APPENDIX : ENGLISH "CONTRACT LAW" ACCORDING TO TEXTS IN CIRCULATION AT THE TIME OF BRITAIN'S SETTLEMENT OF NSW (1788-1824)

Comyns' Digest

1. The fifth and last edition of *A Digest of the Laws of England*, originally published by Sir John Comyns (1667-1740), was published (in eight volumes) in 1822. The entry for ñcontractò in Volume 3 demonstrates that, in the ñtaxonomyò of English law in the preceding century, the term ñcontractò was a peripheral one. It read (omitting page cross references):

> **"CONTRACT.**
> **Vide ABATEMENT,– ADMIRALTY, AGREEMENT. – BARGAIN AND SALE. – BARON AND FEME, – DETT, – ENFANT, – IDIOT, – MERCHANT, PLEADER, – TRADE, – WAR, "**

2. A related entry, in the same volume, related to ñconsiderationò Omitting page cross references, it read:

> **"CONSIDERATION.**
> **To raise an assumpsit. Vide ACTION UPON THE CASE UPON ASSUMPSIT,**
> **--- an use by bargain and sale. Vide BARGAIN AND SALE,**
> **-------- by covenant to stand seized. Vide COVENANT,– T. 10. – PLEADER, – USES, "**

3. A reader intent upon learning about the antecedence of modern ñcontract lawò might notice, in a small part of an extended discussion of the term ñActionò (in Volume 1), a passing reference to ñaction founded upon contractò in which the concept was described by reference to ñaccount, covenant, debt, detinue, & cò A noticeable omission in that list was express reference to assumpsit. A separate entry for ñassumpsitò in the same volume led to a more elaborate entry entitled ñAction upon the Case upon Assumpsitò A lesser, but related, entry appeared in the same volume for ñAgreementò

4. The ñforms of actionò generally regarded as most akin to the modern law of contract (the actions of assumpsit, debt and covenant respectively) were the subject of separate entries. That for debt (in Volume 3) was entitled ñDett, a Law French expression`ò That for ñcovenantò (in the same volume) provided an extended discussion of deeds.

5. There were, too, separate entries for ñAccomptò (ie, account) in Volume 1 and ñdetinueò in Volume 3, actions sometimes mentioned in the ancestry of modern contract law; but, by 1822, an ñaction of accomptò was said to have been superseded by the filing of a bill (for an accounting) in Equity.

6. *Comyns' Digest* cannot be read as containing any straightforward presentation of "contract law" as understood today. At most, it portrayed fragments of forms of action that, when recast, might support a modern "cause of action in contract".

Blackstone's Commentaries

7. Blackstone's *Commentaries* represented a large step towards an academic presentation of English law. They reflect the influence on Sir William Blackstone of property law concepts; the Roman law tradition; and his mentor, Lord Mansfield (1705-1793), a Scot whose mastery of the English Bar never quite discarded Scottish law's affinity with the Roman law tradition.

8. Blackstone treated the topic "contract" in two of his four volumes. In Volume 2 he treated it as an adjunct of the law of property. In Volume 3 he dealt with it in the context of legal remedies.

9. The following extracts are taken from chapter 30 (in Volume 2) entitled "Of Title by Gift, Grant, and Contract" (in the modernised spelling edition published by Dr Wane Morrison in 2001, omitting footnote references):

> **"OF TITLE BY GIFT, GRANT, AND CONTRACT**
>
> **We are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant,* and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action.***
>
> **VIII. Gifts then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent; and they may be divided, with regard to their subject matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal.***
>
> **…**
>
> **A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately: …**
>
> **… But if the fit does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration; as we shall see under our next division.**
>
> **IX. A contract, which usually conveys and interest merely in action, is thus defined: 'an agreement upon sufficient consideration, to do or not to do a particular thing'. From which definition there arise three points to be contemplated in all contracts; 1. The *agreement;* 2. The *consideration*; and 3. The *thing* to be done or omitted, or the different species of contracts.**

First then it is an *agreement,* a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract; as where A contracts with B to pay him 100/. and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law; …

This contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, *viz.* that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts, of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contract* and *quasi ex contractu.*

