Landmark Cases in the Law of Contract

Edited by

Charles Mitchell and Paul Mitchell

OXFORD AND PORTLAND, OREGON
2008

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

Hart Publishing, 16C Worcester Place, OX1 2JW
Telephone: +44 (0)1865 517530 Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-759-9

Typeset by Hope Services Ltd, Abingdon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Preface

The essays in this collection, like the essays in the companion volume, *Landmark Cases in the Law of Restitution* (2006), grew out of papers presented at a symposium held at the School of Law, King's College London. We gratefully acknowledge the School's financial assistance.

As with the earlier collection, we gave authors a free choice of case, and complete freedom of method in how to approach their material. The results are predictably diverse: the cases range from the early 18th- to the late 20th-centuries, and deal with an array of contractual doctrines. Some of them call for their case to be stripped of its landmark status (*Smith v Hughes*), whilst others argue that it has more to offer than we have previously appreciated (*Suisse Atlantique*, among others).

But the essays also, perhaps surprisingly, share several common themes. Thus, mundane factual situations have frequently triggered elaborate legal responses (as, for instance, in *Coggs v Barnard*, *Pillans v Van Meirop* and *Johnson v Agnew*). Similarly, otherwise unremarkable transactions such as taking out an insurance policy (*Carter v Boehm*), hiring a theatre (*Taylor v Caldwell*), or a boat (*The Diana Prosperity*) can be thrust into the legal spotlight by external events. There is no need for the parties to be trying to achieve something novel for their contract to become the start of a landmark case.

Another striking theme is the influence of judicial personality and technique. In several cases, what made the decision a landmark was that individual judges had chosen to go beyond the arguments of counsel and develop the law as they felt appropriate. They might carry their brethren along with them (as in *Hochster v De La Tour*) or they might not (*Coggs v Barnard*). There was also a similarity about the kind of arguments used as catalysts for change. Appeals to 'reason' have flourished, perhaps inspired by Lord Mansfield's example, as have invocations of the Civil law (*Taylor v Caldwell*), even if they did not make it to the final draft of the judgment (*Coggs v Barnard*).

A further recurrent and fundamental argument, which has not been universally successful, concerns the role of contract law in facilitating commercial transactions. Some of our cases expressly acknowledge that contract law should fit commercial expectations: Lord Mansfield was probably the most famous exponent of this view (*Pillans v Van Mierop, Carter v Boehm, Da Costa v Jones*), but Lord Campbell, inspired by Mansfield, took the same line (*Hochster v De La Tour*). On the other hand, Lord Mansfield's innovative approach in *Pillans v Van Mierop* was short-lived, and the House of Lords in *Foakes v Beer* acknowledged that its decision was at odds with commercial expectations. The Court of Appeal's decision in *The Hongkong Fir* prioritised justice over

certainty, despite the commercial preference for the latter. On this fundamental question of policy the judges have been, and, we expect, shall continue to be, fundamentally divided. There can be little doubt that, as the courts continue to wrestle with this problem, the contract landscape will continue to change, and new landmarks will appear.

CHARLES MITCHELL
PAUL MITCHELL

Contents

Contributors

Michael Bridge is a Professor of Law at the London School of Economics and Political Science.

Roger Brownsword is a Professor of Law at King's College London.

David Ibbetson is Regius Professor of Civil Law at the University of Cambridge.

Michael Lobban is Professor of Legal History at Queen Mary University of London.

Catharine MacMillan is a Senior Lecturer in Law at Queen Mary University of London.

Gerard McMeel is a Professor of Law at the University of Bristol.

Charles Mitchell is a Professor of Law at King's College London.

Paul Mitchell is a Reader in Law at King's College London.

Donal Nolan is a Fellow in Law at Worcester College Oxford.

John Phillips is Professor of English Law at King's College London.

Warren Swain is a Lecturer in Law at the University of Durham.

Stephen Watterson is a Senior Lecturer in Law at the University of Bristol

in trust-based terms. In his *Actions upon the Case for Deeds*, for example, William Sheppard had included carrier's liability under the heading of 'Actions upon the Case for Breach of Trust',[123] and in *Boson v Sandford*[124] Holt CJ had mingled together the ideas of trust and contract in concluding that where goods were 'trusted' jointly to a group of carriers it followed that they were joint contractors so that all had to be joined as co-defendants. 'Every trust', it was said, 'supposes a contract'.[125]

All of these hints of a linkage between ideas of trust and contract were rather allusive, but in *Coggs v Barnard* the argument of Holt CJ had the makings of something a good deal more general. Moving outwards from *Megod's case*, his reasoning suggests that whenever one person trusts another to do something—or, we might put it in more modern terms, whenever one person relies on another to do something—that is sufficient to create a contractual relationship, entitling the party giving the trust to bring a contractual action against the defaulting party. The doctrine of consideration—and hence the underlying sense of the nature of contract—was in a state of fluidity at this time, some lawyers seeing it as the element which created a reciprocal relationship and some as simply a matter of evidence that there was a serious intention to be bound[126]; and if the seed planted by Holt had germinated and taken root we might suppose that this would have foreclosed the questions destined to be raised in 60 or more years later. But it was not to be so. As was to be found in the aftermath of *Pillans v van Mierop*, the reciprocal model of consideration was still well entrenched, and *Coggs v Barnard* was not to become the foundation decision of a new model of contractual liability.

[123] W Sheppard, *Actions upon the Case for Deeds* (London, 1675) 292; cf also 314.

[124] *Boson v Sandford* (1690) 3 Mod 321, 323; 87 ER 212, 213; 1 Shower KB 101, 104; 89 ER 477, 479. See too *Buckmyr v Darnall* (1704) 2 Lord Raym 1085, 92 ER 219, treating a relationship of trusting as contractual in the context of the Statute of Frauds.

[125] *Boson v Sandford* (n 124 above) (1690) 3 Mod 321, 323, 87 ER 212,13.

[126] See most clearly J Gilbert's treatise on contract, BL MS Harg 265 40–3. Ibbetson, *A Historical Introduction to the Law of Obligations* (n 15 above) 216–17, 237.

2

Pillans v Van Mierop (1765)

GERARD McMEEL

A. INTRODUCTION

TWO OF THE most striking topographical features of English contract law are the doctrines of consideration and privity. The former dominates the terrain of ascertaining which promises or agreements attract legal sanction. The latter remains the intellectual starting-point, despite vigorous statutory intervention, of determining the range of enforceability. I have chosen *Pillans v Van Mierop*,[1] a crucial case in the evolution of the doctrine of consideration, as my leading case. To those familiar with the story, my choice may appear startling and contrary (with the necessary Irish inflection). A case which has been repudiated, even (arguably) over-ruled, does not appear to be an ideal candidate even for the controversial appellation of 'leading' case. Nevertheless I intend to suggest that this case is central to the evolution of modern contract law, and, by extension, modern commercial and financial law. One could go further and say it is significant in the evolution of modern commerce and finance, which requires independent courts, eager to facilitate trade, and reasonably stable and ascertainable rules for the conduct of business. The spirit of *Pillans* is the enabling philosophy which has made English law, and Common law more generally, a valuable export commodity in itself, providing the governing regime for much of the world's trade and finance. Almost 250 years later the City of London is recognised as the world's leading financial centre. One is tempted to add the world's leading legal centre, with the services of the City's lawyers a significant export commodity in their own right.[2] The seeds are all there in *Pillans*.

A comparative lawyer cannot but help being drawn to the architectonic structures of consideration and privity, when seeking to orientate himself around

[1] *Pillans v Van Mierop* (1765) 3 Burr 1663, 97 ER 1035.

[2] According to a report by International Financial Services London, sponsored by the Commercial Bar Association (COMBAR), it is estimated that legal activity contributed £14.9 billion (1.4%) of the United Kingdom's GDP in 2004: (April 2007) *Counsel* 5.

English contract law.[3] However, I will suggest that—with apologies to Walter Bagehot—these doctrines constitute the 'dignified façade' of our law of contract. The 'efficient secret' lies elsewhere in English law's incredibly flexible and effective doctrines for ascertaining the content and ambit of an agreement. Lord Mansfield, the presiding genius of *Pillans*, was instrumental in promulgating the underlying philosophy and the techniques for implementing that philosophy in *Pillans* and other late 18th century authorities. The case is the *fons et origo* of the modern approach to formation and interpretation disputes.

A note about methodology: this is not an exercise in legal archaeology. I am interested in the broader legal and economic history rather than the particular circumstances of the merchants concerned in the case. This was probably a routine, if not mundane, transaction. I am also interested in the reception of *Pillans* and its ideas. Despite its relatively swift repudiation, it has always awakened the subsequent interest of jurists, probably because of the clarity and economy with which it handles a central debate in our contract law. In contract theory there is a tension between the conception of contract as promise (party intention) and the conception of contract as bargain (consideration). Lord Mansfield famously declared himself for the former.

The particular context was the recurrent problem of a party undertaking to be answerable for the liabilities of another. Where the primary debtor fails, incensed creditors will search around for another party to shoulder the burden. Allegations of such promises are so widespread that we have legislated twice in attempts to ensure that such actions can only proceed if the promise is evidenced by signed writing. We still have extant 17th century and 19th century legislation embodying this policy. However many financial instruments are effectively promises of this sort, and either via compliance with statute or circumvention, they are usually made to work.

1. The Rise of Northern European Commerce

The wider context is the rise of the modern economy, which expanded beyond trade in goods, and saw the development of modern financial instruments. The roots of this were diverse, but London was the eventual beneficiary of various political events. John Roberts, in his magisterial survey of world history, noted the shift of 'economic gravity' from Southern to North-Western Europe in the early modern period, during which time the foundations for the Industrial Revolution were laid and the apparatus of modern capitalism emerged[4]:

> One contribution to this was made by political troubles and wars such as ruined Italy in the early sixteenth century; others are comprised in tiny, short-lived but crucial pressures like the Portuguese harassment of the Jews which led to so many of them going, with their commercial skills, to the Low Countries at about the same time. The great commercial success story of the sixteenth century was Antwerp's, though it collapsed in political and economic disaster. In the seventeenth century Amsterdam and London surpassed it. In each case an important trade based on a well-populated hinterland provided profits for diversification into manufacturing industry, services and banking. The old banking supremacy of the medieval Italian cities passed first to Flanders and the German bankers of the sixteenth century, and then, finally, to Holland and London. The Bank of Amsterdam and the Bank of England were already international economic forces in the seventeenth century. About them clustered other banks and merchant houses undertaking operations of credit and finance. Interest rates came down and the bill of exchange, a medieval invention, underwent an enormous extension of use and became the primary financial instrument of international trade.

The Portuguese Jews were also in London, together with Huguenots and a myriad of other nationalities—London and Great Britain taking, as so often, an economic benefit from the intolerance of other regimes. On the accession of George III in 1760 (five years before *Pillans*) some 250 of the 810 merchants who kissed His Majesty's hand had foreign surnames.[5] Neither of the principal party names in our case has an Anglo-Saxon ring. This too has been the experience of the Commercial Court since its inception, with the overwhelming majority of cases featuring one foreign party, and a majority involving entirely overseas entities.[6]

2. The Emergence of a Law of Contract

The story of the emergence of modern contract law is the subject of extensive literature.[7] For our purposes it is worth noting that the old action of covenant to some extent embodied a conception of contract as promise. However, access to the King's central courts was soon limited by the insistence that such promises must be evidenced by a sealed deed.[8] This practice still underlies the formal

[3] The authors of the leading German comparative text say of English lawyers: 'Some see the doctrine of consideration as an indispensable and characteristic feature of English law, the jewel in the crown. Others, noting that systems on the Continent get by quite well without it, conclude that it could be done away with in England too'. K Zweigert and H Kotz, *An Introduction to Comparative Law*, T Weir (trans), 3rd edn (Oxford, Oxford University Press, 1998) 398. Whilst Lord Wright (and his essay 'Ought the Doctrine of Consideration to be Abolished from the Common Law' (1936) 49 *Harvard Law Review* 1225) is cited as an example of the latter persuasion, no writer is cited from the former camp.

[4] JM Roberts, *The Penguin History of the World* (London, Penguin Books Ltd, 1995) 536.

[5] D Kynaston, *The City of London, Volume I: A World of Its Own 1815–1890* (London, Chatto & Windus, 1994) 11.

