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## FORMS OF ANGLO-SAXON CONTRACTS AND THEIR SANCTIONS.\*

### II. THE WARRANTY CONTRACTS.

*Including (a) Warranty of Title, and (b) Warranty of Quality.*

Perhaps the most primitive commercial transaction affecting legal rights was the executed barter; in a more advanced state when money had been introduced, the executed sale.

In the very earliest Anglo-Saxon period of which we have knowledge such transactions might involve contractual rights. For instance we read in the laws of King AETHELBERT,<sup>53</sup> "If a man buy a maiden with cattle, let the bargain stand, if it be without guile; but if there be guile, let him bring her home again, and let his property be restored to him." The bargain, if there has been guile, has not been executed properly. There is then a right of rescission. The laws clearly state a legal right of the party defrauded to have his original property restored to him.

What was the nature of such right, and how was it enforced? From our modern point of view it is contractual. The property in the maiden and in the cattle had passed. An obligation, at the option of the defrauded party, rested on both parties to re-vest the property exchanged. But it may at once occur to the reader that primitive men did not look upon the matter from our modern viewpoint. Perhaps the defrauded party conceived of his claim for restitution as "real." He demanded the return of his own. As a matter of fact such was not the case, if we may judge from Anglo-Saxon procedure. There were only two kinds of proceedings which could be brought for a chattel. One was the property procedure involving a charge of theft. The other was Debt. In the case in question the first clearly could not be brought, for the chattels had been parted with with consent. If the second were brought it would have to be based on a contract.<sup>54</sup> So if either party could sue it must have been on a contract right. If we take as an example a case of failure of title the matter is still clearer. A buys a cow from B; it turns out that B had no title. B is under obligation to give A another cow of the same value.<sup>54a</sup> Certainly if A sues B it is not upon a "real" right.

But it seems probable that in the early law no direct action was available for B where there was a failure of title. And where there

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<sup>53</sup> Aethelbert, 77.

<sup>54</sup> Laughlin, 196.

<sup>54a</sup> Cf. Glanvil, III, c. 1.

was a breach of warranty of quality there was a provision for a special issue on the point. How do such procedural facts then affect the question as to the nature of right? In case of failure of title it would seem that judicial recognition was at first indirect. The law started with the composition procedure above described.<sup>55</sup> By it the first legal needs of society were met, namely redress for assault, battery, and homicide. It was not long, however, before trouble caused by stealing, particularly cattle-stealing, gave serious concern, and we get the theft-procedure. The composition procedure, as we have seen, was set in motion by demanding justice, backed up by threats of vengeance. Thereby the defendant was induced to enter into the procedural contract, with sureties. The theft-procedure was begun by demanding property as one's own. The defendant would then have to give it up, or give sureties to insure his proving that it was his own.

A sues B for the recovery of a stolen cow. One plea that B may set up in defense is that he bought the cow from a designated party, C. If B can produce C, and C admits the sale, B may give the cow into C's hands and the suit will then proceed against the latter, thus freeing B from the charge.<sup>56</sup> Suppose then C succeeds in defending the charge of theft, but is unable to prove ownership or to produce his own warrantor. In that case C will have to give up the cow to A.

The procedure in this matter we find early, in the laws of HLOTHAER and EADRIC 7, "If any man steal property from another, and the owner afterwards lay claim to it; let him vouch to warranty at the king's hall, if he can, and let him bring thither the person who sold it to him; if he cannot do that, let him give it up and let the owner take possession of it."

In our case B has paid C for the cow, what then are B's rights? Obviously C should give him another cow. It is clear B had such a right.<sup>56a</sup> But what of an action to enforce it? The purpose of a suit was to determine a right, not to enforce it, and judgments had in any case to be collected by the plaintiffs, and not by officers of the law. What clearer determination, then, of B's rights could be desired than in the action of theft between A and C? If C cannot defend his title and gives up the cow to A, he must, of course, compensate B.

But what will compel C to compensate B? The very same sureties who held C to his obligation of warranty, who compel him to take B's place in the theft charge brought by A. For certainly the

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<sup>55</sup> Ante, page 554-5.

<sup>56</sup> Oaths 3, Ethelred II., 9.

<sup>56a</sup> Cf. Glanvil, III, c. 1.

claiming of the chattel in B's hands will itself be no constraint upon C. To get him to court there must be a different set of sureties from those given to release A's demand for the thing claimed to be stolen.

There might, however, be a preliminary issue which would have to be settled. C might deny the sale of the particular cow and refuse to accept it back. Provision for such an issue is found in *INĒ* 75; "If a man attach stolen property, and the person with whom it is attached then vouch another man to warranty; if then the man will not accept it, and says that he never sold him that, but sold him other; then must he prove who vouches it to that person, that he sold to him none other, but that same."