A contract may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action.*

Having thus shown the general nature of a contract, we are, secondly, to proceed to the *consideration* upon which it is founded; or the reason which moves the contracting party to enter into the contract. 'It is an agreement, upon *sufficient consideration'.* The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen, is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another. This consideration may sometimes however be set aside, and t he contract become void, when it tends in its consequences to defraud creditors, or other third persons, of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate

value, is never set aside in equity; for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

…

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum* or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. As if one man promises to give another 100/. here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which t he municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maximum of the civil law, that *ex nudo pacto non oritur actio.* But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, through barred by the statute of limitations), it is no longer *nudum pactum.* And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere berbal promises, for which no good reason could be assigned, it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

We are next to consider, *thirdly,* the thing agreed to be done or omitted. A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing*. The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale* and *exchange*. 2. That of *bailment*. 3. That of *hiring and borrowing*. 4. That of *debt.*

…".

10. The following extracts are taken from chapter 9 in Volume 3 of the *Commentaries*, entitled ñOf Injuries to Personal Propertyò (using, again, Dr Morrisonôs edition and omitting footnotes):

> **In the preceding chapter we considered the wrongs or injuries that affected the rights of persons, either considered as individuals, or as related to each other; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.**
>
> **And here again we must following our former division of property into personal and real; *personal*, which consists in**

goods, money and all other moveable chattels, and things thereunto incident; a property which may attend a man's person wherever he goes, and from thence receives its denomination: and *real* property, which consists of such things as are permanent, fixed, and immoveable; as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place which they subsist.

First then we are to consider the injuries that may be offered to the rights of personal property; in *possession*, and then those that are in *action* only.

I. The rights of personal property in *possession* are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage to the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful *taking* them away; and the unjust *detaining* them, though the original taking might be lawful.

II. Hitherto of injuries affecting the right of things personal, in *possession.* We are next to consider those which regard things in *action* only; or such rights as a re founded on, and arise from *contracts;* the nature and several divisions of which were explained in the preceding volume. The violation, or non-performance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered: but I shall now consider them in a more comprehensive view, by here making only a twofold division of contracts; *viz.* contracts *express,* and contracts *implied*; and pointing out the injuries that arise from the violation of each, with their respective remedies.

Express contracts include three distinct species; debts, covenants, and promises.

1. The legal acceptation of *debt* is, a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt* to compel the performance of the contract and recover the specific sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate* contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debts are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed: for, in the case of such an action upon a simple contract, the plaintiff labours under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper. Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies from the

claim, cannot be looked upon as the same contract whereof the performance is sued for. If therefore I bring an action of debt for 30/. I am not at liberty to prove a debt of 20/. and recover a verdict thereon any more than if I bring an action of *detinue* for a horse, I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, and determinate. But in an action on the case, on what is called an *indebitatus assumpsit, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if *any* debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto,** and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30/. *undertook* or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of proof, allow me either the whole in damages, or any inferior sum. And even in actions of *debt,* where the contract is proved or admitted, if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue.**

The form of the writ of *debt* is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only: that is, the writ states, either that the defendant owes and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit against the other who personally incurred the debt, or against his heirs, if they are bound to the payment: as by the obligee against the obligor, the landlord against the tenant, etc. But, if it be brought by or against an executor for a debt due to or from the testator, this not being his own debt, shall be sued for in the *detinet* only. … And indeed a writ of debt in the detinet only, for goods and chattels, is neither more nor less than a mere writ of *detinue*: and is followed by the very same judgment.

2. A covenant also, contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by a writ of *covenant*: which directs the sheriff to command the defendant generally t o keep his covenant with the plaintiff (without specifying the nature of the covenant) or show good cause to the contrary: and if he continues refractory, or the covenant is already so broken tht it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages, in proportion to the injury

sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

There is one species of covenant, of a different nature from the rest; and that is a covenant *real*, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature. For this the remedy is by a special writ of covenant, for specific performance of the contract, concerning certain lands particularly described in the writ.

