

# Book Review

## Transcending Covenant and Debt

*A History of the Common Law of Contract: The Rise of the Action of Assumpsit.* By A. W. B. Simpson. Oxford: Oxford University Press, 1975. Pp. xlv, 646. \$35.00.

### Reviewed by Morris S. Arnold†

As Professor Simpson's bibliography demonstrates,<sup>1</sup> a great deal of secondary material is available on the history of the law of contracts. But there are few works of a truly synthetic nature, which attempt more than superficially to survey that history.<sup>2</sup> Simpson has drawn on all this secondary material, including previous publications of his own,<sup>3</sup> to produce the present volume. But most of the book is new, and Simpson reviews the sources with an analytical depth and attention to detail never before undertaken. The present work is the first of a projected two-volume series and carries the story to 1677, the date of the Statute of Frauds.<sup>4</sup> For the first time students of the common law can hope for a reliable and reasonably complete doctrinal history of the common law of contracts.<sup>5</sup>

### I

The modern law of contracts is supposed to be about promises. So anxious are we to maintain this masquerade that a heavy analytical dependence, almost automatic and at times unthinking, is laid on

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1. A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* xli-xlv (1975) [hereinafter cited to page number only].

2. The principal book-length treatments are C. FIFoot, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* (1949) and the appropriate portions of 1-16 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1922-1926).

3. Simpson, *The Penal Bond with Conditional Defeasance*, 82 L.Q. REV. 392 (1966); Simpson, *The Equitable Doctrine of Consideration and the Law of Uses*, 16 TORONTO L.J. 1 (1965).

4. Simpson makes no attempt to trace the history of contract before the beginning of the Year Books (circa 1290). For the previous period, F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2d ed. reissued 1968) remains the chief source. Also see C. FIFoot, *supra* note 2.

5. Professor Simpson's second volume will cover the period from 1677 to the end of the 19th century, and he promises it "in due course." P. v.

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so-called "implied promises" both in law and in fact. Many of these in personam obligations cannot realistically be said to have anything to do with consent, much less with promise, and sometimes they represent instead an imposition of standard-form "agreements" by judicial or legislative fiat. But the language of promise continues to be used, and our entire law of contracts is analyzed with the concept as its central focus.

At first, the idea of promise was important in the medieval law of contracts as well as our own.<sup>6</sup> The proposition was simply that promises (covenants) ought to be kept, and no theoretical restriction was placed on the types of promises understood to be actionable. There were, moreover, no encumbering doctrines like consideration or offer and acceptance to muddle the essential simplicity of the proposition that one had a duty to do what one promised; the writ which enforced the obligation contemplated specific performance. But the central courts, which gave birth to the "common" law, seemed from the beginning somewhat reluctant to hear these kinds of cases.<sup>7</sup> Very soon, certainly by the 14th century, the central courts developed the rule that a promise must be in writing and sealed before they would entertain an action on it. The rule used to be the object of great ridicule, but it was probably motivated in part by considerations similar to those that gave rise to the Statute of Frauds. At least at first, the rule was regarded as an evidentiary one, and no one thought that a promise needed the magical touches of ink and wax to come into being.<sup>8</sup> The enforcement of oral undertakings was simply left to local courts, which applied rules of law about which we know nothing at present.<sup>9</sup>

Whatever the reasons for the rule of the seal—and there are other explanations<sup>10</sup>—the rule stifled the early development of a common law of promissory liability. There was, however, another essentially contractual idea which could be used to obligate someone to pay

6. On the substance of the following paragraph, see Arnold, *Fourteenth-Century Promises*, 35 *CAMB. L.J.* (November, 1975; forthcoming).

7. See R. GLANVILL, *TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIE* 132 (G. Hall ed. 1965) ("[I]t is not the custom of the court of the lord King to protect private agreements [*convenciones*], nor does it even concern itself with such contracts [*contractibus*] as can be considered to be like private agreement [*quasi private convenciones*].") Interestingly, the passage demonstrates that Glanvill also perceived a distinction between covenants and contracts.

8. The clearest statement of this was made in 1320 by Herle, J., in *Y.B. 14 Edw. 2* (Eyre of London), 86 *SELDEN SOCIETY* 286, 287 (H. Cam ed. 1969): "[A] covenant is neither more nor less than an agreement between parties which cannot be taken to law without specialty [*i.e.*, a sealed writing]."

9. The only real contribution is R. HENRY, *CONTRACTS IN THE LOCAL COURTS OF MEDIEVAL ENGLAND* (1926). Work on the local courts is badly needed.

10. Simpson reviews them at pp. 10-12.

money: instead of saying a defendant promised to pay money, a plaintiff could claim that he owed it. This is what the writ of debt said simply—*debet*, he, the defendant, owes. The writ always was general, although the facts of the transaction giving rise to the duty to pay would be given in the plaintiff's declaration. A duty to pay money might arise (a writ of debt might work) in a great miscellany of situations, most of them consensual. So if a person admitted a debt in a sealed writing—by executing a *scriptum obligatorium*, a bond—then a writ claiming that the person *debet* the obligee named (or his attorney) would work. The liability arose not because the obligor impliedly promised to pay, as we ourselves would say, but because he admitted he owed. The instrument was an I.O.U., not a promissory note, and the writ was said to be “on the obligation” (*sur obligacion*). At least by the 14th century, the obligation was thought of as being granted by the maker to the creditor;<sup>11</sup> the making of the bond created an *obligatio* and transferred it to the obligee.