A further issue may be suggested, for may not C deny having sold B any cow? In the first Anglo-Saxon period such an issue could not have occurred. For as has been shown,<sup>57</sup> you could not get a defendant before the court on a contract claim unless you had taken sureties at the time of the making of the contract. So if the defendant was in court, brought there by his sureties, there could be no question of the defendant having sold the plaintiff something, for otherwise the sureties would not have required him to answer, in fact there would have been no sureties. At a later time, when sureties were provided to hold a man to every justice, it might happen that a defendant would deny having sold anything to the plaintiff and that there would consequently be such an issue.<sup>58</sup>

In the guile case a need was early felt for the direct determination of an issue raised by a breach of warranty of quality, as the matter could not be incidentally settled as in the failure of title case.

We read in *INĒ* 56, "if a man buy any kind of cattle and he then discover any unsoundness in it within XXX days; then let him throw the cattle on his vendor's hands, or let the latter swear that he knew not of any unsoundness in it when he sold it to him."

The oaths used in the suit were as follows:

Plaintiff's oath: "In the name of Almighty God, thou didst engage to me sound and clear that which thou soldest to me, and full security against after-claim, on the witness of N., who then was with us two."<sup>59</sup>

Defendant's oath: "In the name of Almighty God, I knew not, in the things about which thou suest, foulness or fraud, or infirmity or

<sup>57</sup> See *supra*, page 562.

<sup>58</sup> Cf. *Glanvil*, X, c. 15, "But if he have made default in his warranty, then there will be a plea between the purchaser and his warrantor, so that matters may arrive at a duel."

<sup>59</sup> Oaths X.

blemish, up to that day's-tide that I sold it to thee; but it was both sound and clean, without any kind of fraud."<sup>60</sup>

The plaintiff's claim is based on the defendant's engagement. The denial first asserts good faith, the absence of knowledge on the defendant's part, and then ends with a flat denial of unsoundness. The action looks like one for fraud, but it only covers such frauds as arise out of contracts of sale. The wrong is a breach of contract.

What were the formalities of the contract violated by failure to give good title, and by the giving of unsound goods with an engagement of soundness? And what were their sanctions? How were defendants brought to court?

We may suppose that barter or sales took place at first without any formalities except such as were inherent in the nature of the transaction. Each party formally delivered goods to the other.

But at a very early date witnesses became an essential part of the ceremony. Were they necessary in order that title might pass? Probably. The laws prescribed them. In *HLOTHAER* and *EADRIC* 16, we read, "If any Kentish-man buy a chattel in Lunden-wic, let him then have two or three true men to witness, or the king's wic-reeve." And all through the Anglo-Saxon laws are to be found similar provisions.<sup>61</sup> Also a fine was prescribed for dealings without witnesses.<sup>62</sup> And when a man bought cattle when out on a journey there were minute provisions for declaring the matter to his neighbors upon his return, and heavy penalties, forfeiture of life and property, for failure to do so.<sup>63</sup>

The primary object of the witnesses was as a safeguard against theft. The purchaser needed them in order to defend against a charge of theft.

In the second place, they were of use in proving that a defendant was vendor and warrantor of title, in case an issue was taken on that point. They thus enabled a purchaser to compel his vendor to defend in his place; and were also witnesses of the vendor's obligation to compensate his vendee in case the chattel had to be given up on the claim of a third party.

The matter of witnesses then, at least in all important sales,—there were exceptions in matters of trifling values<sup>64</sup>,—was so rigidly prescribed and of such practical importance, that we may fairly conclude that a sale or delivery without witnesses was imperfect and

<sup>60</sup> Oaths XI.

<sup>61</sup> *Aethelstan*, I, 10, 12; *Edgar*, Supp. 6.

<sup>62</sup> *Aethelstan*, I, 10.

<sup>63</sup> *Edgar* Supp. 7-11.

<sup>64</sup> See *Aethelstan*, I, 12—where witnesses are required for sales of property over XX pence in value.

did not give the vendee the full property. A matter, which for centuries was required by law and custom, must in the popular mind have become an essential of validity.

Also, in the later law at any rate, sureties were required in executed sales. In *ÆTHELRED 1, 3*, we read: "And let no man either buy or exchange, unless he have sureties and witnesses; but if any one do so, let the land-lord take possession of and hold the property, till that it be known who rightfully owns it." When such a stage has been reached, and in practice we may take it the expedient of requiring sureties of a vendor must have very early been resorted to, the form of the executed contract of sale becomes precisely that of the formal surety contract. The ceremony of the *wed* with the giving of sureties is gone through with with witnesses. The two contracts are completely assimilated. And such is quite what we should expect. The surety contract was regularly employed for matters which were purposely left executory on one side. Why should it not be used for transactions which were intended to be fully executed, but which might turn out not to have been so?

