibility associated with bills as a basis to bring a claim, both bills and writs framed and limited how courts understood and resolved contractual problems. These originating processes provided a basis for dispute resolution that did not require comprehensive conceptual understanding of contracts or contract law. Therefore, accounts of contract law which assume that this body of law has always been focused on substantive rather than formal considerations will always face the difficult task of squaring such assumptions with the historical reality of an early common law contract restricted largely to matters of form and formal logic. This picture is clearest if

---

150. BAKER, *supra* note 1, at 19.

151. *Id.* at 48.

152. *Id.*

153 . *See Selected Readings and Commentaries on Magna Carta: 1400–1604*, 132 PUBLICATIONS OF THE SELDEN SOCIETY 91 (2015).

154. BAKER, *supra* note 1, at 50.

155. *Id.*

one looks specifically at the main contractual actions of debt and covenant, and their associated writs.

IV. MAIN MEDIEVAL CONTRACTUAL WRITS

A. Covenant

Covenant was in a sense the quintessential medieval contractual action. The action was available for nearly all consensual agreements and obligations.[156] As a thirteenth-century statute notes,[157] the early theory with the action of covenant was that any type of agreement could potentially fall within its scope. Milsom calls covenant the "action on a contract."[158] While this may have been the case from the eleventh to thirteenth centuries, over time the jurisprudence that developed around the action of covenant was not simply contractual. The restrictions that occurred in this development were such that covenant fell out of favor to the much more popular form of action known as debt.

Three reasons explain why, despite a promising start in the common law, covenant never encompassed a broad conceptual understanding of contract as contract law does today. First, a jurisdictional rule meant that, from at least the fourteenth century, a plaintiff relying on a common law writ of covenant could only do so if they produced a sealed document, known as a 'specialty.'[159] Secondly, certain in-court processes (in addition to those already considered), including the evidentiary rather than dispositive nature of the covenant deed, discouraged plaintiffs from bringing actions in covenant. The result was fewer opportunities for substantive and conceptual questions of contract law to be put to judges or juries. Thirdly, the remedial fragmentation that followed these first two points meant that there was not one remedy for resolving issues involving contractual transactions. This procedural fragmentation made conceptual cohesion around a unified notion of covenant difficult.

1. The Formal Requirement Rule.—The story of the action of covenant is "[l]ike a plant shooting up too enthusiastically at the start of spring only to be faced with a late frost."[160] This analogy captures the general scholarly view that covenant rose to prominence as the basis to bring contractual claims in common law courts into the early thirteenth century, only to be frozen thereafter because of a rule requiring a document under seal as a precondition to relying upon the action.[161] While there is no dispute that this is what happened based on the historical record, there is less consensus regarding why this change emerged.

---

156. *Id.* at 339.

157. Statute of Wales (1284), c. 10, Statutes of the Realms, I, p. 65, *reprinted in* BAKER, *supra* note 4, at 309–10.

158. S.F.C. Milsom, *Not Doing Is No Trespass*, 12 CAMBRIDGE L.J. 105, 108 (1954).

159. *See* SIMPSON, *supra* note 21, at 10.

160. IBBETSON, *supra* note 19, at 24.

161. *See id.* at 21, 24.

One likely explanation is that the norm of using sealed deeds to evidence a disputed transaction transitioned to a requirement imperceptibly.[162] Simpson suggests that the story is somewhat different, and that early covenant recorded cases reflect a struggle between conflicting views as to whether oral covenants not contained in written documents should be enforceable in the royal courts.[163] On this explanation, the theory is that royal courts believed local courts were better placed to determine disputes often centered on questions of credibility, and such questions invariably arose when an alleged oral covenant is central to the dispute.

If Simpson is correct,[164] then the introduction of the jurisdictional rule in the royal courts was not (at least initially) evidence of a conceptual fragmentation.[165] This view is consistent with the Year Book records. For example, Year Books of the late fifteenth-century show that this jurisdictional rule about specialty was not adopted in local courts in London.[166] In other words, covenants could be enforceable if informal—just not in the common law courts.[167]

Evidence of common law courts requiring sealed deeds as a precondition for a covenant claim dates back at least as early as 1292. A case in the Shropshire Eyre, recorded as *Corbet v. Stury*, involved the plaintiff bringing a claim against multiple defendants.[168] The defendants borrowed the plaintiff's horse for a jousting match in which the horse was, unfortunately, maimed.[169] There are several reports of the case, including the Year Book record which refers to the action as debt rather than covenant.[170] While the matter ultimately settled, the pleadings show that, prior to settlement, the parties argued before the court about whether the covenant needed to be in writing.[171]

Eventually, this rule hardened so that informal covenants fell outside the jurisdiction of common law courts.[172] Consider the *Case of the Waltham Carrier* from 1321.[173] In this case, the plaintiff relied on a writ of covenant to bring a claim against the defendant regarding undelivered hay.[174] The plaintiff said the

---

162. *Id.* at 24.

163. *See* SIMPSON, *supra* note 21, at 11.

164. *Id.*

165. In other words, the jurisdictional fragmentation was not a result of a conceptual fragmentation that believed a purported covenant could only be a covenant if it was solemnized in a sealed deed.

166. *See, e.g.*, Y.B. 22 Edw. IV, f. 1, pl. 6 (1482) (Eng.).

167. *See* Teeven, *supra* note 110, at 39.

168. Corbet v. Stury, Y.B. 20 & 21 Edw. I, Rolls Series, at 223 (1292) (Eng.), *reprinted in* BAKER, *supra* note 4, at 312–13.

169. *Id.* at 312.

170. *Id.* at 312–13. This ambiguity is likely because the case was brought by bill rather than writ which, as noted in Part III, gave plaintiffs more flexibility in how they stated their claim.

171. *Id.* at 313.

172. *See* BAKER, *supra* note 1, at 341.