[6] Sir R Goff, 'Commercial contracts and the Commercial Court' [1984] *Lloyd's Maritime & Commercial Law Quarterly* 382.

[7] See JH Baker, *An Introduction to English Legal History*, 4th edn (London, Butterworths, 2002) chs 18–20; AWB Simpson, *A History of the Common Law of Contract—The Rise of the Action of Assumpsit* (Oxford, Oxford University Press, 1975).

[8] Baker, *An Introduction to English Legal History* (n 7 above) 318–21.

branch of our law of contract, and is the method generally employed for dispositions of land, but is considered inapt for commerce. The watershed moment was the eclipsing of the old action of debt by the later action of *assumpsit* ('he undertook'). The former was attended by the ancient mode of proof known as 'wager of law',[9] whereas the latter entailed the more popular procedure of trial by jury. *Assumpsit* had gradually taken on the business of contractual misfeasance, then nonfeasance, and eventually the non-payment of money.[10] The triumph over debt is associated with *Slade's case*[11] at the beginning of the 17th century.[12]

With respect to the central question of the requirements for a binding contract, English law, with its discrete forms of action, had evolved at least three, originally clearly distinct, tests.[13] First, in the old action of covenant there developed the jurisdictional pre-condition of a sealed deed. Secondly, in the old form of action of debt the notion of quid pro quo (which many modern lawyers assume is synonymous with consideration).[14] Thirdly, *assumpsit*, which is the source of the doctrine of consideration.[15] This doctrine in its classical sense requires an element of reciprocity before a promise is legally recognised. There must be some requested or stipulated counter-promise or counter-performance for a promise to be enforced. A number of subsidiary propositions are often said to be derived from the core doctrine. First, consideration must be contemporaneous and not past. Secondly, consideration must move from the promisee (a vital step in privity reasoning). It is nevertheless said that there is no enquiry into the adequacy of the exchange stipulated. A penny or a peppercorn is sufficient.

The doctrine incorporates the conception of contract as exchange at the heart of English law. There are obviously good reasons for such a test. Bargained for promises are more likely to indicate a serious intention to be bound than a casual, gratuitous undertaking. But as the sole test for the enforceability of informal promises in English law, it has always hampered judges who are alive to the wider question: 'Is this a promise the court should enforce?'

Later in the 17th century, in the wake of *Slade's case*,[16] the legislature imposed a further requirement for an enforceable contract, namely that certain

[9] Baker, *An Introduction to English Legal History* (n 7 above) 321–6. For wager of law see 4–6, and for the rise of the jury 72–4.

[10] J Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill, University of North Carolina Press, 2004), 80–82.

[11] *Slade's case* (1603) 4 Co Rep 91a, 92b; 76 ER 1072.

[12] Baker, *An Introduction to English Legal History* (n 7 above) ch 19. For *Slade's case* see 341–5 and also J Oldham, *English Common Law in the Age of Mansfield* (n 10 above) 82–3.

[13] Sir W Holdsworth, *A History of English Law* (London, Methuen & Co, 1903–72) VIII.1-48.

[14] Baker, *An Introduction to English Legal History* (n 7 above) 322–3.

[15] Baker, *An Introduction to English Legal History* (n 7 above) 339–41. Assumpsit was broader in some respects than the modern law of contract, and obviously contained the roots of much of the common law of restitution. For another example of a non-contractual deployment of the form of action (albeit consideration was still an issue) see its use in the collection of port fees in respect of Great Yarmouth in *Mayor of Yarmouth v Eaton* (1763) 3 Burr 1402, 97 ER 896, where Lord Mansfield—two years before *Pillans*—found the 'making of a port itself is sufficient consideration'. (at 1406).

[16] *Slade's case* (see n 11 above) *ibid.*

promises (including to answer for another's debt) had to be evidenced by signed writing: Statute of Frauds 1677, section 4. Both the doctrine of consideration and the 1677 Act feature in *Pillans*, and the latter is put to interesting use.

3. The Emergence of Commercial Law

English substantive commercial law basically originated in the 18th century. Whilst some specialist issues of mercantile law—especially in relation to maritime events—may have deeper roots, the principles and rules in respect of insurance, bills of exchange and other commercial transactions only appear with clarity in this era. Revisionist accounts of our legal history have persuasively scotched the myth of a reception of substantive legal rules from a supposedly coherent medieval *lex mercatoria*.[17]

In contrast to subjects such as land law where the source of our concepts and doctrines are largely unknown, the founders of our commercial law are clearly identifiable. Milsom, considering our ability to identify innovation at Common law (as opposed to in Chancery), observed[18]:

> The common law itself is to a surprising degree anonymous, largely because the intellectual initiative has come from the bar rather the bench and has been directed to the single case rather than to the state of the law. In the single case the difficulty has always been to escape from the past, and there has been little opportunity to look to the future. Only where events or a bold hand had produced a clean slate, as with the mercantile work of Holt and Mansfield, could individuals in some sense mould the law.

My chosen case, *Pillans*, is a brilliant example of Lord Mansfield's 'bold hand' cutting free from the past, with his eye firmly on the future.

His predecessor as Chief Justice of the King's Bench, Holt, is perhaps most famous for his taxonomy of bailments in *Coggs v Barnard*.[19] Traditionally Holt CJ has received a bad press for his hostility to promissory notes, principally in *Clerke v Martin*[20] and *Buller v Crips*,[21] albeit his mercantile reputation on this score has recently received a sympathetic rehabilitation from Professor Rogers.[22] Nevertheless, Parliament still reversed the result of these decisions in

[17] The two principal accounts are JH Baker, 'The Law Merchant and the Common Law before 1700' (1979) 38 *Cambridge Law Journal* 295 and JS Rogers, *The Early History of the Law of Bills and Notes—A Study of the Origins of Anglo-American Commercial Law* (Cambridge, Cambridge University Press, 1995) 12–31. See also J Baker, 'The Law Merchant as a Source of Law' in G Jones and W Swadling (eds), *The Search for Principle* (Oxford, Oxford University Press, 1999) 79.

[18] SFC Milsom, *Historical Foundations of the Common Law*, 2nd edn (London, Butterworths, 1981) 95.

[19] *Coggs v Barnard* (1703) 2 Lord Raym 909, 92 ER 107. For discussion see G McMeel, 'The redundancy of bailment' [2003] *Lloyd's Maritime & Commercial Law Quarterly* 169, 172–5. See also David Ibbetson's contribution to this volume at ch 1.

[20] *Clerke v Martin* (1702) 2 Lord Raym 757, 92 ER 6.

[21] *Buller v Crips* (1703) 6 Mod 29, 87 ER 793.

[22] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 173–86.

the Promissory Notes Act 1704, which permitted promissory notes to be negotiated (transferred) and sued upon in the same way as bills of exchange.

In contrast, Lord Mansfield's reputation in commercial law is virtually unblemished.[23] William Murray, that rare but splendid creature, a Scottish Tory, was Solicitor-General from 1742, and from 1754 Attorney-General, until his appointment as Chief Justice of the King's Bench two years later. It is impossible to improve on Buller J's fulsome tribute to Lord Mansfield in 1787 in *Lickbarrow v Mason*,[24] a seminal case in establishing that bills of lading were documents of title to the goods shipped. Buller J described the hesitancy of judges before the last 30 years (being the period of Lord Mansfield's tenure from 1756[25]) to determine the general principles applicable to mercantile questions. However, since the mid-18th century: 'the commercial law of this country has taken a very different turn from what it did before'. Buller J continued[26]:

> Before that period we find that in the courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated and reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of human understanding. I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may truly be said to be the founder of the commercial law of this country.

Lord Mansfield's tenure was fundamental to the establishment of the governing principles of carriage of goods, (marine) insurance, bills of exchange and promissory notes, (to a lesser extent) sales, and also—as I hope to demonstrate—the basic techniques for handling commercial documents which remain essential in commercial and financial contexts. In *Pillans* he boldly took on the doctrine of consideration, which had the potential to frustrate the recognition of seriously-intended undertakings in a commercial context.

[23] The current biographies are CHS Fifoot, *Lord Mansfield* (Oxford, Oxford University Press, 1936) and E Heward, *Lord Mansfield* (Chichester, Barry Rose, 1979). See also Lord Campbell, *The Lives of the Chief Justices of England—From the Norman Conquest till the Death of Lord Mansfield* (London, John Murray, 1849) vol II chs 30 to 40. Professor Atiyah suggests in *The Rise and Fall of Freedom of Contract* (Oxford, Oxford University Press, 1979) 121 that 'an adequate biography is still awaited'.

[24] *Lickbarrow v Mason* (1787) 2 Term Rep 63, 100 ER 35 (KB). There were later proceedings in Exchequer Chamber (1790), House of Lords (1793), and again before the King's Bench (1793).

[25] Mansfield was in post from 1756 to 1788, and the tribute is more moving as the court sat without Mansfield, who was too ill to attend. Interestingly, Mansfield was manoeuvring for Buller J to be his successor: Campbell, *The Lives of the Chief Justices of England* (n 23 above) 2.549—2.550.

[26] *Lickbarrow v Mason* (1787) 2 Term Rep 63, 73; 100 ER 35. Lord Campbell was similarly fulsome (in respect of the law of bills) when he wrote: 'Lord Mansfield first promulgated many rules that now appear to us to be as certain as those which guide the planets in their orbits'. Campbell, *The Lives of the Chief Justices of England* (n 23 above) 2.407.

B. THE CASE

1. A Note on Terminology

The bill of exchange was once the principal financial instrument facilitating exports and imports, as well as a widespread payment mechanism in domestic situations. Indeed, it is difficult for us in the modern economy, where paper money has yielded to plastic cards and electronic fund transfers, to recapture a world of limited specie and emerging bank notes, where private bills were a significant—if not principal—mode of settling debts.[27] However in the 21st century the use of such instruments is no longer widespread and the magnificent gothic masterpiece of the Bills of Exchange Act 1882 sits broodingly in the statute-book, only rarely consulted. Even the bill's broken-backed cousin, the cheque, is a comparative rarity. Modern financial instruments and electronic payment methods have largely taken their place.

Accordingly, the terminology of the law of bills is no longer common parlance. It is useful to set out the players and the terminology in outline. The original rationale of bills of exchange was to make use of credit which one party (the drawer) had in the hands of another person (the drawee), especially where the two parties were situated in different countries. However the existence of a credit in the hands of a drawee is not necessary for a valid bill.[28] Accordingly, the 'drawer' is the author of the bill who addresses it to another, the 'drawee', requiring the latter to make payment usually to a named payee, or bearer. If the drawee accepts this order he becomes an 'acceptor'.[29] The 1882 Act also distinguishes between 'inland bills' and 'foreign bills'.[30] *Pillans* concerned the latter and more ancient species.

2. The Factual Matrix

The case's full title is *Pillans and Rose v Van Mierop and Hopkins*. The usual abbreviation may be misleading, as it is likely the names of each party reflect a

[27] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 195, describes the 18th century context: 'Merchants and others would regularly have to take bills and notes as a form of payment, since there frequently was no other available payment medium'.

[28] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 198: 'The main point of bills was that they permitted a person in one location to make use of funds in the hands of a correspondent in another location'.' However, in *Pillans v Van Mierop* itself the judges treated as irrelevant the question of whether White & Co had any funds to its credit with Van Mierop and Hopkins, that is whether he had any 'effects' with that firm.

[29] The modern definition is: 'A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer'. Bills of Exchange Act 1882, s 3(1). By s 17(1): 'The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer'.

[30] Bills of Exchange Act 1882, s 4.

partnership or firm name.[31] Both merchant and banking enterprises were described as 'houses', although it would be ahistorical to assume there was a perceived dichotomy between mercantile and financial functions, and certainly no regulatory fissure required.