It is submitted that we have here an additional proof that the obligations of vendors to make good for failure of title or for unsoundness were strictly contractual. We need not rely on the procedure for the enforcement of such rights alone. The form of the transaction clinches the point.

But why have sureties? For exactly the same reason as in the unilateral, or partly executed, contract. How was one to get his warrantor to court, if he was unwilling to come voluntarily? Obviously, by the procedural contract made in advance, with sureties. The ability of a vendee to force his vendor to submit to the jurisdiction of a court was of the most vital importance. If he could get him there he could force him to take the chattel claimed as stolen, and defend in the vendee's place. In case the vendor was forced to give up the chattel to the claimant in the theft suit, the same sureties were at hand to compel him to give another of equal value to his vendee.

So although the earliest laws mention only witnesses and not sureties, the latter were of such importance that we may conclude they were early employed. Unless they were, we can hardly say that there were warranty contracts in connection with the sale. It might happen that a vendor who had not given sureties would be willing to defend in his vendee's place, but the chances were against it, for by doing so he would run the risk of being convicted of theft himself, and it was most likely that it was for the express purpose of avoiding such an obligation that he omitted to give sureties.

If he voluntarily came forward, and lost the chattel to the claimant, it might be that the judgment against him would require him to give sureties, as security for compensating the vendee. If so, his contractual obligation would begin with the giving of such sureties. But it may well be doubted whether a court would compel the giving of sureties, or render any judgment to compensate the purchaser against the seller, if the latter had not assumed such obligation in the first instance by a formal surety contract.

Were these warranty contracts express or implied, and was there any difference in that respect between the warranty of title and the warranty of quality?

In the first place, the caution should be made that it was the form in both cases which gave validity and not words, express or implied. We must put aside any preconceptions that we may have from our familiarity with consensual contracts, for it was centuries later before they were recognized in England. To talk about suing on contracts express, implied in fact, or implied in law, would be an anachronism. The question is simply: did every vendor who could be sued have to expressly guarantee his title, and the soundness of the goods he sold, or were such warranties a part of every sale regardless of whether the vendor said anything or not?

It is submitted, that when the procedural contract was entered into, i. e. when there were not only witnesses, but also sureties, that the vendor did say something. Or at any rate, that in every sale in which sureties were given there was a warranty. If the vendor was unwilling to warrant he could refuse to give sureties on that express understanding. There would of course be witnesses, for they were necessary to protect the vendee from the charge of theft. But if the vendor had no intention to defend in his vendee's place, and to compensate him if the chattel were lost through a third party's claim, he could quit-claim by refusing to give sureties. As to the warranty of quality, it would seem likely that express words were used, for the oath used for the declaration ran: "In the name of Almighty God, thou didst engage to me sound and clean that which thou soldest to me, and full security against after-claim, on the witness of N. who then was with us two."<sup>65</sup> The action is on the promise and apparently on an express engagement to make good in case there was unsoundness.

What was testified to by the transaction witness was what he saw and heard,<sup>66</sup> so if the suit was for breach of warranty, we may take

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<sup>65</sup> Oaths 7.

<sup>66</sup> Oaths 8.

it that he testified to words of warranty, or at least to what the agreement was, as evidenced by what the parties said.

It may be said then, that in every case in which a right for breach of warranty existed, there had been a surety contract entered into at the time of the sale, and suit, if brought, was upon such contract. In all cases where he gave sureties, the vendor probably actually warranted, usually expressly. In failure of title cases, it might not have been of great importance what he said, for the very fact that he sold and gave sureties showed that he warranted the title. In warranty of quality cases, the words, no doubt, were of greater significance, were perhaps essential for the right.

It is felt to be justifiable to place the warranty contracts in the first period of Anglo-Saxon law, even though it is not clear that sureties were required by law in executed sales until the reign of King EDGAR, for the rights created by breach are very early mentioned. In the case quoted from the laws of AETHELBERT<sup>67</sup> in which a man who bought a maiden with cattle and found that there was guile, was declared to have a right to have his property restored to him, it seems certain that the forms of the surety contract were used. The *wed* ceremony was, as far back as we have any record, a part of the betrothal ceremony. It is from *wed* that our word "wedding" is derived. So both the purchaser of the maiden and the relatives who sold her must have given sureties.<sup>68</sup> And it seems not unfair to conclude that such was the common practice at that early day in all important sales.