…

3. A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy indeed is not exactly the same: since, instead of an action of covenant, there only lies an action upon the case, for what is called the *assumpsit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it; Caius has an action on the case against the builder, for this breach of his express promise, undertaking, or *assumpsit*: and shall recover a pecuniary satisfaction for the injury sustained by such delay. So also in the case before-mentioned, of a debt by simple contract, if the debtor promises to pay it and does not, this breach of promise entitles the creditor to this action on the case, instead of being driven to an action of debt. Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit*; and the payee at common law, or by custom and act of parliament the endorsee, may recover the value of the note in damages, if it remains unpaid. Some agreements indeed, t hough never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory (which sometimes will induce the perjury) of witnesses. To prevent which, the statute of frauds and perjuries, 29 Car. II. c.3. enacts, that in the five following cases no verbal promise shall be sufficient to ground an action upon, but at he least some note or *memorandum* of it shall be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made, upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And, lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void.

From these *express* contracts the transition is easy to those that are only *implied* by law. Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his non-performance.

Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and has virtually agreed to pay such particular sums of money, as are charged on him by the sentence, or assessed by the interpretation, of the law. …

A second class of implied contracts are such as do not arise from the express determination of any court, or positive direction of any statute; but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or *assumpsits*; which t hough never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature, that every man has engaged to perform what his duty or justice requires. Thus,

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit*; … This is called an *assumpsit* on a *quantum meruit.*

2. There is also an implied *assumpsit* on a *quantum valebat,* which is similar to the former, being only where on takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

3. A third species of implied *assumpsits* is when one has had an received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes this to be money had an received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the t rue proprietor. And, if he unjustly details it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repay the owner in damages, equivalent to what he has detained in violation of such promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* he ought to refund. It lies for money paid by mistake or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

4. Where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit.*

5. Likewise, fifthly, upon a stated account between two merchants, or other persons, t he law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise.

…

6. The last class of contracts, implied by reason and construction of law, arises upon this supposition, that everyone who undertakes any office, employment, t rust, or duty, contracts with those who employ or entrust him, to perform it with

integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case."

<u>Tomlin's Law Dictionary (based on Jacob's)</u>

11. *Tomlins' Law Dictionary* published (in two volumes) in 1810. It was prepared by Sir Thomas Edlyne Tomlins (1762-1841) based upon an earlier *Law Dictionary* prepared by Giles Jacob (1686-1744). Jacobôs *Dictionary* was first published in 1729. It ran for several editions. Tomlinôs edition was first published in 1797.

12. Both Dictionaries were apparently intended to address a lay audience. Nevertheless, their entries surveyed much the same territory as *Comyns' Digest* and *Blackstone's Commentaries*.

13. Suffice for the present to set out in full the entry for ñcontractò in the first volume of Tomlinsô1810 edition:

> **"<u>CONTRACT</u>*, contractus*.] A covenant or agreement between two or more persons, with a lawful consideration or cause.**
>
> **Every *contract* doth imply in itself an *assumpsit* in law, to perform the same, for a *contract* would be to no purpose, if there were no means to enforce the performance thereof.**
>
> **There is a diversity where a *day of payment* is limited on a *contract*, and where not; for where it is limited, the *contract* is good presently, and an action lies upon it, without payment: but in the other not.**
>
> **All *contracts* are to be certain, perfect and complete: for an agreement to give so much for a thing as it shall be reasonably worth, is void for incertainty; so a promise to pay money in a short time, &c. or to give so much, if he likes the thing when he sees it.**
>
> **In *contracts*, the *time* is to be regarded, *in* and *from* which the *contract* is made: the words shall be taken in the common and usual sense, as they are taken in that place where spoken; and the law doth not so much look upon the *form of words*, as on the *substance and mind* of the parties therein.**
>
> **A *contact* for goods may be made as well by word of mouth, as by deed in writing; and where it is in writing only, not sealed and delivered, it is all one as by word. But if the *contract* be by writing sealed and delivered, and so turned into a deed, then it is of another nature.**
>
> ***Contracts*, not to be performed in a year, are to be in writing, signed by the party, &c. or no action may be brought on them; but if no day is set, or the time is uncertain, they may be good without it. *Stat. 29 Car- 2. c. 3.* And by the same statute, no *contract* for the sale of goods for 10*l.* or upwards, shall be good, unless the buyer receive part of the goods sold; or give something in earnest to bind the *contract;* or some note thereof**

be made in writing, signed by the person charged with the *contract.*

A *contract* made and entered into upon good consideration, may for good considerations be dissolved. See *Agreement, Assumpsit, Sale.* As to *Usurious Contracts,* See title *Usury.*"