A course of correspondence took place between three merchant houses in Ireland (presumably Dublin), Rotterdam and London respectively. An Irish merchant, White—apparently trading as 'White & Co' (although it is not clear he had any partners in business)—wished to make a payment to one Clifford, presumably another merchant, of £800. In order to do so he wished to draw on Pillans and Rose, a merchant house in Rotterdam, the plaintiffs. He wrote to Pillans and Rose asking them 'to honour his draught for 800l. payable ten weeks after'. They agreed to this proposal, in the words of Wilmot J, 'on condition that they will be made safe at all events'.[32] Accordingly, White was the proposed drawer, Pillans and Rose the drawees and potential acceptors and principal payers, and Clifford was the payee. The use of Pillans and Rose suggests Clifford was either based in, or required payment in, Rotterdam. There is no reference in the case to the underlying transaction which had generated or was to generate White & Co's indebtedness to Clifford. We can speculate that it was probably an import of some Dutch produce into Ireland. What is striking is that the judges were content to focus on the financing arrangements, unconcerned with the underlying deal.

How were Pillans and Rose to be reimbursed for the credit they were extending to White & Co? He proposed giving them credit at a 'good house' in London, or whatever method of reimbursement they chose.[33] In response Pillans and Rose stipulated for a 'house of rank' in London as a condition of their accepting the bill. White & Co named the defendants, Van Mierop and Hopkins, as a suitable house. Pillans and Rose then honoured the 'draught', that is, they accepted it, and became liable as acceptors in respect of it to Clifford or to any person to whom he negotiated the draft, with payment due some 10 weeks later.

3. The Correspondence

Various letters were read in evidence. Indeed, from the report it appears that the evidence in the case was either exclusively or at least principally documentary in nature. There is no mention of witness evidence in the report, and certainly no

[31] *Pillans* (n 1 above) 3 Burr 1663, 1669 in his judgment, Lord Mansfield describes the defendants as both 'the house of Van Mierop' and 'Van Mierop and Company'.

[32] *Pillans* (n 1 above) 3 Burr 1663, 1672.

[33] This is based on the account of the letter in the report. In his judgment, Lord Mansfield states, somewhat differently, that '[t]he first proposal from White, was "to reimburse the plaintiffs by a remittance, or by credit on the house of Van Mierop"'. *Pillans* (n 1 above) 3 Burr 1663, 1669. Actual reimbursement by a remittance would obviously be comprehended by any mode of reimbursement they chose.

significance was attached to any oral evidence. It seems to have all turned on the documents. This is a common characteristic of modern commercial litigation, and a reflection of the prominence given to contemporaneous mercantile records. It also indicates English law's characteristic focus on what the documents actually say, as opposed to what their authors may have intended when they wrote or signed them.

There were several key letters. First, a letter dated 16 February 1762 from White & Co to Pillans and Rose post-dated Pillans and Rose's honouring of the bills drawn upon them by White & Co, payable to Clifford, but was used to evidence the arrangement. Secondly, a letter from Pillans and Rose to Van Mierop and Hopkins informing them of the arrangement and enquiring

> whether they would accept such bills as they, the plaintiffs, should in about a month's time draw upon the said Van Mierop's and Hopkins's house here in London, for 800l. upon the credit of White.[34]

Thirdly, and at the same time White & Co to Van Mierop and Hopkins, presumably in similar terms, albeit presumably requesting that the house so accommodated him. Fourthly, and crucially, Van Mierop and Hopkins wrote to Pillans and Rose on 19 March 1762 agreeing to honour the bill drawn on the account of White.[35] In the meantime, White 'failed'—that is, became bankrupt—before either any 'draught' had been drawn or indeed Pillans and Rose had forwarded any 'draught' to Van Mierop and Hopkins. Fifthly, Van Mierop and Hopkins wrote to Pillans and Rose subsequently to say 'that White had stopt payment' and desiring Pillans and Rose not to draw, as they could no longer accept their 'draught'. Finally, Pillans and Rose responded to Van Mierop and Hopkins, uncompromisingly insisting 'that they should draw on them, holding them not to be at liberty to withdraw from their engagement'.

4. The Initial Proceedings and Counsels' Arguments

At the trial in 1764 before Lord Mansfield, a verdict was entered for Van Mierop and Hopkins. It appears that the trial below was more focused on an allegation of fraud, than the technical doctrine of consideration.[36]

On 25 January 1765, the plaintiffs, represented by the Attorney-General Norton, together with Mr Walker and Mr Dunning, moved for a new trial on the basis that the verdict was against the evidence. This preliminary hearing took place on 11 February 1765, when the correspondence was read.

[34] *Pillans* (n 1 above) 3 Burr 1663, 1664. The quote marks are in the report, but the language is obviously suggestive of a paraphrase of the letter's text rather than a literal transcription.

[35] See *Pillans* (n 1 above) 3 Burr 1663, 1672, where Wilmot J paraphrases a response '"that they will"'.

[36] Cf Fifoot, *Lord Mansfield* (n 23 above) 130.

(a) The Arguments of Van Mierop and Hopkins

At that hearing, counsel for the defendants, Van Mierop and Hopkins, were Mr Serjeant Davy and Mr Wallace. They made much of the fact that Pillans and Rose had already effectively extended credit to White & Co for longer than a month[37] prior to Van Mierop and Hopkins' indicating a willingness to accept the proposed reimbursement bill. Accordingly, this was an undertaking to pay another's debt, which required consideration and the apparent consideration was past.[38]

(b) The Arguments of Pillans and Rose

In response Pillans and Rose's counsel identified the consideration as follows:

> the liberty given to the plaintiffs 'to draw upon a confirmed house in London,' (which was prior to the undertaking by the defendants,) was the consideration of the credit given by the plaintiff to White's draughts; and this was good and sufficient consideration for the undertaking made by the defendants.

They continued: 'It relates back to the original transaction'. With respect to the then Attorney-General, this was unconvincing. It failed to identify any consideration moving from Pillans and Rose to Van Mierop and Hopkins. Pillans and Rose were exposed by having already extended credit to White. Counsel was, however, able to point out, that

> [i]f any one promises to pay for goods delivered to a third person; such promise being in writing is a good one.

However, that did not circumvent the timing problem. They could, in any event, submit that the promise being in writing at least satisfied the requirement of the statute, referring to the Statute of Frauds 1677.

(c) Referral to the Full Court of King's Bench

Despite the patent weakness of the plaintiffs' arguments, and perhaps because they could hardly refuse the Attorney-General (a post which Mansfield previously held), Lord Mansfield and Mr Justice Wilmot decided that the matter should be argued again the next term before the whole Court of King's Bench. The actual arguments raised by the plaintiffs did not feature in the reasons given for new hearing. Lord Mansfield pointed out that the 'nudum pactum' or past consideration argument had not been raised at trial, where he had been satisfied

[37] The period between White's letter of 16 February 1762 and Van Mierop's and Hopkins's letter of 19 March 1762.

[38] Citing authority, including *Hayes v Warren* (1731) 2 Strange 933, 93 ER 950. Fifoot notes that most of the other authorities were concerned with guarantees, and could therefore be distinguished: Fifoot, *Lord Mansfield* (n 23 above) 130.

that in the absence of fraud, the defendants' clear written undertaking should be given effect to:

> for that they had engaged under their hands in a mercantile transaction, 'to give credit for Pillans and Rose's reimbursement'.

Mr Justice Wilmot suggested that 'the least spark of a consideration will be sufficient'.[39] Both judges insisted that as a mercantile transaction it was quite different to a naked promise to answer for the debts of another. Lastly, Lord Mansfield concluded this preliminary hearing by observing:

> A letter of credit may be given as well for money already advanced, as for money to be advanced in the future.

(d) The Argument before the Court of King's Bench

Submissions took place over 29 and 30 April 1765. The plaintiffs were again represented by the Attorney-General Norton, together with Mr Walker and Mr Dunning, who repeated their argument—namely, that it was sufficient for consideration to have moved from White to Pillans and Rose, and that it was not necessary for it to move from Van Mierop and Hopkins. The undertaking of the latter was sufficient to make their promise irrevocable. They sought to distinguish the cases relied upon by the defendants as 'strange cases', lacking 'solid and sufficient reasons' and 'no meritorious consideration at all'.[40]

Serjeant Davy appeared only on the second day, with Mr Wallace holding the fort for the defendants on the first. Davy tried a different tack to start with, namely a fraudulent concealment of facts. Van Mierop and Hopkins were said to have been misled into believing that their undertaking was for a future credit, rather than to provide security for credit already advanced to White. If they had known, it would have been clear that Pillans and Rose were already nervous about whether White was good for the money. Such concealment vitiated the contract. Davy insisted all letters of credit related to future credit. He then repeated his 'promise to pay the debts of another' and 'past consideration' arguments. Lord Mansfield then interjected, asking whether 'any case could be found, where the undertaking holden to be nudum pactum was in writing'.[41] Serjeant Davy had no ready, or at least precise, riposte:

> It was anciently doubted 'whether a written acceptance of a bill of exchange was binding, for want of consideration,' It is so said, somewhere in Lutwyche'.[42]

That 'somewhere' is striking.[43]

[39] *Pillans* (n 1 above) 3 Burr 1663, 1666.

[40] *Pillans* (n 1 above) 3 Burr 1663, 1667.

[41] *Pillans* (n 1 above) 3 Burr 1663, 1667.

[42] *Pillans* (n 1 above) 3 Burr 1663, 1669.

[43] Compare the lack of a ready answer in *Bilbie v Lumley* (1802) 2 East 469, 102 ER 448, which set English law on a restrictive approach to the recovery of payments made under a mistake of law for almost two centuries, until *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

5. The Judgment of the Court of King's Bench

(a) Lord Mansfield

It seems from the report that Lord Mansfield commenced his judgment almost immediately after Serjeant Davy's vague final submission. This remarkable judgment occupies just over a page of the law report. His Lordship commenced: 'This is a matter of great consequence to trade and commerce, in every light'.

Lord Mansfield accepted that fraud or mala fides would have vitiated the contract. However the correspondence did not suggest that Pillans and Rose doubted White's ability to pay. Accordingly, the matter was one of law. It is noteworthy that in respect of the law of vitiating factors, both Serjeant Davy and Lord Mansfield were ad idem that fraudulent concealment by the plaintiffs would have vitiated the contract.[44] This is a precursor of, and consistent with, another leading case decided the following year. In 1766 in *Carter v Boehm*[45] Lord Mansfield's philosophical underpinning was a broad principle of good faith in commercial transactions. Whilst *Carter v Boehm* concerned a contract of insurance, Lord Mansfield's judgment insisted that all contracts were subject to a duty of good faith. However, subsequently English contract and commercial law developed differently, with no general principle of good faith in mercantile dealings being recognised either in the formation or performance of contracts.[46]

The characterisation of the matter as one of law entailed that at the new trial the matter could be withdrawn from the jury, who might otherwise reach another inconvenient verdict. Furthermore, this was not a question of ordinary law, but one of the 'law of merchants'. The law of merchants and the Common law were both clear that evidence was not required to prove the law of merchants. Lord Mansfield was able to pronounce it himself: 'A nudum pactum does not exist, in the usage and law of merchants'. Lord Mansfield continued in the famous passage from the case[47]:

> I take it, that the ancient notion of want of consideration was for the sake of evidence only: for when it is reduced to writing, as in covenants, specialties, bonds, &c. there was no objection to the want of consideration. And the Statute of Frauds proceeded on the same principle.

[44] *Pillans* (n 1 above) 3 Burr 1663, 1669. See also 1675 (Aston J). Compare Lord Mansfield a decade later in *Trueman v Fenton* (1777) 2 Cowp 544, 547; 98 ER 1232.

[45] *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162. Recently described as 'that *locus classicus* of insurance law from the Age of the Enlightenment'. See *Brotherton v Aseguradora Colseguros* [2003] EWCA Civ 705, [2003] 2 All ER (Comm) 298, [24] (Mance LJ). See further Chapter 3 (below).

[46] According to Lord Hobhouse in *Manifest Shipping Co Ltd v Uni-Polaris Ins Co Ltd, The Star Sea* [2001] UKHL 1; [2003] 1 AC 469, [45], 'Lord Mansfield's universal proposition did not survive. The commercial and mercantile law of England developed in a different direction preferring the benefits of simplicity and certainty which flow from requiring those engaging in commerce to look after their own interests'.

[47] *Pillans* (n 1 above) 3 Burr 1663, 1669.

> In commercial cases amongst merchants, the want of consideration is not an objection.

Accordingly, here Lord Mansfield runs together all written instruments, aligning bonds with covenants and specialties (which were enforced through the writ of covenant).