### III. THE CONTRACT OF COURT RECORD.

Then there was the contract by court record. The first reference to it seems to be in the laws of King INE.<sup>69</sup> It is entirely natural to expect to find this the first type of contract with the state behind it. Just as the criminal jurisdiction of the crown grew from a king's peace which first included only acts committed in the king's presence or in his household, and gradually extended over other places, e. g., to the king's highways and rivers, over specially designated times, and special persons, until finally the king's protection covered the whole realm; so the protection of contracts by the state began with those entered into in the presence of the king or his magistrates, or in the courts.

The formalities of the surety contract were observed. In INE 13<sup>70</sup>

<sup>67</sup> Aethelbert, 77.

<sup>68</sup> Cf. the ceremony given fully in the Laws of Edmund.

<sup>69</sup> Ine 13.

<sup>70</sup> Liebermann, Vol. I. p. 95.



we read: "If anyone is untrue to his oath given before the bishop or breaks the promise entered into in his presence by the *wed* ceremony let him pay 120 shillings."

The object of making the contract in the bishop's presence was to give it greater sanction than it would otherwise have had. By making it in the presence of an ecclesiastic the religious sanction was emphasized. But there was no separate ecclesiastical jurisdiction at this time. Bishops presided over lay courts.<sup>71</sup> So the contract referred to, in addition to any religious weight which may have been conferred upon it by the particular magistrate in question, had behind it the power of the state.

Again in ALFRED 3<sup>72</sup> we read: "If anyone breaks a suretyship guaranteed by the king, let him pay whatever is right to the complainant, and 5 pounds in silver to the king. If he break a suretyship secured by an archbishop, or his protection, let him pay a fine of 3 pounds. The breaking of the guarantee or protection of any other bishop or of an ealdorman shall be paid for by a fine of 2 pounds."

We have the same phenomenon here as in the passage from the laws of INE. If a surety contract is made in the presence of the king or other magistrate, and is broken, a heavy fine must be paid. In the case of the magistrates other than the king the same fine is prescribed for a breach of protection. A lordless man or one without relatives to become his sureties might flee to a magistrate. The latter might then take him under protection and become surety for him. If the pursued then defaulted, he was subject to the above prescribed fines.

In the passages cited it is not clear whether sureties were required or not, whether it would be sufficient to give a substantial *wed* as a pledge, or perhaps whether the ceremony alone, with a symbolic *wed*, would do. It is submitted that all three possibilities were used on occasion. The natural thing in the usual case would be to require sureties. In some instances there could be no objection to receiving a substantial pledge instead. In such a case the magistrate would naturally keep the pledge himself. Even without either sureties or pledge, the making of the contract in the magistrate's presence would be sanctioned by the threatened fine. Sometimes the magistrate would be willing, not only when the debtor was a friend or person of standing, but also when he was a poor man who had fled to him for protection, to become surety for him. In such

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<sup>71</sup> Pollock & Maitland's Hist. Eng. Law. I. 16.

<sup>72</sup> Liebermann, 51.

a case if protection was granted the magistrate himself would have to see to it that the debtor did his part.

In the last situation it might be asked, was the magistrate personally liable? Certainly not if he was the king; but a lesser magistrate probably was. Note the difference between the two in the passage cited from King ALFRED. As to magistrates other than the king there is a provision both for the breach of a guaranty of suretyship, and for *mund-bryce* or breach of protection. In the former case the magistrate exacted sureties, or a substantial pledge. In such a case he was not personally liable. In the latter case he took the defendant under his protection, in other words, he became surety for him, in just the same way every lord was under obligation to become surety for his dependents.<sup>73</sup>

The contract so made before a judicial magistrate was essentially a contract of court record. It was the fact that it was made in court which distinguished it from other contracts. In an important respect it differed from later contracts of record; that is, the sanction was indirect. It was a fine exacted by the state for its breach.

B.—890 A. D. TO 1027 A. D.

#### IV. THE CONTRACT OF PLIGHTED FAITH.

In the laws of King ALFRED we get the first mention of a contract which did not depend on sureties for its force. The surety employed was Deity.

"If any one complains of another that he has broken a promise made with God as a surety, and says that the party complained of has not fulfilled his promise, let him take an oath to that effect in four churches; and if the defendant wishes to clear himself let him take an oath in twelve churches."<sup>74</sup>

Although the quotation is from the lay and not from the ecclesiastical part of ALFRED'S dooms, the matter appears to be one of Church jurisdiction rather than one for the lay courts. The procedure is much like that employed in the lay courts, and perhaps indicates a church jurisdiction over contracts which continued in operation until put an end to by the Constitutions of Clarendon in A. D., 1164.

However that may be, there was without doubt a common practice of attempting to give promises sanction by the performance of the *wed* ceremony, without the giving of human sureties. For example,

<sup>73</sup> As in Ethelred I, 1.