173. *Carrier's Case* (1321), *reprinted in* 86 PUBLICATIONS OF THE SELDEN SOCIETY 1, 286 (Helen M. Cam ed., 1969).

174. *Id.*

parties agreed that the defendant would receive and transport the hay from Waltham to London for six shillings.[175] The plaintiff paid three shillings as a downpayment, and the defendant received the hay but never delivered it.[176] The defendant argued there was no case to answer, for there was no sealed deed.[177] The plaintiff responded that it was impractical to put all covenants in writing.[178] Judge Herle, found in favor of the defendant, and the recording of the judgment contains the memorable line that "we shall not undo the law for a cartload of hay."[179] Additionally, Judge Herle stated that a covenant "is none other than the assent of the parties that" must be in writing.[180] From a substantive legal standpoint, there is no mention of how much detail parties need to give in relation to what they are assenting to; the point is that the written document is evidentiary. The result of the case was that there was no recognizable covenant at common law.[181]

What might to us seem like a rather minor rule in practice had profound consequences on how the action of covenant developed. Moreover, one sees how practice interacts with conceptual understanding. The use of the concept of a 'covenant' at common law impacted its meaning, and the jurisdictional rule increased the distinction between the concepts of covenant and contract, and at least in part explains why today we speak of 'contract' and not 'covenant' law. The rule prevented the emergence of a general contractual remedy at common law. A litigant seeking to rely on an informal contract to bring a claim would have to use another action, such as debt, or go to a local court. A claim in covenant would be argued and decided primarily through the formalities of that action (e.g., whether there was a signed instrument) rather than on any substantive basis.

The hardening of one procedural rule associated with covenant, coupled with other procedural rules unattractive to potential plaintiffs (such as jury assessment of damages), meant that the action of covenant withered away. Instead, plaintiffs used conditional bonds and the action of debt as the main action for contractual disputes.

2. Arguing Breach of Covenant.—Even though the rule requiring a sealed document for covenant claims restricted its scope, one might think that such a development could lead to the development of a substantive body of law regarding how one interprets the agreement as solemnized in the written instrument. However, as the historical record demonstrates, this is not what occurred in the early common law. Take the fourteenth-century case of *Aubrey v. Flory*,[182] for instance. This case provides a relatively rare example of how

175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 286–87.
179. 86 SELDEN SOCIETY, *supra* note 173, at 286.
180. *Id*.
181. *Id.* at 287.
182. Aubrey v. Flory (1321), *reprinted in* 86 SELDEN SOCIETY, *supra* note 173, at 235–41.

common law courts would approach a covenant matter beyond disputes around formalities, such as whether the deed was in fact the defendant's deed (which was a common way to rebut a plaintiff's claim).[183] In this case, a defendant grocer entered into a deed with the plaintiff supplier in London. The parties agreed that certain goods would later be delivered to the defendant at a fair in Lynn.[184] When the plaintiff brought the perishable goods to the defendant, the defendant refused to accept them.[185] Several versions of the case are recorded,[186] and the record shows a detailed series of pleadings and discussion between the bar and bench regarding whether wager law is available.[187] Interestingly, the writ asks for "swift justice to be done . . . according to the law and custom of our realm or according to law merchant."[188]

Despite *Aubrey v. Flory* facially appearing ripe for a discussion about the substance of the agreement between the parties and the basis for the defendant refusing the goods, this case contains no reference to the terms of the deed. There is no substantive discussion of covenant law. In fact, what one does see from the record is the court trying to dissuade the parties from demurring on a point of law, which was simple a way for a party to ask the court to make a statement on the law as it might apply in the case. This reluctance from early common law courts was not uncommon; one can see such reluctance in *Aubrey v. Flory* when the judge tells the parties that they can put the point of law to the court "at [their] risk."[189] Unsurprisingly, the issue seems to have gone no further.

What the recording of a case like *Aubrey v. Flory* points to is that the deed itself played an evidentiary rather than dispositive role in the proceedings.[190] That is to say, the written agreement acted more like a receipt does today, recording the existence of a pre-existing transaction. To paraphrase Maitland and Montague,[191] there is no contract at all, at least not as we understand it (and leaving to one side, for present purposes, a complicating factor like the existence of consideration).

From cases like these, it is possible to see that even when parties get an opportunity to opine on the substantive law of covenant, that opportunity is not taken. The court records reflect a jurisprudential world which is focused on a type of formal legal logic which has little use for broad conceptual or substantive contract considerations. And because that logic begins and ends with formal writs, cases could be resolved formally without judges needing to state on record what their view of the substantive law of covenant was.

---

183. *Id*. at 240.
184. *Id*. at 239.
185. *Id*.
186. *Id*. at 235, 240.
187. *Id*. at 237.
188. 86 SELDEN SOCIETY, *supra* note 173, at 243.
189. *Id.* at 237.
190. *See id*. at 237–39.
191. *See* MAITLAND & MONTAGUE, *supra* note 6, at 15.

3. Fragmentation.—The covenant rule changed to require a sealed deed fragmented jurisdiction and the actions under which such claims were made. Given that each writ had its own conceptual existence and underpinning, with rules and procedures which influenced each stage of proceedings, there were bound to be gaps that arose in practice. For example, because of this rule around specialty and the action of covenant, contracts exchanging services for payment (which were really formalized) were not brought in covenant.[192] In time, an anomaly arose whereby half of this transaction was not actionable at common law. This is because a party performing a service for payment under an informal agreement could claim an amount owed via the action of debt (which did not require a written document but did require a specific amount owed),[193] but the party benefitting from the performance of a service had no common law action.