Lord Mansfield said it was irrelevant whether or not Van Mierop and Hopkins had any effects of White's in their hands.[48] Their acceptance of the bill was sufficient to make it a promise they could not thereafter retract. Furthermore, they were bound by the initial indication that they would accept the bill, even without completing the formality of accepting it by endorsing it with their signature. In a principle reminiscent of the maxim that 'equity regards as done that which ought to be done', Lord Mansfield held:

> If a man agrees that he will do the formal part, the law looks upon it (in the case of acceptance of a bill) as if actually done.[49]

Finally, to permit Van Mierop and Hopkins to retract was not to be countenanced: 'It would be very destructive to trade, and to trust in commercial dealing, if they could'.[50]

Lord Mansfield's facilitative philosophy could not be more emphatic. The policy choice is explicit. Commercial transactions are different. All serious promises and utterances, or at least those in writing, are to be given effect in that context. The doctrine of consideration is merely one of a number of methods of identifying a serious promise or utterance. Promises under seal and any unsealed writing were other alternative routes to enforceability.

The Statute of Frauds 1677 was pressed into service to bolster the argument. This 17th century legislation embodied a policy aimed at discouraging frivolous or mischievous law suits. Obviously it promoted certainty at the expense of justice in the individual case.[51] However in *Pillans*, rather than being understood as imposing an additional requirement for a binding contract in respect of the agreements falling under it, it was boldly said to evidence the fact that Parliament thought that writing alone would be sufficient.[52] It is easy to sympathise with this approach: the policy of the 1677 Act laid down a different test for enforceable contracts, based on signed writing rather than necessarily requiring a wax seal. *Pillans* was a conscious attempt to shift the law of formal contracts

[48] *Pillans* (n 1 above) 3 Burr 1663, 1669. See also at 1673 (Yates J) and 1675 (Aston J).

[49] *Pillans* (n 1 above) 3 Burr 1663, 1669. See also Yates J at 1674: 'A promise "to accept" is the same as an actual acceptance'.

[50] *Pillans* (n 1 above) 3 Burr 1663, 1670.

[51] For the history of the statute see Simpson, *A History of the Common Law of Contract* (n 7 above) 599–620.

[52] Conversely, Lord Mansfield was reluctant to permit the Statute of Frauds to be used as an instrument of fraud, particularly in the context of executory contracts of sale (governed by s 17): *Clayton the Younger v Andrews* (1767) 4 Burr 210, 98 ER 96. See also *Simon v Motivos* (1766) 3 Burr 1921, 97 ER 1170 (auction sales not within mischief of statute).

to embrace all signed written contracts, rather than drawing the line in the sand between deeds and all other agreements.[53]

It is this part of the case—assimilating written contracts to deeds—which attracted most controversy, and was eventually repudiated as a general principle of contract law. However in the context of finance and financial instruments, such as the modern incarnation of the letter of credit, the principle appears still to have force.

(b) Mr Justice Wilmot

Mr Justice Wilmot's judgment is the most substantial, and does not wear its considerable learning lightly. Like Lord Mansfield's, it has little to do with the preceding submissions of counsel. It ranges from the origins of the phrase 'nudum pactum' in Roman law, through the great continental jurists, Grotius and Puffendorff, via the civilian influenced Bracton, to the domestic case law.[54] The civilian jurisprudence suggested a rationale for consideration, which is still trotted out in law schools around the Common law world, that 'it was intended as a guard against rash inconsiderate declarations'.[55] Much of the final category of learning consisted of cases—both old and modern—which are 'strange and absurd'.[56] Mr Justice Wilmot refers to the relaxation of the past consideration rule where a request can be identified, and how the strictness of the rule was relaxed in cases where, for example, a claimant buried the defendant's son.[57] His Lordship observed: 'It has been melting down into common sense, of late times'.[58] This is very suggestive of the importance ultimately attached to rationality over authority by this court.

Curiously at this point Mr Justice Wilmot changes tack, and suddenly claims to be able to identify consideration in any event. The fact that once Van Mierop and Hopkins indicated that they would honour the bill, Pillans and Rose were precluded from calling on White for performance of his promise to give them

[53] Professor Simpson is notably sympathetic: Simpson, *A History of the Common Law of Contract* (n 7 above) 617–20.

[54] In delivering the unanimous opinion of the judges before the House of Lords in *Rann v Hughes*, Skynner CB was scathing of Wilmot J's scholarship: 'he contradicted himself and was also contradicted by Vinnius in his comment on Justinian'. (1778) 7 Term Rep 350n, 101 ER 1014.

[55] *Pillans* (n 1 above) 1670. Wilmot J's 'inconsiderate' is clearly intended as the modern 'ill-considered'. Wilmot J also cites Plowden 308b. There in 1565 in *Sharrington v Stotton* it was famously said that 'because words are often spoke or uttered by a man without great advisement or deliberation, the law has provided that a contract by words shall not bind without consideration'. However Plowden continued: 'But where the agreement is by Deed, there is more time for resolution'. This is not authority for a distinction between written contracts and oral contracts, but for the traditional English approach.

[56] *Pillans* (n 1 above) 3 Burr 1663, 1671. Wilmot J singled out *Hayes v Warren* (1731) 2 Strange 933, 93 ER 950 (a case on past consideration) and continued: 'I have a very full note of the case. The reason of the reversal of judgment was, "that it did not appear by the declaration, to be either for the benefit, or at the request of the defendant"'.

[57] *Pillans* (n 1 above) 3 Burr 1663, 1671.

[58] *Pillans* (n 1 above) 3 Burr 1663, 1672.

credit at a good house in London, was good consideration. Wilmot J concedes that this was a trivial suspension, but insists the law does not inquire into the adequacy of consideration. A more difficult objection to overcome (at least in settled modern doctrine) is that Van Mierop and Hopkins did not request any such forbearance. Furthermore, there is an element of circularity here. Perhaps recognising the weakness of this supposed consideration, Mr Justice Wilmot concludes by reverting to the language of internationalism and the imperatives of trade and commerce. In this respect he lent support to Lord Mansfield's bold re-drawing of the boundaries between formal and informal contracts.

(c) Mr Justice Yates

Mr Justice Yates agreed there should be a new trial: it was 'a case of great consequence to commerce'. In contrast to his preceding brother, his Lordship started instead with the question of whether there was in fact consideration, and concluded that there was. Any forbearance or loss, without necessarily benefiting the other party, would be sufficient. Mr Justice Yates then began to levitate with the aid of his own bootstraps:

> The credit of the plaintiffs might have been hurt by the refusal of the defendants to accept White's bills. They were or might have been prevented from resorting to him, or getting further security from him. It comes within the cases of promises, where the debtee forbears suing the original debtor.

This reasoning is obviously circular. If followed through, the weakest of reliance would justify the enforcement of any promise, regardless of whether it was in writing or not.

In the alternative Mr Justice Yates considered whether consideration was essential in the law of merchants. He reasoned:

> The acceptance of a bill of exchange is an obligation to pay it: the end of their institution, their currency, requires that it should be so.[59]

Accordingly as a matter of pleading, bills were treated as 'special contracts', that is, like deeds, whilst technically they were simple contracts, acceptance of such a bill was by the custom of merchants, a liability to pay.[60] Indeed, acceptance was not necessary: 'A promise "to accept" is the same thing as an actual acceptance'.[61] This judgment turns on the 'virtual acceptance' point and the custom which treated bills as specialties. However, Mr Justice Yates expressed no

[59] *Pillans* (n 1 above) 3 Burr 1663, 1674.

[60] This needs treating with caution. For pleading and the custom of merchants see Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 125–50 and 179, fn 38, where Rogers rejects the view that any 18th century judge regard a bill as a specialty, save as a metaphor.

[61] *Pillans* (n 1 above) 3 Burr 1663, 1674. An approach eventually rejected in *Johnson v Collings* (1800) 1 East 98, 102 ER 40 and *Bank of Ireland v Archer & Daly* (1843) 11 M & W 383, 152 ER 852. See also *Pierson v Dunlop* (1777) 2 Cowp 571, 98 ER 1246 (Lord Mansfield retreating on acceptance).

opinion on the wider question as to whether written mercantile contracts in general were enforceable even in the absence of consideration.

(d) Mr Justice Aston

Mr Justice Aston was the most succinct in his concurring judgment: this was a 'plain case' and that the undertaking to accept was sufficient for the bill to be enforced. 'This cannot be called a nudum pactum'. It was not necessary to show that the defendants had any effects of White's. There was no fraud and the defendants had full notice of the facts.[62] However, he did not explicitly concur with Lord Mansfield's broader proposition.

(e) Disposal

The court unanimously resolved to set the verdict aside, ordered a new trial and made the rule absolute.

6. The Backlash

(a) The written contract front

Pillans is sometimes said to have been overruled by the House of Lords in *Rann v Hughes*,[63] albeit may be safer to say that it is 'generally said to have been overruled' in that case on the point that writing is not an alternative test for enforcement to consideration in commercial cases.[64]

Rann v Hughes[65] is a strikingly different type of case. In its original enacted form section 4 of the 1677 statute explicitly extended to actions to sue an executor or administrator of a deceased's estate on a promise to pay 'out of his own estate', unless there was a memorandum in writing. The case concerned such a promise.[66] At a trial before Lord Mansfield in Westminster Hall in 1774 the jury found the promise had been made and awarded £483 damages. That was upheld by the full court of King's Bench, but reversed by the Exchequer Chamber.

[62] *Pillans* (n 1 above) 3 Burr 1663, 1675.

[63] *Rann v Hughes* (1778) 4 Brown PC 27, 2 ER 18 (submissions of counsel); 7 Term Rep 350n, 101 ER 1014 (opinion of the judges before the House of Lords).

[64] The more cautious formulation is Rogers's *The Early History of the Law of Bills and Notes* (n 17 above) 200, fn 22.

[65] *Rann v Hughes* (n 63 above) (HL). See Oldham, *English Common Law in the Age of Mansfield* (n 10 above) 84–7. Oldham also discusses the unreported, non-commercial *Losh's Case*, decided in 1775, between *Pillans v Van Mierop* and *Rann v Hughes*. It is also known as *Williamson v Losh*, and despite being unreported found its way into the late 19th century collection of contract cases by Harvard Law School Dean, CC Langdell, *A Selection of Cases on the Law of Contracts* (Boston, Little Brown & Co, 1871) 180, sandwiched between the better known authorities.

[66] For such promises generally see Simpson, *A History of the Common Law of Contract* (n 7 above) 439–45.

Before the House of Lords, Buller and Dunning appeared for the plaintiffs and submitted[67]:

> In reason, there is little or no difference between a contract which is deliberately reduced into writing, and signed by the parties, without a seal, and a contract under the same circumstances, to which the party at the time of signing it puts a seal or his finger on cold wax. In the case of a deed, *i.e.* an instrument under seal, it must be admitted that no consideration is necessary; and in the year 1765, it was solemnly adjudged in the court of King's bench (*Pillans v. Van Mierop*. 3 Burr. 1663), that no consideration was necessary when the promise was reduced to writing. That opinion has since been recognized in the same court, and several judgments founded upon it; all which judgments must be subverted, and what was conceived to be settled law, totally overturned, if the plaintiffs in this cause were not entitled to recover.

Such might be expected to be the submissions of counsel, but the reference to *Pillans*, and in particular Lord Mansfield's opinion, as settled law for a decade and regularly followed is striking. If they were wrong about that counsel claimed to be able to identify a consideration in the effects which the defendant had of the deceased. However, the declaration had neither alleged that the promise was in writing nor that the assets in the hands of the defendant covered the liabilities.

The Lord Chief Baron of the Exchequer then delivered the unanimous opinion of the judges of the Exchequer Chamber before the House of Lords, which re-asserted traditional doctrine. Skynner CB pronounced[68]:

> It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration . . . All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved.

The House of Lords concurred and *Pillans* was out of favour, at least as a precedent on the enforceability of written promises.

(b) The Moral Obligation Front

Lord Mansfield obviously regarded his assault on the citadel of consideration as requiring the opening up of at least two fronts. After *Pillans* he developed in the 1770s his parallel 'moral obligation' account of consideration[69] in the cases of

[67] *Rann v Hughes* (n 63 above) 4 Brown PC 27, 31.

[68] *Rann v Hughes* (n 63 above) (HL).