<sup>74</sup> Alfred 33, Liebermann, Vol. I, 67.

we see the great men of the *Witan* giving their *weds* to the Archbishop to make binding their promises to do justice and to see that the laws are executed.<sup>75</sup> The members of town and gild organizations gave each other their *weds* to confirm their solemn promises to abide by the peace of and the rules of group or organization.<sup>76</sup>

If there were no ecclesiastical penalties suffered for breach of such obligations, we may conclude there were none, other than those of social pressure and public opinion. For there is nothing to indicate that the state ever gave any aid, other than perhaps some approval or support, to the ecclesiastical tribunals. It seems reasonably certain that such contracts were not actionable in the lay courts.<sup>77</sup>

#### V. THE PLEDGE CONTRACT.

Precisely when the pledge contract arose may be difficult to say, but how and why it arose may be explained. It is placed in the second period for the reason that there is nothing to show it was used in the first. Like the surety contract, it could be used for procedural purposes, and was perhaps first used in that way.<sup>78</sup> It seems to have been a modified form of the surety contract. It might sometimes happen that the defendant could find no one willing to become surety for him. In that case if he had property he could induce someone to be his surety by placing the sum claimed, or a sufficient amount of property in the surety's hands. The *wed* then instead of being a worthless symbol, became a substantial pledge. When the same contract was used to secure extra-judicial agreements there was no particular use for the surety. A defendant might be quite unwilling to place his money or property into the plaintiff's hands, but it was quite another matter, when, for instance, he was about to borrow money. There would then be no objection to the lender holding the pledge himself instead of passing it on to a third person.

There can be no doubt that the early pledge was a *wed*. *Wed* is the word for a pledge. And as we find the pledge in the hands of the pledgee instead of in those of a surety, it must be that its passing to the surety has been arrested.

Witnesses for such a transaction would seem to be unessential. They were of no use for making proof in a suit, for as will be shown, no right of action grew out of the matter. Possibly the pledgee might demand them in order to defend in case he were

<sup>75</sup> Aethelstan, V. *Judicia Civitatis Lundoniae*, Tenth.

<sup>76</sup> Aethelstan, V. *Judicia Civitatis Lundoniae*, Intro.

<sup>77</sup> See an interesting discussion of this contract, there called *fides facta*, in Pollock & Maitland's *History of English Law*, II, pp. 181-187.

<sup>78</sup> Ethelred III, 12.

charged with theft. Or they might be required in order that a formal transfer of the property in the pledge might be made to the pledgee. But no doubt motives of secrecy would often induce the making of the transaction in private and without witnesses.

The result of leaving out the sureties would be to destroy the actionability of the transaction. There would be no sureties to compel appearance. But might not the pledge itself be a sufficient constraint?<sup>79</sup> Yes, if the creditor could sue the debtor on the debt. But he could not.<sup>80</sup> In the absence of such a right there would seem to be little chance of an issue being brought before the courts at the instance of the creditor.

At a later time, when equitable rights in the *res* had developed, the situation was of course different. The creditor did in certain cases have an interest in the thing which might induce him to sue if there were an appropriate remedy. If the debtor defaulted, the creditor would wish to make the thing his own. If it had been transferred to him informally, that is, without a properly witnessed livery of seisin,—for that was as necessary for chattels as for land in the early law,<sup>81</sup>—it still belonged to the debtor. The creditor then would wish to foreclose the debtor's rights, and acquire the authority of the court to dispose of the chattel as his own. In GLANVIL'S time he was given such a right.<sup>82</sup> Likewise the debtor was given an equitable right to redeem.<sup>83</sup> Involved in the remedies also was the matter of the duty of care for the chattel. But in the Anglo-Saxon regime we need not look for such rights. We must find a single issue action, or conclude that there was no legal redress. And as has been stated the pledgee had no such right. It certainly would not have been fair to allow him to recover the debt and not to compel him at the same time to return the pledge. But that would involve more than a single issue, and a rather complex one at that, for there would be the question of due care to consider. It might be answered as to that, that an absolute liability could be imposed on the pledgee and perhaps was. But even so, there would be a double issue, for while the pledgee sued for the debt the pledgor would be suing for the pledge, a situation which the Anglo-Saxon procedure was not able to contemplate. No contract except a unilateral one was actionable.

<sup>79</sup> Cf. Quære to that effect by Glanvil, X, c. 8.

<sup>80</sup> That was the rule in primitive Germanic law generally. Wigmore, 10 Harv. L. Rev. 327. Also such was the rule of the Common Law of Glanvil's age, Glanvil, X, c. 8.

<sup>81</sup> Pollock & Maitland's Hist. Eng. Law, II, p. 179.

<sup>82</sup> Glanvil, Book X, c. 8.

<sup>83</sup> Glanvil, Book X, c. 9.