These gaps in the law provided space for creative arguments that blurred the line between what we would now think of as tort law versus traditional contract law. For example, a 1329 case from the Nottingham Eyre involved the plaintiff using a bill to bring a claim against a local doctor.[194] The plaintiff had a problem with his eye, which he wanted the defendant to cure; however, the "cure" caused the plaintiff to lose his eye.[195] The plaintiff was, unsurprisingly, rather displeased with the defendant's service.[196] Counsel for the defendant argued that the matter was really contractual in nature.[197] Part of the basis for this line of argument was that the plaintiff had submitted himself to the doctor's "medicines and . . . care," and therefore no "trespass" occurred.[198] The defendant's argument created several problems for the plaintiff if correct. First, the plaintiff was not owed a specific amount, which ruled out a debt claim. Secondly, there was no sealed deed, barring a covenant claim. It followed that the court had no power to resolve the matter in the plaintiff's favor. The Court dismissed the claim, with Judge William Denum recorded as saying: "suppose a farrier, who is man of skill . . . injures your horse with a nail, whereby you lose your horse: you will never have recovery against him. No more shall you here."[199] The maxim of Judge Herle, that "for a cartload of hay we shall not undo the law" of covenant,[200] also unfortunately extended to a gouged eye.

---

192. *See, e.g.*, SIMPSON, *supra* note 21, at 148.

193. *Id*. at 148–49.

194. The Oculist's Case, LI. MS. Hale 137(1), fo. 150 (Eyre of Nottingham) (1329–1330) (Eng.), *reprinted in* BAKER, *supra* note 4, at 381.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id*.

199. *Id*.

200. 86 SELDEN SOCIETY, *supra* note 173, at 286.

B. Debt

The writ of debt was the most commonly used action for contractual claims up to the sixteenth century.[201] The action of debt remained popular to enforce performance on conditional bonds until the nineteenth century,[202] making it by far the most durable means to bring contractual claims in common law courts. The writ of debt as described by Glanvill takes the following form: "Command *N.*, that justly and without delay, he render to *R.*, [stipulated goods] . . . of which he complains that he has unjustly deforced him."[203] From the twelfth to sixteenth centuries, the majority of actions on contracts were a specific action of debt requiring a bond or other sealed instrument, and these claims were known as debt *sur obligation*.[204]

The popularity of the action owed much to its simplicity and flexibility. The writ of debt could be used for both formal and informal transactions, although when there was only an oral agreement, the scope of the action was narrower because there needed to be a specific sum of money in dispute.[205] A type of deed known as a conditional bond was a common instrument used to secure performance of an underlying agreement because, unlike contracts today, the instrument could include a penalty that incentivized performance.[206] In theory, the penalty was compensatory, not usurious.[207] Practically, the penalty operated as interest does for creditors today—to mitigate some of the inherent risks in lending.[208] Thus, a promise to pay £100 as a penalty for failure to pay £50 under a bond was permissible, and in fact often the amount owed under the bond was fixed at twice the original loan amount.[209] In this scenario, the loan of the £50 was gratuitous, and the agreement to pay £100 if the gratuitous loan was not repaid by a certain date was compensatory. The parties willingly entered into the bond, so there was nothing preventing its enforcement if the condition was not performed. The operation of bonds in this way creatively circumvented religious sensibilities that prohibited the use of interest. The bond's penalty was only enforceable if the debtor failed to perform the condition, so there was no guarantee the creditor would be entitled to the larger amount.

Early common law lawyers thought about the action of debt in terms of what was owed (noting that the Latin verb *dēbēre* means to owe or be bound).[210] This fact shows, again, how the writ framed the logic and terms of the law. Litigation

---

201. *See, e.g.*, SIMPSON, *supra* note 21, at 53.
202. *See* BAKER, *supra* note 1, at 347.
203. *See* GLANVILL, *supra* note 61, at 198.
204. SIMPSON, *supra* note 21, at 88.
205. *Id.* at 53.
206. The rule against penalties did not develop until the late-seventeenth century. *See id.* at 113.
207. *Id.* at 114.
208. *Id.*
209. *See, e.g.*, *id.* at 114.
210. CASSELL'S LATIN AND ENGLISH DICTIONARY, *supra* note 53, at 151.

on a conditional bond was understood in terms of a creditor-debtor relationship, and not in terms of the underlying agreement it sought to secure. In other words, it was the form of the transaction that mattered rather than the precise details of what was transacted. Courts were not primarily concerned with the facts of a case aside from when they went to the formal nature of the relationship.

Yet despite the popularity of the action of debt, it never developed into a substantive contract law jurisprudence for at least two reasons. First, unlike covenant (which necessitated agreement), debt was not necessarily contractual; the action of debt contained scenarios where there was no agreement. This scope meant that, conceptually, debt did not always coincide with contract. Secondly, the action of debt was successfully argued through technical grounds, and therefore a court was largely uninterested in substantive legal considerations.

Regarding the first point, understanding the etymology is helpful to understand the concept of a 'debt' when Latin was the language of learning. Originally, a 'debt' in the medieval legal sense was an obligation broadly understood.[211] This broader understanding is consistent with the etymology of the noun *debitum*.[212] The broader understanding is also consistent with Glanvill's usage of the term,[213] which is not surprising when Latin was the language of learning and the law. Therefore, the original concept of a 'debt' was closer to how the term was used in Roman law.[214] The Year Books examples from the fourteenth and fifteenth centuries contain non-contractual uses of a writ of debt.[215] For instance, the action of debt could be used to recover an amount owed by dint of a judgment of the court on an action of debt (i.e., a debt upon a successful action of debt).[216] Using an action of debt in this way was neither contractual nor consensual. An exception like this shows that the action of debt relied on underlying notion of entitlement rather than contract.[217] Again, this relates back to etymology of debt as owing something to another, which need not be consensual.