[69] Fifoot, *Lord Mansfield* (n 23 above) 134: 'alternative experiment'. More forthright: M Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 15th edn (Oxford, Oxford University Press, 2007) 95, 'more insinuating'.

Atkins v Hill[70] and *Trueman v Fenton.*[71] Supposed instances included acknowledgements of debts contracted in infancy, or in respect of which limitation had expired, or promises by executors to pay legacies. In the 1780s, after the rejection of *Pillans* in the House of Lords, we find Lord Mansfield happily distinguishing *Rann v Hughes* in *Hawkes v Saunders*,[72] where it was held that an action lay against an executrix on her promise to pay a legacy where she knew she had the benefit of assets. He pronounced[73]:

> Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of Law or Equity can inforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promises to pay a just debt, the recovery of which is barred by the Statute of Limitations: or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessaries; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing, by the Statute of Frauds.

Rann was distinguished on the grounds that there were no assets or that it was not alleged there were any assets.[74] Lord Mansfield now accepted the necessity for consideration, but was stretching its definition as far as he could. In that case Buller J concisely stated the applicable principle:

> The true rule is, that whenever a defendant is under a moral obligation, or is liable in conscience or in equity to pay, that is a sufficient consideration.[75]

The moral obligation assault had greater longevity, surviving until 1840 and *Eastwood v Kenyon.*[76]

(c) Promises to Answer for Another's Liability

Obviously section 4 of the Statute of Frauds 1677 continued and continues to delimit the enforceability of guarantees.[77] At the end of the 18th century under the Chief Justiceship of Lord Mansfield's successor, Lord Kenyon, the King's

[70] *Atkins v Hill* (1775) 1 Cowp 284, 288—9; 98 ER 1088. Oldham, *English Common Law in the Age of Mansfield* (n 10 above) 85 dates the development back to 1772 and the unreported case of *Bromfield v Wilson.*

[71] *Trueman v Fenton* (1777) 2 Cowp 544, 98 ER 1232.

[72] *Hawkes v Saunders* (1782) 1 Cowp 289, 98 ER 1091.

[73] *Ibid* 290.

[74] *Hawkes v Saunders* (n 72 above) 1 Cowp 289, 291. However as observed above, this had been an alternative submission before the House of Lords in *Rann.*

[75] *Hawkes v Saunders* (n 72 above) 1 Cowp 289, 294.

[76] *Eastwood v Kenyon* (1840) 11 Ad & El 438, 113 ER 482 (Lord Denman CJ).

[77] Note the refusal of the House of Lords to circumvent the Act in *Actionstrength Ltd v Intenational Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2004] 2 AC 541. Contrast the recent suggestion that a typed name at the end of an e-mail will suffice for the purposes of the Act: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Civ), [2006] 1 WLR 1543.

Bench opened up a further front for claimants in respect of promises to answer for another's liability. In *Pasley v Freeman*,[78] the seminal case on the tort of deceit, it was held that an action would lie where the defendant made a false representation as to the creditworthiness of a third person to a plaintiff, who then dealt with that third person. It was sufficient that the plaintiff suffered a loss and was not necessary that the defendant should benefit. Lord Kenyon CJ observed[79]:

> There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals, in which case he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them, and the law of morality ought to induce them to give the information required.

This must have proved the basis for many actions, as it eventually provoked section 6 of the Statute of Frauds (Amendment) Act 1828 (often known as Lord Tenterden's Act), which required false representations to be in signed writing before they could form the basis of an action. This quirky restriction on the scope of deceit has somehow survived into the 21st century. Of course we now live in the post-*Hedley Byrne & Co Ltd v Heller & Partners Ltd*[80] world. Emphatic appellate authority states that the 1828 Act does not to apply to claims which are not based on fraud.[81] Somewhat asymmetrically, we have a formality pre-condition in the law of fraudulent misrepresentation in respect of representations about the creditworthiness of a third party, but no similar rule for a negligent misrepresentation of the same character.

C. PERSPECTIVES

1. The History of the Law of Bills of Exchange

First, it is worth looking at the case from the relatively narrow perspective of the law on bills. Professor Rogers's brilliant study of the origins of our commercial law,[82] through the prism of the law governing bills of exchange, describes the widespread use of such bills in the 18th century as often the only means of discharging a payment obligation. However, they were not always dependable, being only as valuable as the promises of the persons who became obliged under them[83]:

[78] *Pasley v Freeman* (1789) 3 Term Rep 51, 100 ER 450.

[79] *Ibid* 3 Term Rep 51, 64.

[80] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

[81] *Banbury v Bank of Montreal* [1918] AC 626 (PC).

[82] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above).

[83] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 195.

> A bill or note might have been transferred from hand to hand in a long chain of payment transactions on the assumption that it would be paid by the drawee or the maker. In the case of bills, however the drawee was not legally bound until acceptance. Thus bills would have been passed from person to person long before it was known whether the drawee would incur any legal obligation to pay.

Even after acceptance the solvency of the drawee/acceptor was still a risk factor. Rogers describes how in modern texts on bills the discussion of the topic of acceptance is highly attenuated. In the leading modern American text it is accomplished in one page.[84] In stark contrast, in 18th century texts acceptance could account for a quarter of the text.[85] Despite the need for certainty in this field, the law yielded to practical reality and permitted both conditional acceptances and partial acceptances by drawees.[86] Furthermore, whilst it is now orthodox that only a party who appends his signature to a bill of exchange can be liable upon it,[87] earlier case law held a drawee liable in some cases, even in the absence of written acceptance. Rogers cites a pronouncement of Chief Justice Holt that 'a bill of exchange might be accepted by parol, tho' the usual way be to do it by writing'.[88]

For Rogers, *Pillans v Van Mierop* is crucial to the resolution of the debate about 'extrinsic acceptance' and 'virtual acceptance'. The former was a separate written undertaking to accept a bill already in existence. The latter was a promise to accept future bills. *Pillans* is a case of 'virtual acceptance'. It seems that Pillans and Rose never even drew up the anticipated reimbursement bills to send to Van Mierop and Hopkins before White & Co failed.

Acceptance financing permitted one merchant who shipped goods to another, and who drew a bill on the consignee, to discount the bill immediately in order to obtain ready funds in respect of the consignment. Greater credit was afforded in cases where a factor (later an accepting house) was willing to permit a merchant to draw a bill on him even prior to the sale or shipment of goods. If the factor's standing was good, the merchant would be able to discount the bill immediately and therefore finance the underlying transaction. As Rogers points out, much of the work done by such bills in oiling the wheels of commerce had already occurred before it reached the drawee for his acceptance.[89] A right of a merchant to draw upon a substantial house such as Barings would be very

[84] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above): citing J White and R Summers, *Uniform Commercial Code*, 3rd edn (St Paul, West Publishing Co, 1988) 558. See White and Summers, 4th edn (St Paul, West Publishing Co, 1995) 471–2.

[85] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 195–6: citing J Bayley, *A Short Treatise on the Law of Bills of Exchange, Cash Bills and Promissory Notes*, 1st edn (London, Brooke, 1789).

[86] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 196–7.

[87] Bills of Exchange Act 1882, ss 17(2) and 23.

[88] *Anon* (1698) Holt 296, 297; 90 ER 1063; Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 198.

[89] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 199.

valuable.[90] Such willingness to accept bills in the future was communicated by means of a 'letter of credit', the very phrase used in *Pillans* by Lord Mansfield.

Such 'letters of credit' have a lineage. The 17th century treatise by Gerard Malynes, *Consuetudo, vel, Lex Mercatoria: or, The Ancient Law-Merchant*,[91] describes the phenomenon. For Rogers the interest in *Pillans* lies not in the usual dicta on consideration, which attract the contract scholars, but rather in the liberal approach to acceptance. This appears in all the judgments, but most prominently in that of Mr Justice Wilmot. However in the early 19th century it was held that a promise to accept future bills could not bind.[92]

Consideration fundamentalism had re-asserted itself. There followed the sclerotic formalism which would attend the final formulation of (the various satellite maxims of) the doctrine of consideration in the full gothic splendour of its Victorian incarnation. So far as bills in particular were concerned, the matter was settled by statute in 1821 which laid down the modern rule that acceptance should be written on the face of the bill.[93] Fundamentalism about form and reliable evidence prevailed.

2. The History of the Law of Contract

More generally, *Pillans* is a central case in any account of the history of the Common law of contract, being the case which established the rationalist assault on the formalism inherent in the hegemony of consideration.[94] Whilst, generally speaking, conservatism prevailed in *Rann v Hughes*, the potential challenge by contract as promise to contract as exchange has been appreciated ever since, and has been adopted in some contexts.

Milsom's analysis of consideration stresses the delictual origins of *assumpsit*, and the presence of justified reliance.[95] His conclusion on Mansfield's judgment in *Pillans* is that he faced the same problems as late 20th century scholars trying to make sense of the doctrine of consideration[96]:

> Like the rational Lord Mansfield, we try to assign it some place as an element in a contract itself seen as an entity. But it has always been just the label on a package

[90] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 200: citing RW Hidy, *The House of Baring in American Trade and Finance: English Merchant Bankers at Work 1763–1861* (Harvard Studies in Business History) No 14 (1949).

[91] G Malynes, *Consuetudo, vel, Lex Mercatoria: or, The Ancient Law-Merchant*, 3rd edn (1686; reprint Abingdon, Professional Books, 1981); (1st edn, 1622). *Consuetudo* is Latin for 'custom'.

[92] *Johnson v Collings* (1800) 1 East 98, 102 ER 40; *Bank of Ireland v Archer & Daly* (1843) 11 M & W 383, 152 ER 852. See also *Pierson v Dunlop* (1777) 2 Cowp 571, 152 ER 852 (Lord Mansfield retreating on acceptance).

[93] 1 & 2 George IV c 78, s 2; now superseded by Bills of Exchange Act 1882, s 17.

[94] Holdsworth, *A History of English Law* (n 13 above) vol VIII, 29–30, 34–6, 45–8; Baker, *An Introduction to English Legal History* (n 7 above) 351–2; Simpson, *A History of the Common Law of Contract* (n 7 above) 406–7.

[95] SFC Milsom, *Historical Foundations of the Common Law* (n 18 above) 356–60.

[96] SFC Milsom, *Historical Foundations of the Common Law* (n 18 above) 360.

> containing many of the separate rules about the liabilities which may arise in the context of a transaction. Separate questions were answered by assertion, and at first they were asked in terms of reliance. Perhaps some answers were not ideal when the questions came to be asked in contractual terms.

This is suggestive of the view that a number of different tests of enforceability may be appropriate, and Milsom himself suggests the example of the United States, where deeds are not employed, but both consideration and reliance may ground liability.

Similarly, Simpson is sympathetic to Lord Mansfield's categorisation of consideration as a matter of evidence, rather than a true substantive requirement[97]:

> [I]n a sense Lord Mansfield's conception of consideration as 'evidence' is historically correct, if the idea is given a somewhat extended sense along the following lines. They jury, before holding the defendant liable, need something more to go on than merely a parole promise, inadequately perhaps proved, but if they can prove a good reason for the making of the promise which is also a good reason for holding the defendant liable then they can with more confidence award damages for breach, the consideration making it more plausible to say both that there was a promise and that it was seriously intended. But it must be emphasized that no such rationalization is to be found in the cases.

This is reminiscent of more modern doctrines where we see the courts reluctant to commit to firm probanda (matters which must be proved), but instead enumerate a number of factors which may tend to show the wrong complained of, such as in discussions of the comparatively recent vitiating factor of economic duress.[98] Both historians' accounts, and in particular Simpson's 'good reason' analysis, also provide grist for Atiyah's critique of modern English law. In contrast to Simpson's sympathy with the evidential categorisation, Baker is emphatic that Mansfield's suggestion 'was not a sound historical argument, but a deliberate attempt to reject the magic of the seal'.[99] As a result, Baker observes, the repudiation of this strategy in *Rann v Hughes* ensured the survival of this 'Tudor' doctrine into the 21st century.