If we turn to the plight of the pledgor we find precisely the same situation, for he could not sue to get back his pledge. First, let us note that in the case supposed the pledgee had given no sureties to compel him to return the pledge. How get him to court? If the pledge was more valuable than the money, there would be no constraint in the transaction itself, as there might be if the pledgee wished to sue.

Again, what remedy was available to the pledgor? There were only two possible actions. One was a property claim normally involving a charge of theft. That certainly could not be brought against a pledgee, for he had not taken the property without the owner's consent. The other remedy was Debt, which was based on a contract *in genere*, as LAUGHLIN calls it,<sup>84</sup> even where the claim was for the return of a chattel. In our principal case the pledgee has entered into no such contract, either as surety or as debtor.

Furthermore, it would not be fair to allow the pledgor to get the *res* without paying the debt, and that as stated above would involve more than one issue.

We may conclude, therefore, that the pledgor could no more sue the pledgee, than the pledgee could sue the pledgor.<sup>85</sup> And this regardless of whether the property in the thing remained in the pledgor or not. For if the property had passed to the pledgee without a formal contract for its return, *a fortiori* there was no remedy.

When we come to GLANVIL'S age, it makes a difference whether the delivery of the chattel was formal, so as to convey the full seisin or property to the pledgee, or not. For instance, the question of absolute liability or only due care on the part of the pledgee, or the necessity for foreclosure, may depend upon it. But it would seem that in the age under consideration, the chief difference would arise in case the pledgor attempted to take back the chattel or succeeded in doing so. If the chattel were still his own he would not be guilty of larceny.

As to third parties also there might be a difference. If the pledgor had parted with the title, it is clear he would have no right to bring theft against a taker.<sup>85a</sup> That right would belong solely to the pledgee. But if the pledgee merely had the custody, the right of protection would remain in the pledgor.<sup>86</sup> Also if the pledgee had

<sup>84</sup> Laughlin, 196.

<sup>85</sup> Cf. Wigmore, *The Pledge Idea*, 10 Harv. L. Rev., 327.

<sup>85a</sup> But see a different rule in Glanvil, X, c. 11. For the older rule see Laughlin, 197.

<sup>86</sup> It should perhaps be noted that bailies ordinarily did have the property. Pollock & Maitland's *Hist. Eng. Law*, II, 175. It is suggested that whenever they were contract-bound they had the property. But the pledgee in the case supposed was not bound by contract and was not suable.

seisin he could give an indefeasible title to a third party, which would not be the case if he had custody only.

If neither party could sue on a pledge contract should we not hesitate to call it a contract at all? The matter was executory on both sides, yet even without external sanction there were good chances of mutual performance. The debtor was constrained to pay by his desire to get back the article pledged, which normally was of greater value than the debt. Unless the disparity in value was great, the creditor was not strongly tempted to keep the pledge. He might even prefer his money. Especially would that be the case where the article pledged had not been formally transferred with witnesses. Then the pledgee, not being the absolute owner, would not desire to continue to hold a thing which was not his own.

If the property in the pledge was transferred to the pledgee, if it was much more valuable than the debt, and if the pledgee was unscrupulous, he might refuse to allow redemption. But if a pledgor got himself into such a situation, it was his own fault.

The pledge contract, regardless of the sanction of a right of action for its breach, was a usable and practical business transaction. And have we not a right to call it a contract? Other contracts, ninety-nine times out of a hundred, would give rise to no right of action, because they would be performed. Perhaps in many of the ninety-nine cases, performance would be due to the knowledge that a breach would give such a right. Out of a hundred pledge cases, ninety-nine would be performed because of its inherent sanctions. What matter if in the hundredth case there was no right of action?

But a pledge transaction could no doubt be made actionable, if there were two separate surety contracts entered into, one on each side. When the money is delivered to the borrower, he may give sureties for its repayment. Likewise, when the pledge is transferred to the lender, he may be put under sureties for its return. The property in the *res* would then pass to the pledgee, and his liability, being contractual, would be as absolute as that of the pledgor to pay the money. Just as no amount of hard luck would excuse the payment on the one side, so a similar misfortune should not excuse on the other. The two contracts were independent. It is unlikely that performance on the debtor's part would be considered a condition precedent to the obligation of the creditor, as that would involve a double issue, which could not be settled by the one-sided proof of Anglo-Saxon debt procedure. The science of pleading for reducing a controversy to a single issue was still inchoate. And the rules for awarding proof now to the defendant and now to the plaintiff according to the result of the pleadings

seem to have been confined to real property actions.<sup>87</sup> In Debt the plaintiff asserted that the defendant owed him, and if the latter defended, it was by a denial. If the pledgee sued the pledgor, the latter would have to take an oath that he did not owe the money, without raising the issue of whether the chattel had been returned or not. Likewise, if the pledgor sued for the chattel, the pledgee could not defend on the ground of non-payment of the debt.