14. That the common understanding of English law in the early 19th century was, perhaps, closer to the modern law of contract than appears from *Comyns' Digest* may be gleaned from the following extracts from Tomlinsôentries for ñAgreementò, ñAssumpsitò, ñCovenantòand ñDebtò

> **"<u>AGREEMENT</u>, *agreementum, aggregtio mentium*.] A joining together of two or more minds in any thing done, or to be done. *Plowd.* 17. The joint consent of two or more parties to a contract or bargain; or rather the effect of such consent. See also *Contract; Covenant; Condition.***
>
> **A person *non compos* is not capable of entering into any agreement. See title *Idiots* and *Lunatics.***
>
> **Also an infant, for the same reason, is generally incapable of contracting, except for necessaries, *&c.* See title *Infant.***
>
> ***…***
>
> **Every *Agreement* ought to be perfect, full, and complete, being the mutual consent of the parties; and should be executed with a recompence, or be so certain as to give an action or other remedy thereon. *Plowd. 5.* Any thing under hand and seal, which imports an agreement, will amount to a covenant; and a *proviso*, by way of *agreement*, amounts likewise to a covenant; and action may be brought upon them. 1 *Lev.* 1*55* – Under the stamp acts all agreements must be stamped.**
>
> **Besides the bare words of an agreement, the common law, to prevent imposition, ordained certain ceremonies where an interest was to pass; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet in equity, where there was a consideration, the want of ceremonies was not regarded. However, in former times, courts of equity were very cautious of relieving bare parol agreements for lands, not signed by the parties, nor any money paid (2 *Freem.* 216.) although they would sometimes give the party satisfaction for he loss he had sustained. And now by the stat. of 29 *Car. 2. cap. 3.* commonly called the Statute of Frauds, if an agreement be by parol, and *not signed by the parties, or somebody lawfully authorized by them, (Pre. Ch.* 402) if such agreement be not confessed in the answer, it cannot be carried into execution. But where, in his answer, the defendant allows the barain to be complete, and does not insist on any fraud, there can be no danger of perjury; because he himself has taken away he necessity of proving it. … as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part, for where there is a performance, the evidence of the bargain does not liemerely upon the words, but upon the fact performed *See 2 Bro. Rep. 566.* And it is unconscionable, that the party that has received the advantage, should be admitted to say, that such contract was**

never made. So, if the signing by the other party, or reducing the agreement into writing, be prevented by fraud, it may be good."

"<u>ASSUMPSIT</u>, from the Lat. *assumo*.] Is taken for a voluntary promise, by which a man assumes or takes upon him to perform or pay any thing to another; it comprehends any verbal promise, made upon consideration, and the civilians express it diversely, according to the nature of the promise, call it sometimes *pactum,* sometimes *promissionem,* or *constitutum, &c. Terms de Ley.* An action upon the case *on assumpsit* (or as it is also expressed, *on promises*) is an action the law gives the party injured by the breach or non-performance of a contract legally entered into; it is bounded on a contract either *express* or *implied* by law; and gives the party damages in proportion to the loss he has sustained by the violation of the contract. *4 Co. 92: Moor 667.* In every action upon assumpsit, there ought to be a consideration, promise, and breach of promise. 1 *Leon. 405.* For

The law distinguishes between a general *indebitatus assumpsit* and a *special assumpsit: …*

<u>COVENANT</u>, *conventio*.] The agreement or consent of two or more by deed in writing, sealed and delivered; whereby either, or one of the parties doth promise to the other that something is done already or shall be done afterwards; he that makes the covenant is called the *covenantor*: and he to whom it is made, the *convenantee.*

A *Covenant* is generally either in *fact* or *in law*; in *fact* is that which is expressly agreed between the parties, and inserted in the deed; and *in la,* is that *covenant* which the law intends and implies, though it be not expressed in words; as if a lessor demise and grant to his lesse a house or lands, & c. for a certain term, the law will intend a *covenant* on the lessor's part, that the lessee shall, during the term, *quietly enjoy* the same against all incumbrances. 1 *Inst.* 384.