3. Economic History

It is also worth placing the case in the wider context of the rise of modern commerce and finance. David Kynaston's account of the history of the City of London takes as its starting point the end of the Napoleonic wars, charting both the social and economic history of the individuals and institutions responsible for making the City great in the 19th century and beyond.[100] However in his

[97] Simpson, *A History of the Common Law of Contract* (n 7 above) 407.
[98] *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530, [131] (Dyson J).
[99] Baker, *An Introduction to English Legal History* (n 7 above) 352.
[100] Kynaston, *The City of London* (n 5 above).

detailed prologue Kynaston concisely sets the scene, identifying the beginnings of the emergence of the merchant banks of the 19th century from the merchant houses of the 18th century. Barings's strength in the 18th century was founded on both its close connection with the powerful merchant house of Hope & Co, which was based in Amsterdam, and its financing of North American trade.[101] Similarly, in the last two decades of the 18th century Bird, Savage & Strange exported manufactured goods to South Carolina (which was then probably the richest State in the newly formed United States), which in turn financed exotic imports such as rice and indigo. Kynaston then identifies the trade practice which underlies our case[102]:

> Credit was the crux, especially since many merchants, at home and abroad, began business with little or no capital. Systems of credit could be complicated things, but the basic mechanism on which they increasingly revolved was the sterling bill of exchange, a negotiable instrument through which a seller was able to receive payment for goods as soon as he had sent them on their way. Towards the end of the century a few of the leading London merchants, above all Barings, were taking on a 'finance' function and becoming what would eventually be termed merchant banks—or, more narrowly, accepting houses—to service the international trading community. It was a profitable business, done on a commission basis; but since it involved guaranteeing bills of exchange that would eventually be sold on the London bill market centred on the Royal Exchange, it was one that demanded the nicest possible judgement of clients, of trades, and of countries.

A number of important contextual factors require highlighting. First, the interest of exporters in payment or adequate assurance of payment by bill of exchange as soon as goods were shipped, probably in return for the bill of lading, representing the cargo at sea; and secondly, the increasing separation of the underlying physical transaction from the associated, but increasingly autonomous, financing mechanism. We observed this in *Pillans*, with the lack of reference to, or apparent interest in, the underlying cargo or traded goods. Thirdly, and crucially was the existence in the 18th century of a developed secondary market in bills. This was focused on the Royal Exchange, with its various specialist 'walks'—'Norway Walk', 'Virginia Walk' and 'Jews Walk'—together with the coffee shops, Garraway's of Change Alley (which was a centre of commodities trading), the 'Jamaica', the 'Jerusalem' and the 'Baltic', forerunner of the Baltic Exchange. It is likely that bills such as White's bill initially drawn on Pillans and Rose, and the reimbursement bill which Pillans and Rose proposed to draw on Van Mierop and Hopkins, were to be traded or discounted on this secondary market. It would be vital to its attractiveness that such a bill bore the imprimatur of acceptance by a leading merchant house.

[101] Kynaston, *The City of London* (n 5 above) 11. At the end of the 18th century following the French invasion of The Netherlands, Hope & Co diminished to a virtual subsidiary of Barings, representing the eventual eclipse of Amsterdam by London: Kynaston (n 5 above) 23.
[102] Kynaston, *The City of London* (n 5 above) 12.

It seems likely, given Lord Mansfield's familiarity with, and lively curiosity concerning, mercantile practice, that he would have been aware of (or, at least, familiarised himself with) these considerations in deciding *Pillans*. It is clear from his remarks at the preliminary hearing that he was sensitive to this issue, and regarded the timing issue as one which might frustrate the trading of such bills. Furthermore, the marketplace and reputation of such houses depended on the honouring of such clear undertakings, which were likely to be circulated and relied on far beyond the original parties to the transaction.

The facts of *Pillans* took place in 1762. The following year a financial crisis struck. The Bank of England, founded in 1694 to finance war with France, had become a proto-Central Bank during the course of the next century. In 1763 it took an important further step in this process by acting as a lender of last resort for the first time in its history.[103] Lord Mansfield cannot have been unaware of this crisis. Despite this, the Bank of England remained a profit-making commercial entity in its own right. From the 1760s onwards it was a major player in discounting commercial bills, thereby providing short-term finance and increasing the liquidity of the marketplace in bills. Its prominence and power in this field was described by Sir Francis Baring[104]:

> Before the Revolution [in France in 1789] our Bank [referring to the Bank of England] was the centre upon which all credit and circulation depended, and it was at that time in the power of the Bank to affect the credit of individuals in a very great degree by refusing their paper.

We also know that in addition to the Bank of England, there were probably some 50 private banks operating in the City of London and engaged in the trade of discounting commercial bills by the 1770s. *Pillans* helped to facilitate this trade.

Rann v Hughes was not a bills case, so it may not have had much direct impact on bills practice. However, as we have seen, statute tightened up the rules on 'virtual acceptance' in England in the early 19th century. A decision by the Bank of England in 1837 to tighten up credit by refusing to support three UK merchant banks caused the three houses to fail, leaving some US$10 million of bills drawn by American merchants on them dishonoured, and leading to a rash of bankruptcies amongst American cotton merchants.[105] Once faith is gone, failure follows.

4. Comparative Perspective

Every legal system must grapple with the problem of which promises or agreements, and other voluntary arrangements, are to be attended by legal effects.

[103] Kynaston, *The City of London* (n 5 above) 13.
[104] Kynaston, *The City of London* (n 5 above) 14.
[105] Rogers, *The Early History of the Law of Bills and Notes* (n 17 above) 201.

Which promises should attract remedies backed up—ultimately—by the full coercive power of the state? The recognition of such powers to change one's legal rights and obligations through dealings with other citizens is the hallmark of a mature legal system. The apparent—but not real—paradox of the ability to limit one's freedom of action is the core to freedom of contract. We multiply our freedom by the ability to transact with others, in arrangements which ultimately attract legal sanction, and do not only depend on either moral opprobrium or prudential incentives.[106] Such arrangements provide the framework for the market economy. Mutual reliance, co-operation and planning can take place in a context where faith can be placed in such voluntary arrangements.

However, it is trite—but necessary—to point out that no legal system has ever gone to the extreme of enforcing all promises. The obvious counter-examples are social and domestic arrangements, which courts are reluctant to see attended by the full rigour of the law of contract. Something more than promise or agreement is needed. In the words of Professor Goode:

> Some further element is said to be necessary, such as the promisee's knowledge of the promise, his assent to it, the cause of French law, consideration, benefit, reliance, or solemnity of form.[107]

Most systems use both a form-based requirement and at least one other substantive requirement, such as the doctrine of consideration, for informal undertakings.

In their classic comparative text, Zweigert and Kotz entitle the chapter on this core issue: 'Indicia of Seriousness'.[108] They focus immediately on the distinction between promises with some stipulated return, which most systems readily enforce, and promises of gifts. Whilst most systems give effect to gifts perfected by actual delivery, promises to make gifts in the future are generally required to satisfy some further evidential step, such as notarial form in France[109] or deed in England.[110] In respect of informal promises English and American law generally require a requested counter-performance as a necessary condition for legal enforcement: the core idea of the 'extremely complex and subtle' doctrine of consideration.[111] However it may be misleading to suggest that a consideration must be bargained for, if this suggests that there is an enquiry into the adequacy of the return for the promise. Classically, a peppercorn will suffice.[112] Similarly, at

[106] C Fried, *Contract as Promise* (Cambridge MA, Harvard University Press, 1981).
[107] R Goode, 'Abstract Payment Undertakings' in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Oxford, Oxford University Press, 1991) 209, 210.
[108] Zweigert and Kotz, *An Introduction to Comparative Law* (n 3 above) 388–99.
[109] Code Civile, Art 931.
[110] Written instruments which traditionally had to be 'signed, sealed and delivered.' The position is now governed by s 1 of the Law of Property (Miscellaneous Provisions) Act 1989, which dispenses with the need for the customary wax seal.
[111] Zweigert and Kotz, *An Introduction to Comparative Law* (n 3 above) 390.
[112] Zweigert and Kotz, *An Introduction to Comparative Law* (n 3 above) 391. Famously, Lord Somervell: 'A peppercorn does not cease to be good consideration if it established that the promisee does not like pepper and will throw away the corn'. *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87.

what may be the loveliest parish church in the Kingdom, at Long Melford in Suffolk, a single red rose laid on a tomb constitutes the annual rent for a market.

From the civil law perspective, Zweigert and Kotz consider some of the consequences of the doctrine of consideration 'surprising or even shocking',[113] given that it extends to all gratuitous promises—even in a business context, such as the gratuitous provision of bad advice, or undertaking to look after the property or affairs of another. Liability here will generally only be delictual in nature if loss occurs, and cannot be based on the breach of promise. Similarly, from that perspective, the pre-existing duty rules throw up strange results, such as in the well-known seamen's wages cases.[114] However they note that recent decisions now focus on the presence or absence of improper pressure.[115] English lawyers can only feel uncomfortable as Zweigert and Kotz brilliantly expose the empty formalism of the hunt for consideration in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*,[116] supposedly resulting in some technical 'practical benefit' being identified. They scathingly conclude:

> The implausibility of the point merely shows how useless the doctrine of consideration is as a test of the validity of modifications of contractual arrangements.[117]

They further observe that difficulties are thrown up if the past consideration rule is applied mechanically and the impact on apparently 'binding offers'. However even in England with respect to the variation context and the inability to create binding offers:

> There is fairly general agreement that these outposts of the doctrine are indefensible and that the time has come to abandon them.[118]

However, the civilian approach outlined by Zweigert and Kotz does not identify with certainty an alternative approach, save that it is clear that the treatment of gratuitous promises differs, with many promises which would clearly fail for want of consideration or want of form in England, brought within the fold of enforceable promises on the Continent. Nevertheless, they note the potential of the doctrine of promissory estoppel in this context, particularly in the way it has developed in the United States. Zweigert and Kotz conclude in their comparison of the two approaches[119]:

> We have seen, too, that judges on the Continent approach the question whether a transaction was really gratuitous in a rather cavalier fashion and often hold a promise binding despite lack of form if the promisor was actuated by creditable motives. One could object that this etiolates the requirement of form and creates legal uncertainty, but this objection hardly lies in the mouth of an English jurist when one considers how astute the English judges are at snuffling out some consideration lurking in the background.

[113] Zweigert and Kotz, *An Introduction to Comparative Law* (n 3 above) 392.
[114] *Stilk v Myrick* (1809) 2 Camp 317, 170 ER 1168.
[115] Zweigert and Kotz, *An Introduction to Comparative Law* (n 3 above) 393.
[116] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA).
[117] Zweigert and Kotz, *An Introduction to Comparative Law* (n 3 above) 394. They point out the doctrine of consideration is rarely insisted on in the United States in the context of modifications: eg under the Uniform Commercial Code, § 2-209 (sales). Similarly, the Vienna Convention on the International Sale of Goods 1980 ('CISG') Art 29(1).
[118] Zweigert and Kotz, *An Introduction to Comparative Law* (n 3 above) 399.
[119] Zweigert and Kotz, *An Introduction to Comparative Law* (n 3 above) 399.

The reproach of inventing consideration is here combined with the memorable image of the truffle-hunting pig. It is clear that all systems could benefit from abandoning the search for a monistic answer to the question of which (informal) promises should be enforced. It remains tragic that Lord Mansfield's suggested alternative route of writing in a commercial context was not embraced whole-heartedly.

5. Theoretical Perspective

There has been little writing on the doctrine of consideration in recent decades, save to welcome the barely coherent, but pragmatically attractive, decision of the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd.*[120] In terms of English theoretical writing, the titanic struggle was the Atiyah-Treitel debate of the 1970s. Atiyah's inaugural lecture at the Australian National University, 'Consideration in Contracts: A Fundamental Restatement', is the *locus classicus* of the pragmatic critique of the formalism of the modern doctrine of consideration.[121] Consideration simply meant a good reason for enforcing a promise, or more properly an obligation.

> From being merely a reason for the enforcement of a promise . . . it has come to be regarded as a technical doctrine which has little to do with the justice or desirability of enforcing a promise, or recognizing obligations.[122]

In fact, courts often enforced non-bargain promises for good reasons of policy. Atiyah then describes the variety of such arrangements, hidden from view by an excessive focus on consideration. In the commercial sphere, agency, bailment undertakings and bankers' commercial credits are obvious examples. It should go without saying that I agree wholeheartedly with Atiyah that consideration obscures the variety of voluntary transactions enforced by English law, albeit I may not go down the routes for reform he favours. Professor Treitel's more orthodox riposte is less convincing.[123] However, we can acquit Treitel of inventing the idea of 'invented consideration',[124] which clearly has a much longer history, as demonstrated in the judgments of Wilmot and Yates JJ in *Pillans*.