The etymology of the term 'debt' and nature of the action of debt did not create an environment in which the action could be considered exclusively consensual, let alone contractual in a modern sense.[218] Moreover, for a medieval lawyer, the issue in dispute in debt actions was whether the debtor held a debt to which the creditor was entitled.[219] The notion of entitlement—what was owed to the creditor—was the focus.[220] Consequently, plaintiffs in medieval England thought about the debtor's failure to perform in terms of misfeasance (i.e.,

211. IBBETSON, *supra* note 19, at 18.
212. CASSELL'S LATIN AND ENGLISH DICTIONARY, *supra* note 53, at 151.
213. *See* GLANVILL, *supra* note 61, bk. X.
214. *See* JUSTINIAN'S INSTITUTES 13–14 (Peter Birks & Grant McLeod eds. 1987).
215. *See, e.g.*, Y.B. 11 Hen. IV, f. 56, pl. 2 (Eng.); *see also* SIMPSON, *supra* note 21, at 73.
216. *See, e.g.*, Y.B. 11 Hen. IV, f. 56, pl. 2 (Eng.); *see also* SIMPSON, *supra* note 21, at 73.
217. *See, e.g.*, BAKER, *supra* note 1, at 342–43.
218. SIMPSON, *supra* note 21, at 80.
219. *Id.*
220. *Id.*

failure to perform correctly) rather than nonfeasance (i.e., failure to perform a duty).[221] In other words, when a debt was not paid, it was not because the debtor did not live up to the promise to pay. Instead, the debtor acted illegally because the debtor detained in his or her possession a thing to which the creditor was entitled.[222]

Regarding the second point, Simpson points out that "the writ [of debt] was not trammelled by any inbuilt substantive restrictions."[223] This aspect of the action meant that pleadings resorted to procedural technicalities rather than a substantive agreement. As noted, the writ of debt could, for instance, require the plaintiff to claim a specified sum.[224] When a plaintiff specified the amount of money owed, the proper writ was usually debt rather than covenant, and during the medieval period, the plaintiff could not simultaneously bring an action of debt and covenant.[225] When a specific amount was claimed, it was important to ensure the amount claimed did not differ from the amount transacted. Preciseness was important because a plaintiff's claim could be dismissed if a jury found that the amount owed differed in any way to the amount claimed.[226] A reason for this apparent harshness is that, notwithstanding the fungible nature of what was often claimed in a writ of debt, the plaintiff was effectively seeking a remedy of specific performance. On this logic, getting the precise amount to which the creditor was entitled is important.

Creditors bringing an action of debt based on a condition bond typically needed to do little more than state that they were relying on the writ of debt and produce a bond.[227] In other words, it was not necessary for the plaintiff to specify to the court which conditions in the bond formed the basis of the claim. The plaintiff could proffer further details at his or her discretion, but it was not necessary.[228] After the plaintiff produced the bond, the defendant could choose whether to rely on an available proof or seek a trial by jury.[229] If the plaintiff made a claim based upon an informal contract without a written instrument, then the plaintiff needed suitors before the defendant had a claim to answer.[230] But this went to questions of creditability of the parties rather than any inquiry into what exactly was agreed.

Once the plaintiff brought an action with the necessary bond or deed (for formal transactions) or suitors (for informal arrangements), the burden automatically rested with the defendant.[231] For formal transactions, a typical

---

221. *Id.*
222. *Id*.
223. *Id*. at 73.
224. *Id.* at 70–71.
225. *Id.* at 61, 70.
226. *Id*. at 63.
227. *Id*. at 92.
228. *Id.*
229. *Id.* at 139.
230. *Id.* at 136.
231. *See, e.g.*, BAKER, *supra* note 1, at 344.

defense was that there was no legal instrument (*non est factum*), or that the instrument was not the defendant's (*non est factum meum*).[232] Either question was for the jury and did not require the court to undertake substantive consideration of the agreement.[233]

On the few occasions where the court did consider the terms of a deed or bond, the scope of such consideration tended to be strict and narrow. For example, in *Glaston v. Abbott of Crowland*,[234] The claim was based on a deed between the abbot's predecessor and the plaintiff.[235] The plaintiff handed over the deed to the defendant's predecessor, who kept the document and did not dispose of it.[236] Given that possession of the deed was evidence for a claim (rather than dispositive), the plaintiff plotted to steal the document so that he could use it as evidence in a claim for payment.[237] The plaintiff broke into a chest the defendant abbot used to store the deed, and relied on the stolen deed for his claim.[238] The record of the case shows how little the court was interested in underlying facts. The judge noted that the court "cannot inquire upon this writ of debt" on the veracity of the theft.[239] The formal rules and internal logic of the writ prevented the court from inquiring further. If the defendant wanted to allege trespass, that claim needed to be made in separate proceedings, in which damages might be available to correct the wrong.[240] The action of debt was only concerned with ensuring an entitlement to a thing is enforced (i.e., a kind of specific performance).[241]

What a case like this shows is that the law was strict on matters of form, but often silent on what we might call substance. That silence extended to directions to the jury, matters of evidence, and burdens of proof. Even if a judge wanted to develop the law or consider fundamental concepts like contract, the system provided few if any opportunities for such speculation. As Baker states, "in actions of debt on a contract . . . there could be no elaboration of the law of contract. The medieval law of debt was a law of procedure and little more, because it was a survival of the ancient pattern of lawsuit."[242]

What this Part demonstrates is that neither action—covenant nor debt—was a simpler law of contract focused on form over substance. Contract as a concept was ancillary to the lawyer's focus on the formal and technical rules which required one to shoehorn legal problems into pre-existing categories. In a doctrinal sense, the story of early common law contract provides an example of

232. SIMPSON, *supra* note 21, at 98.

233. *Id*.

234. Glaston v. Abbot of Crowland, Y.B. Mich. 4 Edw. III, no. 1 (1330) (Eng.), *reprinted in* 98 PUBLICATIONS OF THE SELDEN SOCIETY 665 (Donald W. Sutherland ed., 1983).

235. *Id.*

236. *Id*.

237. *Id.* at 666.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 667.

242. BAKER, *supra* note 1, at 89.

a dual balancing act legislators and judges must make. The first aspect of this act requires a balancing of procedural rigidity and legal stability. The second is substantive legal flexibility and the uncertainty this can sometimes create. In a theoretical sense, this story shows how difficult it is to make accurate generalizations about what contract law is or must be.