…

The most frequent use of a convenant, is to bind a man to do something *in future*, and therefore it is for the most part executory; and if the covenantor do not perform it, the covenantee may t hereupon for his relief have an action or writ of covenant, against the covenantor, so often as there is any breach of the covenant. *Sheph. Touchst.* 161.

No duty or cause of action arises on a *covenant* till it is broken: and as to breaches of covenant, if a person by his own act disables himself to perform a covenant, it is a breach t hereof. And if a covenant to do a thing is performed in substance, and according to the intent, it is good, though it differs from the words; and on the other hand, although the covenantor performs the letter of his covenant, if he does any act to defeat the intent and use of it, he is guilty of a *breach.*

When the intention of the parties can be collected out of a deed, for the doing or not doing of the t hing, covenant shall be had thereupon. A covenant, being one part of a deed, is subject to the general r ules of exposition of all parts of the deed: and in a covenant the last words, that are general, shall be expounded by the first words, which are special andparticular.

Covenants are generally taken most strongly against the covenantor, and for he covenantee. But it is a rule in law, that where one thing may have several intendments, it shall be construed in the most favourable manner for the covenantor. The common use of covenants is for assuring of land: quiet enjoyment free from incumbrances; for payment of rent reserved; and concerning repairs, &c.

…

DEBT, *debitum.*] In common parlance is a sum of money due from one person to another. And if an action be brought, and the plaintiff recovers judgment, he may by law take either the person, or his real or personal estate in execution, *i.e.* the moiety of his real estate, or the whole of the personal, if not more than sufficient for payment of the sum recovered and charges.

In the legal sense of the word, *debt* is said to be an action which lieth where a man *oweth* another a certain sum of money, either by a debt of *record,* by *specialty,* or by *simple contract*; as on a judgment, obligation, or bargain for a thing sold, or by contract, & c. and the debtor will not pay the debt at the day agreed; then the creditor shall have action of debt against him for the same.

The legal acceptation of *debt*, is a sum of money due by certain and express agreement: as by a bond for a determinate sum; a bill, or note; a special bargain; or rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt*, to compel the performance of the contract, and recover the specific sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal.

…

The form of the writ of *debt* is sometimes in the *debet & detinet*, and sometimes in the *detinet* only; that is, the writ states either that the defendant *owes*, and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debt,* as well as *detinet*, where sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obliger, the landlord against the tenant, &c. But, if it be brought by, or against an executor for a debt due to or fro t he testator, this, not being his own debt, shall be sued for in the *detinet* only. So also if the action be for goods, for corn, or an horse, the writ shall be in the *detinet* only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as by *debt.* And indeed a writ of *debt* in the *detinet* only, for goods and chattels, is neither more nor less, than a mere writ of *detinue*; and is followed by the very same judgment. *3 Comm. 156."*

Buller's Trials at Nisi Prius

15. The last of the primary sources here laid out upon a review of English ñcontract lawò in the early 19th century is a practitionerôs book: the seventh (1817) edition of *An introduction to the law relative to trials at nisi prius*, originally written by Sir Francis Buller (1746-1800). It was known colloquially as Bullerôs *Trials at Nisi Prius.*

16. It was divided into seven parts. To a modern eye, its Table of Contents appears to interweave substantive and adjectival law topics ï a sign of differences in mindset between ñthenò and ñnowò. For present purposes, express notice needs to be taken only of the first two Parts. Part I is entitled ñOf Actions Founded on Tortsò. Part II is entitled ñOf Actions Founded Upon Contractò. The first Part should not go entirely unnoticed in an historical review of contract law because it included chapters on negligence (ñOf Injuries arising from Negligence or Folly ò), Deceit and Detinue, amongst others. However, the central focus must be on Part II. The chapters within it were directed severally to the Actions of Account, Assumpsit, Covenant and Debt.