## VI. THE DELIVERY-PROMISE.

What may be called an informal formal contract arose at some time during the Anglo-Saxon period. It was like the formal surety contract except that the *wed* ceremony did not have to be performed at the time of the making of the contract. If A delivered goods on credit, or money by way of loan to B, in a formal way before witnesses, and B at the time promised to pay A for the goods or to return the loan; then if B broke his promise the matter gave rise to an action.

This contract might be called "real," but such a name would give an entirely wrong impression. It would import Roman ideas into Germanic law, which should not be done. The right of A in such a contract was no more "real" than in any other contract. This is clearly indicated by the only available action which could be brought by the promisee.<sup>88</sup> Some name, however, must be given to the contract to distinguish it from the surety contract, for it was distinct. In the surety contract the surety was the promisor, in the contract in question it was the debtor who was the promisor. The latter is here called the "delivery-promise." The delivery of property was a characteristic part of it, and also the promise. To be sure, a delivery and a promise were a part of the surety contract also; but some name must be chosen which will suggest what the substance of the transaction was, and "delivery-promise" seems adequate for that purpose.

This contract is placed in the second period because it seems improbable that it could have been actionable until the changes in the administration of justice which took place then,<sup>89</sup> to-wit, the provision that every man should have a surety to hold him to every justice, and the development of a determination on the part of the state indicated by the provisions for "riding" to compel a recalcitrant party to give sureties for appearance in court.

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<sup>87</sup> Laughlin, 230 et seq.

<sup>88</sup> See supra, page 553-4.

<sup>89</sup> See supra, page 557-8.

When such a point had been reached it was no longer necessary to have sureties, provided at its inception, for every contract. There were sureties already provided for all occasions in which a man's presence in court was demanded.

That does not mean that men did not have to have specially designated sureties in each particular case in which they were defendants.<sup>90</sup> The difference was that there was an officially designated group of sureties for every man, and group-responsibility provided by law, and that the state meant to compel every man of whom justice was demanded to get the required sureties from such group. It is not suggested that the departure was radical, for prior to such time there was a general customary obligation on the members of the kindred to go surety for each other. The difference is this: from that time on, the matter was no longer to be a matter of special treaty. The procedural contract was made in advance.

This difference in the legal situation should not be expected, however, suddenly to do away with the necessity of forms. What seems to have taken place is this. The old ceremony was at first used. The debtor would hand a *wed* to the creditor and the creditor would then hand it back to the debtor.<sup>91</sup> That, however, no doubt would after a time appear to the Saxons of that day quite as futile as it does to us today. Nothing could be gained by putting a man into the power of himself. The law had already provided with great strictness that all contracts and sales should be witnessed.<sup>92</sup> And to prove them it was necessary to produce at least one of the transaction-witnesses, who took an oath as to what he saw and heard, *de visu et audita*.<sup>93</sup>

The result was that a new contract, the delivery-promise, was evolved. It was a transaction quite as essentially formal as the surety contract itself. It did not derive its efficacy from the delivery as such, but from the ceremony of which the delivery was a part. A part of the ceremony, that of handing over the *wed* stick, was omitted, that was all. There was still the formal delivery, the formal promise, and the witnesses.

The suggestion might be made that the delivery-promise was merely an arrested sale or barter. For some reason the matter is not complete. Delivery has taken place on one side and not on the

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<sup>90</sup> Even in Blackstone's day we find the "common bail," all civil suits were started by the arrest of the defendant, who gave John Doe and Richard Roe as bail. Bl. Comm. III, 1287.

<sup>91</sup> That such proceedings actually happened, see Pollock & Maitland's Hist. Eng. Law, II, 185.

<sup>92</sup> Aethelstan I, 10, 12.

<sup>93</sup> Oaths 8.



other. The suggestion seems plausible enough if we do not hesitate to apply modern notions to ancient transactions. But the danger of such reasoning cannot too often be warned against. At a much later time we find the familiar doctrine that when a bargain is struck for the sale of specific goods the title is at once in the purchaser. Everything is complete except the delivery of the goods on the one hand and payment of the price on the other. To apply this doctrine to ancient law we must, of course, narrow down the case to a unilateral contract, for bilateral contracts were unknown to the law.<sup>94</sup> We must assume that the money has been paid. But then we encounter the difficulty that in ancient law delivery was absolutely essential for the transfer of property.<sup>95</sup> Even land had to be symbolically delivered. So the undelivered goods did not belong to the purchaser. Unless we reason in a circle we are starting with a time in which, if a man did not get the goods or the money bargained for at the time he parted with his own goods or money, there was no security unless he took sureties or a pledge.