V. PLEADINGS, PROOFS AND JURIES

A. Pleading

Once writs around the actions of debt and covenant became fixed, avenues to develop law were limited largely to, at first instance, the methods of pleadings, proofs and juries. The importance of these processes is secondary only to the writs when attempting to understand early common law contract. As Hogg notes when tracing the role of a promise in the early common law:

> [O]ne remarkable shared feature of both English law and Roman law is the extent to which legal development in each came about as a result of changes in forms of pleading rather than as a result of legal theory. While their content might be different, English law and Roman law were both essentially legal systems based upon actions . . . . [T]he eventual rise of will theory in the Common law should not really be seen as the triumph of any overarching theoretical or moral perspective, but rather the result of gradual development in legal and commercial practice.[243]

In the education of a medieval English lawyer, pleading came second only to an understanding of types of writs.[244] Littleton, writing in the fifteenth century, noted that it is "one of the most honourable, laudable, and profitable things in our law to have the science of well pleading."[245] Once a law student learned the writs, the next step was to learn pleading.[246] Pleadings in medieval law resembled a series of chess moves, and they contained their own kind of formal logic which permeated the early common law. While such pleadings were often recorded in Latin,[247] they were spoken in Norman French until 1362.[248]

The pleading system that developed in the early common law was different to modern pleading in some important respects beyond language. Central to medieval pleading were two things. First, the ability to understand the nature of

---

243. MARTIN HOGG, PROMISES AND CONTRACT LAW: COMPARATIVE PERSPECTIVES 119 (2011).

244. BAKER, *supra* note 1, at 78.

245. PLUCKNETT, *supra* note 10, at 399.

246. BAKER, *supra* note 1, at 78.

247. *See* BAKER, *supra* note 1, at 94–95.

248. PLUCKNETT, *supra* note 10, at 400.

the action and how it fit within technical categories and rules formed around the system of writs and actions.[249] Secondly, pleading was undertaken in open court rather than through written pleadings.[250] For centuries, legal training was directed to this oral aspect of pleading, particularly following the increased importance of the jury.[251]

Pleadings in medieval law resembles the way interlocutory matters are handled today, in that what we would recognize as factual disputes followed legal pleadings.[252] This description does not, however, mean that pleading was ancillary to the litigation process; medieval pleading was a distinct stage.[253] Indeed, often this was the central part of litigation, where a good lawyer could add the most value.[254] The order of pleadings relatively early on in litigation meant that judges often hesitated to make findings of law aside from preliminary technical matters.[255] This factor partly explains why the Year Book case records largely do not contain discussions on substantive law.[256]

Writs did not say much other than the statement of an order or command, and so courts required a way to understand what gave rise to the writ. This is where pleadings were crucial. A plaintiff or the plaintiff's pleader would appear at the bar of the court with the defendant (or the defendant's pleader), and the plaintiff would briefly explain what gave rise to the writ.[257] The defendant could then simply deny the claim and, if possible, provide proof or offer up a technical procedural reason as to why the matter should be thrown out (e.g., a 'variance' between the writ and the plaintiff's opening statement).[258] In one recorded case from the late-thirteenth century, in which a plaintiff brought a writ of debt,[259] the judge stated that "the defendant can choose any of three courses: to put himself upon the countryside [to a jury];to be at his law [to wager law]; to put himself upon your suit."[260]

Where proof (such as wager law) or a jurisdictional technicality did not determine the matter, then the parties needed to 'reach the issue' to be put to the jury.[261] Reaching the issue meant that the parties would, with the court's assistance, work out the question to be put to the jury.[262] Often the issue reached was simply a general denial of circumstances giving rise to the case, and there

---

249. *Id.*
250. *Id.*
251. *See e.g.*, *id.* at 412; *see also* BAKER, *supra* note 1, at 84, 89.
252. PLUCKNETT, *supra* note 10, at 417.
253. *Id.* at 399–400.
254. *Id.* at 400.
255. *Id.* at 417.
256. *See, e.g.*, BAKER, *supra* note 1, at 89.
257. *Id.* at 83.
258. *Id.* at 83–84.
259. Anon. Y.B. 2 & 3 Edw. II (1297) (Eng.), *reprinted in* BAKER, *supra* note 4, at 232.
260. *Id*. 'Suitors' were typically eleven witnesses of the transaction brought to support the suit. *See, e.g.*, BAKER, *supra* note 1, at 7.
261. *See* BAKER, *supra* note 1, at 84.
262. *See, e.g.*, *id.* at 80.

was a presumption that any matter not argued was true.[263] The court moreover did not have power to consider matters not pleaded,[264] and this also limited the court's ability to develop the law. The lay nature of the jury meant that the parties needed to frame the issue in terms that the jury could understand. In an action of covenant, framing the issue was essential to restitution because the jury decided the quantum of damages.[265]

In addition to reaching the issue, there was also an informal aspect to pleadings which allowed the parties and the court to informally discuss a potential pleading as a means of reaching the issue. If it was apparent that the court was not with one particular side's argument or question of law, then that party could withdraw the pleading before it was entered on the roll for posterity.[266] Informal pleading was a popular way for judges to avoid demurrers on question of law.[267] While this was convenient for parties and judges in particular cases, one consequence of informal pleadings was that it made the development of a substantive body of law based on discernible principles applied to facts more difficult.[268] However, the relatively minor role which 'fact' played in this process is less surprising when one also thinks about the history of the concept of a 'fact.' As one etymological dictionary explains:

> The modern, empirical, sense of "thing known to be true, a real state of things, what has really occurred or is actually the case," as distinguished from *statement* or *belief*, is from 1630s, from the notion of "something that has actually occurred." The particular concept of the scientific, empirical fact ("a truth known by observation or authentic testimony") emerged in English 1660s, via Hooke, Boyle, etc., in The Royal Society, as part of the creation of the modern vocabulary of knowledge (along with theory, hypothesis, etc.); in early 18c. it was associated with the philosophical writings of Hume. Middle English thus lacked the noun and the idea of it; the closest expression being perhaps *thing proved* (c.1500).[269]

Alisdair MacIntyre states that the surprisingly late development of the notion of a 'fact' has much to do with the mind of lawyer Sir Francis Bacon.[270] MacIntyre, tracing this history, notes that:

---

263. *Id.* at 85.
264. *Id.*
265. *Id.* at 78–79.
266. *Id.* at 86.
267. *Id.*
268. *Id.* at 87.
269. *Fact*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=fact [https://perma.cc/33LW-DFLW] (last visited Sep. 25, 2025).
270. MACINTYRE, *supra* note 16, at 79.