17. What follows here is an extract from each of those chapters, incorporating footnotes in square brackets in the text and omitting much of the commentary expressed in the form of digested references to particular cases (marking out *Buller* as a form of literature in transit from *Comyns' Digest* and a modern legal text, of which *Anson* is representative):

PART II
CONTAINING ONE BOOK OF
ACTIONS FOUNDED UPON CONTRACTS
INTRODUCTION

> **Mutual commerce and intercourse is of the very essence of society; but if there were no method of compelling the faithless to keep their engagements, self-interest is so prevalent, that very few would be adhered to, and consequently very few made. Thus the chief advantage of society would entirely fail, unless its laws were so framed as to bind its members to a strict performance of their contracts, by compelling them to make an adequate satisfaction for the breach of them.**
>
> **Hence springs a new set of actions very different from those treated of in the fist part of this work, and they are actions founded upon contract: Such are actions of**
>
> **I. Account.**
> **II. Assumpsit.**
> **III. Covenant.**
> **IV. Debt.**

CHAPTER 1
OF ACTIONS OF ACCOUNT

> **The Action of Account is of late years but rarely used, therefore I shall say very little upon it. …**

CHAPTER II
OF ASSUMPSIT

OF all actions founded upon contract, none is in more general use than the Action of *Assumpsit,* which is founded upon a contract either *expressed* or *implied* by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract.

There are two sorts of *assumpsit.*

First, a general *indebitatus assumpsit.*

Secondly, a special *assumpsit. – Woodford v. Deacon,* E. 1608. Cro. Jac. 206. 1 Rol. Abr. 8. *Green v. Harrington,* Hut. 35.

1st. *General indebitatus assumpsit* will not lie where the debt is due by specialty, for in such case the specialty ought to be declared upon; therefore it is always necessary in t his action to shew for what cause the debt grew due; and in case it be not shewed, it will be sufficient reason to arrest judgment, or to reverse it upon a writ of error.

The general causes for which this action may be brought, are either, first, for money lent. Secondly, for money laid out and expended. Thirdly, for money had and received to the plaintiff's use. Fourthly, for a sum certain (*viz. £10*) for goods sold and delivered. Fifthly, for goods sold *quantum valebant.* Sixthly, for a sum certain for work and labour. Seventhly, a *quantum meruit* for work and labour. Eighthly, on an account stated.

…

2dly. *Special assumpsit.* – In a special assumpsit the plaintiff must prove his declaration expressly as laid, therefore if the agreement be to deliver merchandisable corn, proof of an agreement to deliver good corn of the second sort is not sufficient: (*Anon.* 12 W.III.1 Raym.735)

…

***Consideration*. – A mere voluntary curtesy will not have a consideration to uphold an *assumpsit;* but if such curtesy were moved by a request of the party, that gives an *assumpsit*; … And this leads me to take notice of a distinction between promises upon a consideration executed, and executory. – *Lampleigh v. Braithwaite,* M.13 Jac.I. Hob. 105, *Bosdenv. Thynn,* infra**

[If *A.* promise to do, or to abstain from doing, an act in consideration of the antecedent performance of some act or promise on the part of *B.* the promise of *B.* is called a dependant promise, because *B's* right of action for a breach of such promise depends on the prior performance (or that which is equivalent to performance) of the act or promise on the part of *B.* and the act or promise to be performed by *B.* being in nature of a condition precedent, is usually distinguished by this appellation, because the performance (or that which is equivalent to performance) of such act or promise precedes *B.'s* right of action to recover damages against *A.* for non-performance of his promise, and must be specially avowed in the declaration. *Selw. N. P. Abr. 94.* Vide etiam *Raynay v. Alexander, Yelv. 76* and *Thorpe v. Thorpe,* Ld. Raym. 662, which is a leading case on this subject , and where Ld. *Holt*, after fully discussing the distinction between positive agreements and conditions precedent, observed, that in cases of conditions precedent, an action could not be maintained before performance, but in the case of positive agreements it was otherwise. The learned judge then laid down certain rules to which the reader is referred. See also *Martin v. Smith,* 6 East, 555. and *St. Albans D. v. Shore,* 1 H. Bla. 270, with the remarks of *Ellenborough,* C.J. and *Lawrence,* J. on Lord *Loughborough's* opinion in *Martin v. Smith;* also see *Phillips v. Fielding,* 2 H. Bla. 123.