A partially performed barter or sale, in an age of forms, was not likely of itself to give rise to a cause of action. The fact that a need was felt for it is not sufficient to assure us that the need was met by an action to fit the case.

It seems quite certain that such was not the case. In the first place the mere fact that a vendee had delivered goods and had not received the price gave him no rights. It was absolutely necessary that delivery and promise be witnessed. For instance, in ÆTHELSTAN I, 10 we read, "And let no man exchange any property without the witness of the reeve, or of the mass-priest, or of the landlord, or of the *hordere*, of other unlying man. If anyone so do let him give XXX shillings, and let the landlord take permission of the exchange." Even an executed exchange required witnesses. The same was *a fortiori* the rule where the transaction was executory on one side. The delivery as such gave no rights. It was the witnessed ceremony which did that.

Furthermore, the surety contract itself was prescribed for sales as late as the reign of King ÆTHELRED, 980-1016. ÆTHELRED I, 3 reads, "And let no man either buy or exchange, unless he have surety and witness; but if any one do so let the land-lord take possession of, and hold the property, till it be known who rightfully owns it."<sup>96</sup>

<sup>94</sup> Such was the case also in the time of Glanvil, (Glanvil, Book X,) and probably until about 1442.

<sup>95</sup> Williston on Sales, 354; Pollock & Maitland's Hist. Eng. Law, II, p. 179.

<sup>96</sup> Cf. Alfred and Guthrum's Pesece, 5.

If an executed sale was not valid without formality, certainly a partially executed one was not.

That there was such a contract in use among the Anglo-Saxons can hardly admit of doubt, though direct evidence on the subject is lacking. Perhaps the strongest evidence is that in Germanic law generally there were the two types of contract, the old formal, and the "real."<sup>97</sup> In addition to that we have the law of GLANVIL to appeal to.

In GLANVIL, we find two distinct writs, one to summon a debtor, and one to summon a surety.<sup>98</sup> The latter was clearly to enforce surety contracts; the former could not very well have been so used. For where there was a surety, the surety only was liable, and not the debtor,<sup>99</sup> and if the surety needed to get the debtor to court to defend, that was his business and not the creditor's. It is possible that the writ running against the debtor was invented to assist the surety in such purpose, or to enable the surety to get reimbursement from the debtor. But Debt in the king's courts was from the beginning brought against debtors, where there were no sureties.<sup>100</sup> So we may be sure that there was a "delivery-promise" in GLANVIL's time. How long it was in existence before that, we cannot say. But taking into consideration other systems of Germanic law we may take it that such a contract was enforceable for some centuries before GLANVIL.<sup>101</sup>

## VII. THE WRITTEN CONTRACT.

A debt could be proved by a charter or document.<sup>102</sup> The document itself became a sufficient form in later times, but in the age under consideration the writing was nothing more than proof, taking the place of the necessity of producing witnesses.<sup>103</sup> The transaction which took place when the writing was delivered was probably essentially the same as in the "delivery-promise." One party delivered goods or chattels to the other, the latter instead of making his promise orally before witnesses handed his promise over

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<sup>97</sup> Laughlin, p. 189.

<sup>98</sup> Glanvil, Book X, c. 2 and c. 4.

<sup>99</sup> Glanvil, Book X, c. 3.

<sup>100</sup> Glanvil, Book X, c. 2.

<sup>101</sup> It does not seem fair to argue from the wording of the oaths (see page —, *supra*), that there was a "delivery-promise." The oaths as pointed out clearly indicate an issue between creditor and debtor, but still that is to be expected even in surety contracts, for it was the debtor's business to defend.

<sup>102</sup> Laughlin, 188.

<sup>103</sup> Laughlin, 188.

in writing. If a donation was to be made in writing it was customary for the donee to hand the donor something in exchange for the writing.<sup>104</sup>

#### VIII. THE EARNEST CONTRACT.

And finally, the bi-lateral contract of bargain and sale entered into with "earnest" requires mention. Its genealogy is clear. The *arrha* or "earnest" is the Saxon *wed*.<sup>105</sup> The same ceremony which was used to bind the surety was employed to bind the bargain. The "earnest" contract was clearly a popular development from the surety contract. But it was a late development. In GLANVIL's time, if he gives us a correct picture of the customary law, it was still unpledged,<sup>106</sup> and even in BRACTON's day it was in its infancy.<sup>107</sup>

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<sup>104</sup> Pollock & Maitland's Hist. Eng. Law, II, 211.

<sup>105</sup> Laughlin, 189.

<sup>106</sup> Glanvil, X, c. 14.

<sup>107</sup> Bracton, 61, b. 62.