[120] *Williams v Roffey Bros* (n 116 above).
[121] PS Atiyah, 'Consideration in Contracts: A Fundamental Restatement' (Canberra, Australian National University Press, 1971); reprinted as 'Consideration: A Restatement' in PS Atiyah (ed), *Essays on Contract* (Oxford, Oxford University Press, 1986; paperback 1988) 179.
[122] P Atiyah, 'Consideration: A Restatement' (n 121 above) 186.
[123] GH Treitel, 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 *Australian Law Journal* 439.
[124] Compare Atiyah, 'Consideration: A Restatement' (n 121 above) 182–3.

D. RECEPTION AND THE MODERN LAW

1. Professor Atiyah's Account of the Reception of *Pillans v Van Mierop*

Before briefly surveying the modern law to locate the fruits which have resulted from Lord Mansfield's bold propositions, it is worth citing Atiyah's more historical account of the fate of *Pillans v Van Mierop* at the hands of the House of Lords in *Rann v Hughes*[125]:

> to say that Mansfield's views were 'over-ruled' is too simple an account of what was happening. When Mansfield talked of consideration being evidence only, he was in effect saying, or certainly implying, not one proposition, but three:
>
> [1] first, that the primary basis of contractual liability is the intention of the parties, and not the consideration;
> [2] secondly, that consideration is merely evidence of the parties' intentions;
> [3] thirdly, that other forms of evidence (such as, in a business case, a writing,), may be equally satisfactory . . .
>
> *Rann v Hughes* rejected the third of Mansfield's propositions. But the second has been largely accepted, at any rate at the level of theory, and the first has without doubt, formed the very basis of contractual liability for nearly two hundred years (numbering added).

Overall Lord Mansfield's dictum has 'triumphed beyond measure'. However, Atiyah's main thesis is that Mansfield's theory of contractual liability was obsolescent. I agree with Atiyah's historical assessment, but not with his prognosis for the future. As is well known, since the publication of Atiyah's *magnum opus* in 1979, freedom of contract, and neo-classical contract theory have enjoyed a renaissance. Lord Mansfield's philosophy is reflected in modern case law, and is often still directly cited.

2. Modern Contract Law

Atiyah's first proposition about *Pillans*—the role of the intention of the parties—forms the intellectual basis of modern contract law, having achieved hegemony in the 19th century.[126] It was developed by Lord Mansfield and his brethren in the King's Bench in the 18th century. According to Baker,

> Even as late as 1800, the content of the law of contracts was slight by comparison with the bulky textbooks in use by 1900. There were many old cases on consideration, and a great deal on pleading.[127]

[125] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Oxford University Press, 1979) 216.

[126] See generally AWB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247.

[127] Baker, *An Introduction to English Legal History* (n 7 above) 350.

However, if one treats as the workaday business of the courts the ascertainment of the intentions of the parties[128]—either in establishing whether a contract has been formed or in discerning the meaning and effect of its terms—the techniques were established in judgments of the King's Bench before the 19th century. Fifoot, Lord Mansfield's biographer, stated that he

> started with the assumption that an agreement, as such, was worthy of sanction. The intention of the parties, not the accidental influence of the forms of action, was to determine the scope of the contract.[129]

One of the first—albeit peculiar from a comparative perspective—orthodoxies of English contract law is that the construction of written documents is a question of law (and therefore for the judge, and not civil juries whilst they were extant in this context). This was clearly established in Lord Mansfield's court. In *Macbeath v Haldimond* he pronounced:

> the evidence consisting altogether of written documents and letters which were not denied, and the import of them was a matter of law and not of fact.[130]

Similarly, the fundamental need for certainty in commercial transactions, which is constantly invoked in this field, was emphasised by Lord Mansfield in *Vallejo v Wheeler*: 'In all mercantile transactions the great object should be certainty'.[131]

Two of the principal features of modern approaches to the construction of contracts are said to be the rejection of literalism in favour of an approach which gives effect to the commercial purpose of a transaction, and a broadly contextual approach to language. In construing an instrument, Lord Mansfield was willing to have regard to the document as a whole, and not just its operative provisions. For example, in *Moore v Magrath*[132] Lord Mansfield stated:

> The deed begins with the preamble usual in all settlements; that is, by reciting what it is the grantor intends to do; and that, like the preamble to an Act of Parliament, is the key to what comes afterwards.

This demonstrates both regard to wider internal context and to the business purpose of the transaction. Beyond the four corners of the instrument he was

[128] See also Oldham, *English Common Law in the Age of Mansfield* (n 10 above) 84–7.

[129] Fifoot, *Lord Mansfield* (n 23 above) 121.

[130] *Macbeath v Haldimond* (1786) 1 Term Rep 172, 180; 99 ER 1036. Still orthodoxy: *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724 (HL); *Antaios Compania Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 (HL) 199, albeit Lord Diplock was scathing of: 'that insistence upon meticulous semantic and syntactical analysis of the words in which business men happen to have chosen to express the bargain made between them, the meaning of which is technically, though hardly commonsensically, classified in English jurisprudence as a pure question of law'.

[131] *Vallejo v Wheeler* (1774) 1 Cowp 143, 153; 98 ER 1012. Recently quoted with approval by Lord Bingham in *Hombourg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2004] 1 AC 715, [12].

[132] *Moore v Magrath* (1774) 1 Cowp 9, 12; 98 ER 939. Contrast the orthodox application by the court of parol the evidence rule to prevent oral evidence contradicting a written contract concerning land (which had been admitted at trial by Lord Mansfield) in *Meres v Ansell* (1771) 3 Wils KB 275, 95 ER 1053.

prepared to have regard to the external context, and in particular the obvious commercial context, and what would have been well known to the parties to the transaction. In *Barclay v Lucas*[133] the plaintiffs' house engaged a banking clerk and the defendant provided them with a guarantee in respect of his fidelity. The clerk proved unworthy of the trust of either party and embezzled funds. The defendant contended its bond was vitiated by the admission of a new partner into the plaintiffs' business. Lord Mansfield responded:

> This question turns upon the meaning of the parties. In endeavouring to discover that meaning, the subject-matter of the contract is to be considered. It is notorious that these banking houses continue for ages with the occasional addition of new partners.[134]

The bond was upheld. Good faith in the interpretation of contracts (even in the absence of express stipulation) also demanded that it was in 'the very nature of a sale by auction . . . that the goods shall go to the highest real bidder', and that hired 'puffers' were a fraud on the public.[135]

Lord Mansfield also was able to handle contradictory instruments, resulting from what is sometimes now called the 'patchwork quilt' nature of standard forms. In *Hotham v East India Company* he proclaimed[136]:

> This charter-party is an old instrument informal and, by the introduction of different clauses at different times, inaccurate, and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation. In construing agreements, I know of no difference between a Court of Law and a Court of Equity.

That is the English approach to the construction of commercial documents in a nutshell. The rejection of any distinction between Common law and equitable principles of construction was emphatically affirmed by the House of Lords in 2001.[137] Whilst the modern restatement of the principles of contractual construction eschews the language of party intention until the fifth of five fundamental propositions, it seems indisputable that the ascertainment of the intentions of the parties—albeit objectively ascertained against the available background—is the underlying aim of this central technique.[138]

Similarly, the most commonly cited guidance on the question whether negotiations have crystallised into a binding a contract is obviously indebted to Lord

[133] *Barclay v Lucas* (1783) 3 Douglas 321, 99 ER 676; 1 Term Rep 291n, 99 ER 1100.

[134] *Ibid* 3 Douglas 321, 325.

[135] *Bexwell v Christie* (1776) 1 Cowp 395, 98 ER 1150.

[136] *Hotham v East India Company* (1779) 1 Dougl 272, 277; 99 ER 178, 181. Compare *Hombourg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2004] 1 AC 715, [12]. Lord Bingham stated there that 'to seek perfect consistency and economy of draftsmanship in a complex form of contract which has evolved over many years is to pursue a chimera'. See also *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] AC 266 (HL) 274 where Lord Hoffmann commented: 'In the case of a contract which has been periodically renegotiated, amended and added to over many years, it is unreasonable to expect that there will be no redundancies or loose ends'.

[137] *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251.

[138] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912–13 (Lord Hoffmann).

Mansfield's approach. Valuable guidance was given on the rules of contractual formation at first instance and in the Court of Appeal in *Pagnan SpA v Feed Products Ltd*[139] in the judgments of Bingham J and of Lloyd LJ. Whilst rarely cited in academic discussions, in practice these principles are regularly cited and applied. Most strikingly, Bingham J asserted:

> The parties are to be regarded as the masters of their contractual fate. It is their intentions which matter and to which the Court must strive to give effect.[140]

Lastly, whilst we have earlier noted the incoherence of the implausible search for consideration in the leading modern case on consideration—the decision of the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[141]—it is still worth citing the dictum of Russell LJ, just to observe how close it comes to embracing Lord Mansfield's bold approach[142]:

> Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect [*scilicet* reflects] the true intention of the parties.

3. Modern Commercial Law

We have already mentioned agency and bailment transactions as examples of commercial arrangements which are upheld irrespective of consideration. One could add the modern recognition of a general principle of tortious liability for the negligent provision of services where a party has assumed responsibility for a particular task—be it the provision of advice or information, or the rendering of other services.[143] Furthermore, many financial instruments to this day involve payment obligations which appear to defy the need for consideration. The need for consideration in bills of exchange is moderated by statutory fiat.[144]

(a) Professor Goode's Concept of Abstract Payment Undertakings

Our leading academic commercial lawyer, Professor Sir Roy Goode, has articulated the concept of the abstract payment undertaking, which he says violates 'every principle of law governing the formation of contracts'.[145] He describes

[139] *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 (QBD (Comm Ct) and CA).

[140] *Ibid* 610–11; citing Lord Denning MR in *Port Sudan Cotton Co v Chettiar* [1977] 2 Lloyd's Rep 5, 10 (CA).

[141] *Williams v Roffey Bros* (n 116 above).

[142] *Williams v Roffey Bros* (n 116 above) 18.

[143] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

[144] Bills of Exchange Act 1882, ss 27–30.

[145] Goode, 'Abstract Payment Undertakings' (n 107 above) 209–35. Contrast Atiyah's view that there is consideration, albeit supplied by the buyer (a third party): PS Atiyah, 'Consideration: A Restatement' (n 121 above) 222–3.

the insulation of such obligations or instruments from the underlying supply transaction. He instances: the documentary credit; the documentary guarantee or standby credit (sometimes more colourfully known as the 'suicide bond'); the non-documentary inter-bank payment order; and briefly, both the medieval law of bonds and the negotiable instrument.[146] Two motives are usual. First, to insulate such undertakings from defences raised by the obligor arising from the underlying transaction; and secondly, to facilitate the transferability of the payment undertaking (so insulated). The use of a documentary instrument to embody the promise assists in achieving both objectives. The negotiable instrument as it emerged in its final shape in the 19th century, whilst achieving a high level of abstraction, was never entirely divorced from the underlying realities of the transaction. The theory that it was a mercantile specialty, enforceable without consideration, was repudiated. The modern bill is not exposed to the full rigour of the doctrine of consideration, as consideration is presumed by statute, and it need not move from the promisee.[147] Similarly a good faith purchaser for value of the instrument—or a 'holder in due course' in the jargon of bills law—is to a large degree insulated from defects in the title to the bill and defences arising from the underlying contract. However as the holder in due course ultimately only acquires the rights of the original payee, such an instrument is not wholly 'abstract' in the sense intended by Professor Goode.[148]

(b) Letters of Credit

Perhaps of more interest for our current concerns are Professor Goode's view on documentary credits. During the 20th century documentary credits or letters of credit emerged internationally as one of the principal methods of facilitating and financing export and import transactions, particularly where the parties dealt at arm's length and had little previous trading history.