> The twentieth-century observer looks into the night sky and sees stars and planets; some earlier observers saw instead chinks in a sphere through which the light beyond could be observed. What each observer takes himself or herself to perceive is identified and has to be identified by theory-laden concepts. Perceivers without concepts, as Kant almost said, are blind. Empiricist philosophers have contended that common to the modern and the medieval observer is that which each really sees or saw, prior to all theory and interpretation, namely many small light patches against a dark surface; and it is at the very least clear that what both saw *can* be so described. But if all our experience were to be characterized exclusively in terms of this bare sensory type of description . . . we would be confronted with not only an uninterpreted, but an uninterpretable world, with not merely a world not yet comprehended by a theory but with a world that never could be comprehended by a theory . . . . Theory is required to support observation, just as much as observation theory.[271]

Plucknett's view on the role of 'facts' in early English law is consistent with MacIntyre's general understanding of the concept's development.[272] When considering the distinction between facts and law, Plucknett notes that it "seem[s] obvious to modern English lawyers [that there is a distinction], yet there was a time when it did not exist, and the distinction, even when it was recognised, was not always drawn at the same point."[273] Milsom points out the implication that the development of this concept of a 'fact' has on the law when he states "legal development consists in the increasingly detailed consideration of facts," which he seeks to demonstrate largely through the development of contract law.[274] There are, however, some limits to Milsom's proposition if the notion of fact as we understand it did always exist or play a key role in legal proceedings like it does today. In other words, if legal development is dependent on the increasingly detailed consideration of such facts, and the concept of a fact as used today did not exist for at least most of the early common law era, then logically it would follow that the law was in stasis for that period.

Of course, legal development did occur during the 500 years following the Norman Conquest. If the development of contract law during the first 500 years of the common law era is considered, perhaps a more accurate observation is that legal development occurred during this period more gradually and within a formal and procedural framework which, although remarkably durable, was also less flexible, less substantive, and less abstract than modern common law contract. Lawyers required a different kind of reasoning to navigate that system. The system ensured stability through the granting of limited formal powers,

---

271. *Id.* at 79, 81.
272. PLUCKNETT, *supra* note 10, at 417.
273. *Id.*
274. Milsom, *supra* note 73, at 1.

while also permitting flexibility through informal avenues such as informal pleadings.

The role of judges in this context of pleading demonstrates the limits of formal powers during the early common law. The judge was there to state the law and assist the parties in resolving the matter. The judge was not, in the early common law, there to create law. This point is surprising given the narrative often presented in law schools, which is more a picture of the age of Mansfield than it is of the early common law.[275] Interestingly, Sir Francis Bacon critiqued the expanding role of judges in developing the law in the sixteenth century when he stated that "[j]udges ought to remember that their office is 'jus dicere,' and not 'jus dare;' to interpret law, and not to make law, or give law."[276] The irony is that Bacon's epistemology in time provided an avenue for the kind of common law jurisprudence more familiar to modern lawyers and judges.

In the sixteenth century, the system of pleading began to change so that it became the beginning rather than the end of the lawyer's art.[277] This change was based on the role of demurrer in pleadings being adapted to an unintended consequence of a sixteenth century statute.[278] The demurrer involved an admission of the circumstances as alleged by one's opponent, combined with an assertion that the law did not compel a response because at law those circumstances amounted to nothing actionable as pleaded.[279] The "general traverse" for a defendant was different to a demurrer, in that typically a defendant would simply deny the facts which gave rise to the "general issue" to be put to the jury.[280] This was often preferable to a demurrer because a demurrer meant putting a legal question to a reluctant judge.[281] However, the Statute of Jeofails 1540 changed this.[282]

Parliament enacted the Statute of Jeofails to reduce the number of objections to trivial errors in forms of pleading.[283] Instead of producing the intended effect, the legislation simply meant parties taking issue with such errors relied on demurrers, which in turn meant that judges increasingly had to answer questions of law on the record.[284] The unintended consequence eventually caused the demise of the medieval informal pleading because judges did not want to provide unrecorded opinions in tentative pleadings which might prejudice decisions judges would have to make following demurrer.[285] In other words, if

---

275. *See* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD (2004).

276. FRANCIS BACON, BACON'S ESSAYS AND WISDOM OF THE ANCIENTS 282 (1884) (ebook), https://www.gutenberg.org/files/56463/56463-h/56463-h.htm#FNanchor_579_579 [https://perma.cc/73BJ-UL6J].

277. BAKER, *supra* note 1, at 89.

278. *See, e.g.*, *id.* at 86–87.

279. *Id* at 86.

280. *Id.* at 84.

281. *Id.* at 86.

282. *Id.* at 90.

283. *Id.*

284. *Id*.