In all cases of conditions precedent a performance ought to be specially avowed, or what is equivalent, a tender and refusal, but the averment of a tender alone will not suffice. *Leav. Exelby,* Cro. Eliz. 888. Furthermore, *as to concurrent acts,*Where two acts are agreed to be performed by each party at the same time one party cannot sue the other without avowing either performance of his part of the agreement, or what is equal to it. *Morton v. Lamb,* 7 T. Rep. 125, which case *Lawrence,* J. assimilated to *Callonell v. Briggs,* Salk. 112. But after verdict an averment that plaintiff was ready and willing to perform his part of the contract, has been holden sufficient. *Rawson v. Johnson,* 1 East, 203. *Waterhouse v. Skinner,* 2 Bos. & Pull. 447. So where something is to be performed by two at the same time, he who is ready and offers to perform his part, may sue the other for non-performance. *Jones v. Barkeley,* Dougl. 659. (684).]

In the case of a consideration executed the defendant cannot traverse the consideration by itself, because it is incorporated and coupled with the promise, and if it were not then in deed acted, it is *nudum pactum. (Bosden v. Thynn,* M1603. Cro. Jac. 18.) But if it be executory, the plaintiff cannot bring his action till the consideration performed, and if in truth the promise were made, and the consideration not performed, the defendant must traverse the performance, and not the promise, because they are distinct in fact. And therefore the plaintiff, when he alledges performance, ought to alledge a place where; and if he do not, the defendant may demur for want of a *venue. – Sexton v. Miles,* 1 W. & M. Salk. 22.

[A consideration altogether unexecuted is not good to maintain an *assumpsit;* as if *A.'s* servant be arrested in London for a trespass, and *J.S.* who knows *A.* bails him, and after *A.* for his friendship, promises to save him harmless, if *J.S.* should be charged, this will be no consideration to ground an *assumpsit,* because the bailing, which was the consideration, was past and executed. *Hunt v. Bate,* Dy. 272, 1 Rol. Abr. 11. *Doggett v. Dowell,* Owen, 144. But it would have been otherwise, if *A.* had requested him to bail his servant, and the bailing had been after. *Hunt v. Bate,* sup.]

Where the action is brought upon mutual promises, it is necessary to shew they were both made at the same time, or else it will be *nudum pactum; (Nichols v. Rainbred,* H. 12 Jac. I. Hob. 88.) and though the promises be mutual, yet if one thing be in the consideration of the other, a performance is necessary to be averred, unless a certain day be appointed for it.

[Where there are *mutual promises*, and the bare promise, and not the consideration, an action will lie by either party, without avowing part performance in himself. *Lampleigh v. Braithwaite,* Hob. 106. But *Lawrence,* J. in *Glazebrook v. Woodrow,* 8 T. Rep. 373, said this question depends upon, and must be gathered from the nature and words of the agreement.]

Where in an *assumpsit* two considerations are alledged, the one good and sufficient, the other idle and vain; if tht which is good be proved it sufficeth; and although he fail in the proof of the other, it is no material, because it was in vain to alledge it; but if both be good, both must be proved. – *Crisp v. Garnel,* T. 1607. Cro. Jac. 127.

Though the promise alledge be proved, yet if it appear to be made on a different consideration than is mentioned in the plaintiff's declaration, it is not sufficient, or if it were made on the

consieration alledged, and some other thing beside. – *Carter v. Toddard,* M. 1587. Cro. Eliz. 79.

Ex *nudo pacto non oritur actio*, and therefore if *A.* in consideration that *B.* may immediately determine his will. – *Keble v. Tisdale,* M. 12 Jac. I. 1 Rol. Abr. 23.

[Where the doing a thing will be a good consideration, a promise to do that thing will be so too. *Dict.* Per *Holt,* C.J. in *Thorp v. Thorp,* 12 Mod. 459.]

If in consideration of a thing already done, without my request, not for my benefit, and where I was under no moral obligation to do it, I promise to pay money, that is *nudum pactum*, and void. But if I were under a moral obligation to do a thing, and another person does it without my request, and I afterwards promise to pay, that is good. Therefore where a pauper was suddenly taken ill, and an apothecary attended her without the previous request of the oversees, and cured her, and afterwards the overseers promised payment, if was holden good, for they were under a moral obligation to provide for the poor. – *Watson v. Turner et al', Excheq.* T. 7 Geo. III.

…

***Statute of Limitations.*- By 21 *Jac.* I. *c.* 16. This action must be brought within six years after the cause of action accrued; but if the defendant would take advantage of the statute, it is necessary for him to plead it, for he will not be permitted to give it in evidence on the general issue.**