The documentary credit is a further refinement of the classic use of the bill of exchange as a means of discharging the payment obligation under international sales, and in particular those documentary sales (such as c.i.f. contracts and some f.o.b. transactions, where the price is paid against shipping documents). The use of so-called 'documentary bills' can be seen in section 19(3) of the Sale of Goods Act 1979 (in the same form as the original 1893 Act), whereby the seller tendering the shipping documents (comprising his invoice and, at least, a bill of lading or other carriage contract) also tenders a bill of exchange as

[146] On a personal or anecdotal note, I was one of those in attendance for Professor Goode's first undergraduate lecture as the first Professor of Commercial Law at the University of Oxford in academic year 1989–90. The topic was supposed to be documentary credits, but he announced that we could not properly understand this species of contract without first grappling with bills of exchange (which were off the syllabus, and therefore not to be examined), which he proceeded to do brilliantly (albeit without any citation of authority) for the first of four scheduled lectures. It has taken me many years to grasp why this was necessary!

[147] Bills of Exchange Act 1882, ss 27 and 30.

[148] Goode, 'Abstract Payment Undertakings' (n 107 above) 216–17.

drawer, directed to the buyer as drawee. If the buyer refuses to accept the bill, he must return all the documents and no property in the goods passes to him.

The documentary credit employs the international banking system to handle the documents and mechanics of payment. The mechanics are to a large extent prescribed by an international codification of banking practice, the Uniform Customs and Practice for Documentary Credits.[149] Where the sale contract provides for payment by documentary credit the buyer (as 'applicant') approaches a merchant or commercial bank in his country and requests it to open a credit in the name of the seller. The bank (the 'issuing bank') will utilise the services of a correspondent bank in the seller's country. If the latter bank agrees to add its promise to pay to the promise of the issuing bank it becomes a 'confirming' bank, and the credit is 'confirmed.' In an unconfirmed credit the seller (or 'beneficiary') has the benefit of an undertaking to pay from one bank, and in a confirmed credit, the benefit of two banks' promises. The undertaking of the bank(s) replaces the buyer's usual obligation to pay under the sale contract.

Properly analysed, the transaction has now spawned five autonomous, albeit related, contractual relationships. In the leading case of *The American Accord*[150] Lord Diplock described them as follows[151]:

> (1) The underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank; (3) if payment is to be made through a confirming bank the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents.

Lord Diplock leaves out a fifth contract: the promise to pay owed directly by issuing bank to the seller/beneficiary. Three of the these contracts—the underlying sale, the banking services rendered by the issuing bank to buyer, and by the

[149] The UCP was introduced by the International Chamber of Commerce in 1931, and has been revised in 2007 as 'UCP 600'. For discussion see E Ellinger, 'The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions' [2007] *Lloyd's Maritime & Commercial Law Quarterly* 152. We can be sure Lord Mansfield would have been intrigued by this harmonising measure.

[150] *United City Merchants (Investments) Ltd v Royal Bank of Canada, The American Accord* [1983] 1 AC 168 (HL). The other members of the House of Lords agreed with the single speech.

[151] *Ibid* 183.

confirming bank to issuing bank—are entirely orthodox, bipartite, bilateral contracts, with the banking services being remunerated by fee or commission.

In contrast, the undertakings of the issuing bank and the confirming bank to the seller/beneficiary are traditionally said to be difficult to explain in accordance with orthodox English contract law. The undertaking will usually be contained in a document sent by either bank (more commonly, the confirming bank) which advises the beneficiary that a credit is open in his name, identifying the two banks, the opening and closing dates for exercising the rights, and specifying the documents which the beneficiary must present in order to obtain the funds or other financial accommodation (often the acceptance or negotiation of a 'time' bill of exchange deferred for say 90 or 180 days) in return. Professor Goode summarises the conceptual problems this poses for English lawyers[152]:

> Various ingenious theories have been advanced to reconcile the binding effect of the documentary credit with traditional concepts of contract law, for example, that the credit is a guarantee; that the bank issues the credit as agent of the buyer; that the consideration for the credit is a beneficiary's agreement to present the shipping documents, or alternatively is the actual presentation of the documents; that the credit becomes binding as a result of the [seller's] reliance on it, such reliance either constituting acceptance of the offer giving rise to a unilateral contract or making the bank's undertaking binding by estoppel; that the credit is a form of negotiable instrument.

Goode considers that none of these theories adequately explains or justifies the commercial understanding that the banks' obligations are as principals (not merely ministerially on behalf of the buyer), that they arise from communication of the advice that the credit is open, and are irrevocable from the date of advice to the date of expiry.

It is important not to overstate the difficulties for English law of accommodating letters of credit. Once a beneficiary presents the requested conforming documents stipulated under the credit, it would seem axiomatic that the bank is obliged on ordinary principles of unilateral contract reasoning. However the resources of English law appear not to be able to explain the 'irrevocability' of irrevocable letters of credit. That is, it is only the 'binding offer' aspect of the promise which is problematic. On long-established principles ('If you walk to York I will give you £100') the actual presentation of conforming documents surely equates to arriving at the doors of the Minster. It may even be arguable that steps taken in anticipation of performance of tendering—such as shipping the goods and procuring a bill of lading—could preclude the bank offeror from withdrawing his promise.[153] One could go further. There is modern House of Lords authority—albeit the conservatism of commentators has sidelined this analysis—which supports the view that the unilateral contract device is flexible enough in English law to give effect to 'irrevocable offers', if that reflects the intentions of the parties.

[152] Goode, 'Abstract Payment Undertakings' (n 107 above) 218. I have substituted 'seller's' for 'buyer's' where it obviously appears in error.

[153] At least if the approach of Denning LJ in *Errington v Errington* [1952] 1 KB 290 (CA) 295 is followed.

The case of *Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd*[154] is usually cited for its rejection of referential bids. Two families were locked in a struggle to win control of a company: the Harvey family and the Outerbridge family. RT (the first defendant) invited the plaintiff, Harvela (the Harvey family), and Sir Leonard Outerbridge to submit offers by sealed bid for the controlling stake in the company. The invitation expressly stated:

> We confirm that if any offer made by you is the highest offer received by us we bind ourselves to accept such offer provided that such offer complies with the terms of this telex.[155]

Harvela's offer was CAN$2,175,000. Sir Leonard's offer was

> Canadian $2,100,000 or Canadian $101,000 in excess of any other offer . . . expressed as a fixed monetary amount, whichever is higher.

RT accepted Sir Leonard's bid. The plaintiff claimed it had a binding contractual entitlement to the shares and sought and obtained specific performance, which was upheld by the House of Lords. All members of the House agreed with both Lord Templeman's principal speech and Lord Diplock's 'footnotes'. The latter approached the bindingness of RT's promise as a matter of construction[156]:

> The construction question turns upon the wording of the telex of 15 September 1981 referred to by Lord Templeman as 'the invitation' and addressed to both Harvela and Sir Leonard. It was not a mere invitation to negotiate for the sale of the shares in Harvey & Co. Ltd. of which the vendors were the registered owners in the capacity of trustees. Its legal nature was that of a unilateral or 'if' contract, or rather of two unilateral contracts in identical terms to one of which the vendors and Harvela were the parties as promisor and promisee respectively, while to the other the vendors were promisor and Sir Leonard was promisee. Such unilateral contracts were made at the time when the invitation was received by the promisee to whom it was addressed by the vendors; under neither of them did the promisee, Harvela and Sir Leonard respectively, assume any legal obligation to anyone to do or refrain from doing anything.
>
> The vendors, on the other hand, did assume a legal obligation to the promisee under each contract. That obligation was conditional upon the happening, after the unilateral contract had been made, of an event which was specified in the invitation; the obligation was to enter into a synallagmatic contract to sell the shares to the promisee, the terms of such synallagmatic contract being also set out in the invitation.

The crucial words are: 'Such unilateral contracts were made at the time when the invitation was received by the promisee to whom it was addressed'. This would equally explain the binding force of irrevocable letters of credit from the

[154] *Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd* [1986] AC 207 (HL).

[155] Compare *Spencer v Harding* (1870) LR 5 CP 561, 563: 'If the circular had gone on, "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons'. (Willes J).

[156] *Harvela Investments* (n 154 above) 224.

time of receipt by the seller/beneficiary. It can obviously be objected that such an approach is inconsistent with the orthodoxy that unilateral contract's binding force derives from (at least commencing) the stipulated counter-performance in reliance on the offer. However the House of Lords here was clearly and self-consciously expanding the unilateral contract device. It may be objected that Lord Diplock's account was obiter dicta. This will not wash because the obligatory nature of the vendor's obligation was essential to the holding in the case. He was compelled to perform the sale of shares in accordance with the true construction of his offer. It was not merely optional for him to sell to the plaintiff. He had irrevocably bound himself to do so. RT was not free to renounce its offer before it opened the sealed bids. It is just about possible to say that RT was not bound prior to the plaintiffs submitting the higher bid. However the reasoning is clearly wider than that.

One would have expected that academic commentators would have welcomed the House of Lords clearly providing a vehicle for binding irrevocable offers and similar proposals. Surprisingly the decision has been marginalised as unorthodox and has been largely forgotten. This should not be the fate of such a commercially sensible and rational decision. As I have sought to argue it provides an explanation for the binding force of letters of credit.

Returning to Goode, he concludes[157]:

> The state of English jurisprudence on letters of credit is rather curious. It is well over two hundred years since Lord Mansfield's valiant attempt in *Pillans v Van Mierop* (a case involving what was in essence a letter of credit) to demonstrate that contracts were enforceable without consideration was defeated by the House of Lords in *Rann v Hughes* and to this day there is no reported English case which directly holds that a letter of credit becomes binding on receipt despite the lack of consideration in the ordinary sense. . . . But there are dicta in several cases in which the courts have taken it for granted that letters of credit are enforceable undertakings and any argument to the contrary would be likely to receive short shrift at the hands of the judiciary.

Accordingly consideration fundamentalism is eschewed where commercial necessity demands it. Either as a unilateral contract, a sui generis rule, or on Professor Goode's broader conception of autonomous or abstract payment undertakings, the promises are enforced. The spirit of Lord Mansfield and his bold proposition still hold considerable sway. Whilst his boldest proposition in *Pillans* has not yet been accepted, his underlying philosophy remains crucial in contract law and underpins commerce and finance now as then.

[157] Goode, 'Abstract Payment Undertakings' (n 107 above) 218–19.

3

Carter v Boehm (1766)

STEPHEN WATTERSON*

A. INTRODUCTION

ON 9 MAY 1760, an insurance policy was effected in London on the instructions of Roger Carter, then Deputy Governor of the East India Company's factory at Fort Marlborough, Bencoolen, Sumatra. These instructions had been dispatched from Bencoolen more than eight months previously, addressed to Roger Carter's brother and agent in London. The policy ultimately effected covered the risk of a European enemy assault on Fort Marlborough for one year running from October 1759. However, events had already taken a fateful course. On 5 February 1760, a French privateering expedition under the command of the Count D'Estaing had arrived off the West Coast of Sumatra. Within 10 days, Natal and Tapanouly, two of the East India Company's subordinate settlements to the north of Bencoolen, had fallen. Another six weeks later, D'Estaing's ships had appeared in the sea off Fort Marlborough. By 3 April 1760, it too had fallen into French hands, and the Company's servants there, including Roger Carter, had surrendered and been taken prisoner. Over the ensuing six weeks, the Company's remaining settlements on the West Coast fell to D'Estaing's men.

Carter's resulting insurance claim was resisted by the underwriters on the ground of non-disclosure. It was finally upheld only after protracted litigation, which culminated in the reported decision of the Court of King's Bench in *Carter v Boehm*.[1] Lord Mansfield's judgment in that case unquestionably ranks as a landmark in the development of the law of non-disclosure between parties to insurance contracts. Unfortunately, more than two centuries on, and as the

* I am very grateful to Charles Mitchell and Francis Rose for their comments on an earlier draft of this chapter, and to the staff of the British Library's Asian and African Studies Reading Room for their patience during my long trawls through the India Office Records. I am also indebted to the Society of Legal Scholars, from whom I received a grant to undertake the archival research on which this chapter is substantially based. Any errors are solely my responsibility.

[1] *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162; (1766) 1 Black W 593, 96 ER 342. The reported decision is of the Court of King's Bench, hearing and dismissing the insurer's motion for re-trial, which had been brought after a verdict had been given for the insured by a special jury sitting with Lord Mansfield at Guildhall. Lord Mansfield delivered the opinion of the court.