285. *Id.*

a seventeenth century judge was going to put his opinion on record for posterity, then it needed to occur after fuller pleadings had taken place. A reason this change did not occur earlier is because tentative pleadings permitted informal discussion with the bench and bar, and following these discussions, a lawyer could withdraw a novel or losing argument before it was recorded.[286]

There are at least two lessons in this discussion on pleadings in the early common law relevant to scholars today. First, early common law contained a combination of formal in-court rules that constricted substantive legal development with flexible oral pleadings which further arrested the possibility of substantive legal development. On this basis, early common law pleadings did not provide scope to argue or discuss conceptual or substantive matters of contract, nor did it provide room for theorizing about contract law. Secondly, the focus in pleadings on the process of formal logic, rather than using 'facts' as a basis for more probabilistic arguments, is unsurprising given 'facts' did not always have the same meaning they do today. It is only with later emphasis on establishing facts that one also sees a more substantive and conceptual common law contract developing.

B. Proofs

Baker describes a "proof" as those older methods of resolving non-legal issues in litigation.[287] A "proof" differs from a "trial" in that the latter suggests the weighing up of various factors in reaching a conclusion, whereas the former does not.[288] Proofs included supernatural proofs such as the ordeal of fire or water.[289] Of particular importance for present purposes is the notions of wager law.

Waging one's law was an alternative to trying an issue before a jury.[290] This proof developed out of the old Anglo-Saxon systems of oaths.[291] As a proof, wager law was neither investigatory nor rational—it avoided the need for human reason.[292] Wager of law was a popular mode of proof for a defendant in actions of debt and detinue in particular, and involved the defendant swearing an oath (usually saying nothing was owed).[293] Take the following oath responding to a writ of debt: "In the name of the living God, I owe note to *N* sceatt nor shilling nor penny nor penny's worth; but I have discharged to him all that I owed him, so far as our verbal contracts were at first."[294]

---

286. *Id.* at 86.
287. *Id.* at 79.
288. *Id*.
289. *See* Teeven, *supra* note 110, at 40.
290. *Id.*
291. *Id.*
292. *See* BAKER, *supra* note 1, at 79.
293. *Id* at 81.
294. PLUCKNETT, *supra* note 10, at 400 (emphasis omitted).

In wager of law, an oath would need to be backed up with oaths from (usually) eleven helpers known as compurgators.[295] The compurgators were not asked legal questions, they did not provide their reasons for swearing an oath, and formal rules of evidence or substantive law did not develop under wager of law.[296] Wager of law therefore did not involve questions of law or fact at all. The compurgators were simply there to state whether the defendant was credible or not; they made no statement as to the truth of the alleged transaction or its particulars.[297]

There was no temporal mechanism for punishing perjury when someone waged law.[298] Therefore, it was possible under wager of law for a mischievous defendant to find eleven compurgators to assist in the defendant's unscrupulousness. Avoiding one's debts this way became even easier to do once more matters were heard at Westminster rather than locally.[299] A tradition even arose at Westminster which allowed a defendant to purchase professional oath-takers, which in effect meant that a defendant with deep enough pockets could purchase the services of strangers to destroy a plaintiff's claim.[300]

Legal reasoning had no role in this process. Wager of law, if conducted successfully, decided the whole case. It destroyed the plaintiff's claim before any consideration of fact or law could develop. In this way, wager law inhibited the possibility of a modern understanding of contract law from developing. In cases of debt in particular, wager of law impacted the substantive development of the law in a number of ways.[301] It prevented examination of the facts of the case. It meant that no general principles of law applied if wager law applied. It discouraged plaintiffs from bringing legitimate actions and limited the development of substantive law. As a result, a conceptual and substantive body of contract law could not develop from cases where wager law was successfully used by a defendant.

C. Juries

Unlike methods of proof which did not involve human reason, juries developed a trial procedure which relied on the reason of jurors. Despite its initial role as another oath-taking body, juries developed the ability to reason through issues over time. While the jury had ancient origins dating back to the Anglo-Saxons, the traditional form of trial by jury familiar today (namely, the smaller 'petty jury' as opposed to a 'grand jury') first arose in criminal cases around 1220 following a decision by the Catholic Church five years earlier to

295. *See* SIMPSON, *supra* note 21, at 138.
296. BAKER, *supra* note 1, at 79.
297. Teeven, *supra* note 110, at 40.
298. *Id.*
299. *Id.*
300. *See* BAKER, *supra* note 1, at 81.
301. IBBETSON, *supra* note 19, at 33.

stop participating in ordeals.[302] In early medieval common law, issues were originally called upon primarily in a criminal trial, and usually in response to a defendant pleading not guilty.[303] . The sheriff used a writ of *venire facias* to summon the jurors—twelve men unrelated to the parties—to court.[304]

While pleading shaped the question(s) put to the jury, once the question was posed, it was for the jury to determine the matter.[305] The jury could use local standards to answer the question, and they could do so without concern that their methods or answer might alter the law.[306] The potential arbitrariness of these standards may explain a fourteenth-century statement that plaintiffs sometimes preferred wager law over jury trials in cases of debt.[307] After all, defendants with credibility issues in small communities likely had a harder time finding neighbors willing to assist with their case.

The role of the jury in the early common law, like the role of wager of law, in effect took decision-making out of the hands of judges. Even when juries wanted to ask a judge a legal question, the bench was often relucent to indulge the jury, lest it force the court to make a legal statement on the record.[308] Judges could give unrecorded directions to get around this risk, and through such directions, avoided making a statement that might become recorded precedent for later cases.[309]

The discussion in this Part shows that the trial procedures used in early common law contract litigation encouraged a procedural and formal approach to contract dispute resolution. The concept of contract did not change because there were few opportunities for courts to try and change it. Procedural legal pleadings did not give rise to discussions of fact and how principles of law might apply to facts. Indeed, the very notion of a fact as a concept was a later development. The system of proofs both deterred litigation and, when used, allowed defendants and courts to avoid legal reasoning altogether. Even the jury trial, although it could involve argumentation, was far less directed and structured than jury trials today. Therefore, rules and principles did not uniformly develop there either. Moreover, because jury reasoning was not legal reasoning and was not recorded as such, opportunities to substantively develop the law of contract or even challenge the nature of the concept did not arise then as it later would.

---

302. *See* BAKER, *supra* note 1, at 80.
303. *Id.*
304. *Id*.
305. PLUCKNETT, *supra* note 10, at 120.
306. *See* BAKER, *supra* note 1, at 87.
307. PLUCKNETT, *supra* note 10, at 116 n.4.
308. BAKER, *supra* note 1, at 88.
309. *Id.* at 89.

VI. COURT REPORTING AND TREATISE WRITING

The earliest recorded judge statements come from the 1250s.[310] A generation or so later arose the series of recordings known as Year Books.[311] The Year Books ran up until the mid-sixteenth century.[312] Historically, the view was that these reports were primarily official documents.[313] The majority view today is that the Year Books were by and for the legal profession.[314] As Plucknett describes it, the Year Books during the time of Edward III "resemble not so much the modern law report as a professional newspaper which combines matters of technical interest with the lighter side of professional life."[315]

The professional nature of the Year Books meant that they were not a means for the development of substantive jurisprudence. Rather, the role of these reports was to assist lawyers with writs and pleadings, first and foremost, for these were the two most important aspects of a lawyer's artform. To the extent that these reports assisted in the development of law, they did it in a way which was not binding, and they talked about matters which were neither conceptual nor substantive on matters of contract law.[316]

Case reporting was, consequently, limited in its ability to serve as a basis to develop law. This limit, however, is unsurprising given formation of precedent as we understand it was not the purpose of case reporting. As Milsom has noted:

> A court in the Year Book period, let alone at any earlier time, knew even less than today what had really happened [in a particular case]; and in one respect the procedural framework was less deceptive. Judges could not in general state what look like given facts and then seem, as a separate process, to draw from them legal conclusions; they could at best pronounce upon a single hypotheses: if this, then that . . . . Latent in this rightness were questions which became separated: truth in fact, and justice in law. This separation, and the true beginnings of the law as an intellectual system, could only be brought about by the possibility of more detailed assertions than the blank denial.[317]

---

310. *Id.* at 189.

311. *Id*.

312. PLUCKNETT, *supra* note 10, at 273. Arguably the Year Books did not end here, as ostensibly they were simply private recordings of what was said in court used to assist lawyers in their profession.

313. *See* BAKER, *supra* note 1, at 189.

314. *Id*.

315. PLUCKNETT, *supra* note 10, at 270.

316. *Id.* at 272; *See also* BAKER, *supra* note 1, at 190.

317. *See* S.F.C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW 187–88 (1985).

This same general description could also be applied to the Register of Writs,[318] the Abridgements of cases,[319] or copies of pleadings which also were popular during the period between the eleventh and sixteenth centuries. Each served primarily an educational rather than jurisprudential purpose. The target audience was students and the bar, not the bench. The advancement of a jurisprudence which would permit the creation of a modern conceptual notion of contract was largely foreclosed because the method of reasoning which would allow one to speculate on conceptual matters was not necessary for parties to succeed in litigation or for judges to determine cases. The facts of cases were not recorded for judges to discover conceptual legal principles for application in later cases. While there was norm and strong preference to defer to similarly decided cases, the absence of recorded precedent as we know it resulted from an early common law system and tradition which had its own internal formal logic. That logic permitted development, but when such development occurred, it generally did so far more gradually relative to legal development today.

The absence of commentaries dealing specifically with contract law as its own body of law also meant that there was less of a coherent basis on which to develop that body of law. For example, there was no published treatise dealing solely with common law contract as a distinct area of law until almost the nineteenth century. In 1790, Powell published *Law of Contracts and Agreements* in which he comprehensively sought to discuss contract law.[320] St. Germain's *Doctor and Student* and other earlier treatises did discuss contracts several centuries before,[321] but such texts considered contracts as a small part in a general survey of law. After Powell's text, it took another seventeen years for the publication of the next contract law treatise.[322] Even once such commentaries were written and published, up until the twentieth century they were "slight" by contemporary standards.[323] In other words, the treatises which dealt with contract as a distinct subject matter did not exist between the eleventh and mid-sixteenth centuries.

The discussion in this Part shows that, during the early common law, the manner of recording and transmitting legal knowledge did not aim to develop a broader conceptual, theoretical, or substantial understanding of contract. Legal writing from that time, in and out of the courtroom, does not show lawyers, judges, or commentators thinking about contract as a broad separate area of law worthy of its own literature. The manner of recording legal matters attended to the needs of the legal profession first and foremost. Lawyers were the ones who wrote the legal literature, retained possession of it, and transmitted it. Their motivation was not to record precedent for use in later cases. Instead, legal

318. PLUCKNETT, *supra* note 10, at 276.
319. *Id.* at 273–75.
320. *See* GORDLEY, *supra* note 11, at 134; *see also* MILSOM, *supra* note 317, at 195.
321. *See* SIMPSON, *supra* note 21, at 377.
322. See MILSOM, *supra* note 317, at 195–96.
323. *See* BAKER, *supra* note 1, at 372.

writers focused on those skills—particularly knowledge of writs and pleadings—which were most fundamental to courtroom success. This practical approach meant that broad theoretical considerations were relatively absent in early common law contract. Surprisingly, even without the canons of precedent as we know it, early common law contract hastened in its development. Indeed, in some ways it was more stable than contract law is today. However, this was because of the system of writs, pleadings, and proofs which buttressed a formal body of contract law.

CONCLUSION

Modern contract law arose from historical processes and developed through case law, which is a necessarily selective reading of the past. Modern understandings of contract law, however, are often so selective that they do not consider early common law contract and its development in the medieval period at all. That development demonstrates a body of contract law based on first principles, and one which focuses largely on rules of form and procedure to provide litigants a means of dispute resolution. Understanding early common law contract allows one to see that, at least historically, formal and procedural aspects of contract law were its essence, and not substantive doctrines and rules which are the focus of attention for contract lawyers and students today.