There were many other situations in which a plaintiff could win by claiming that the defendant owed him. The price of goods sold, money lent, the agreed-upon value of services rendered or of a leaseholder's occupation—these were the claims most often made by a writ of debt “on the contract” (*sur contract*). Why did defendants in such cases owe money? Probably at first there was no real theory, but we can at least say that they did not owe it because they promised to pay—although, of course, they might have so promised. For if that were the reason, the right would have sounded in covenant and would not have been actionable without a sealed writing.

In the case of the first two instances, sale and loan, the duty to pay is so clear that no theory is needed; here we modern lawyers are, as always, ready to imply a promise. In the case of services rendered there was a tendency in the 15th century to rationalize the result by reference to the “doctrine” of *quid pro quo*: the defendant was a debtor because he was the recipient of an agreed-upon conferral of a benefit. Indeed, some attempt was made in the late middle ages to assimilate the results in most debt *sur contract* cases to the *quid pro quo* notion: “no *quid pro quo*, no contract.” But there was a curious lack of agreement in discussions aimed at forcing all these cases into a single category;<sup>12</sup> and in any case the substantive liabilities had

11. The remark of Danby, J., in Y.B. 37 Hen. 6, f. 8, pl. 18 (1458) in discussing the wording of a hypothetical indenture demonstrates this attitude clearly: “[W]ould he now have an action of debt on the deed? [As it were he said he would not since there is no word of grant.]” P. 20.

12. For discussions of *quid pro quo*, see pp. 153-69, 193-96, 424-26. In particular, notice the statement at p. 196:

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been around two or three hundred years or more before any curiosity about their theory seems to have been generated. In the beginning, no doubt, people thought justice required that these defendants pay, and that was all the theory needed: etymologically, "he owes" and "he ought" are indistinguishable. Legal doctrines have a way of becoming tautological when traced to their elementary social origins.

Although it is not mentioned by Simpson, the term "debt" is often used interchangeably with the term "duty" in the Year Books, thus making it clear that a debt was simply a duty to pay money.<sup>13</sup> "Duty" is incapable of exact reproduction by a single English word, but it coincides more or less with "a state of being owed" or "owedness." In modern law the word "duty" is almost completely confined to the law of torts, but we still speak of customs duties in America and, in England, of death duties.<sup>14</sup> These obligations to pay money are representative of the class of obligations which escaped assimilation into the law of promise as it began to develop in the 15th century: obligations imposed by government and extracted by the threat of force. Only a political scientist would say that these duties have even the remotest connection with the idea of consent. The word "debt" was broad enough in the Middle Ages to include the duty to pay judgments and certain customary dues. These are collectivist mulcts again, and of course cannot be regarded, except in political science terms, as self-imposed obligations.

Most duties to pay money, therefore, were actionable by writs of debt. The rule of the seal was thus more tolerable and did less damage than might at first be supposed. Yet as with the Statute of Frauds, rules requiring formality can often do injustice.

In the first place, an action of debt lay only for money owed and not for damages. The action was recuperative, lay for a sum certain, and so was obviously useless for enforcing damage claims for breach of promise. In general, debt was confined to situations where there was an agreement to pay money or where modern law would imply

Though the doctrine of *quid pro quo* certainly exercised some influence upon the law governing debt *sur contract* it never acquired either the status or clarity of the doctrine of consideration, and it has perhaps come to seem to historians rather more important than it was to contemporaries.

Also see p. 424: "The doctrine of *quid pro quo* was not very elaborately developed in medieval law; indeed it hardly merits the name of a doctrine."

13. The "cause" of the debt was never really investigated, although the phrase *cause de duite* is occasionally employed in attempted imitation of the Roman *causa debendi*. See editor's explanation in *Bank v. Maulerere*, Y.B. Trin. 2 Rich. 2 (1378), 1 AMES FOUNDATION 27, 28 n.1 (M. Arnold ed. 1975). In T. Plucknett, *Words*, 14 CORNELL L.Q. 263, 270, (1929), Plucknett notes "the curious use of 'duty' in the sense of a debt."

14. Also see U.S. CONST. art 1, § 10, cl. 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . ."

such an agreement. Promises to do something else were not enforceable by claiming that the defendant owed money, because he did not; if he "owed" anything, it was performance, and that was enforceable only by an action on the promise, which required a writing. Second, although debt (or detinue) lay to recover chattels sold when the buyer performed and the seller did not, the same was not true in the case of land sales. Third, debt could not be used to recover money paid by mistake or on a consideration which failed. So if *A* promised *B* to convey land to *B*, *B* paid, and *A* did not convey, *B* could not get his money back in debt even if *A* conveyed to *C*.<sup>15</sup> Lawyers therefore turned to the law of tort for a way around their difficulties, with the curious result that *assumpsit*, essentially an action in trespass (tort), became the chief means of enforcing contracts.

## II

A covenantor promised and a debtor owed; these were the "theories" of their respective liabilities. But what did one who "assumed" (*assumpsit*) do to give rise to his liability? If there was an idea here at all it was probably the intent to evade the jurisdictional barrier erected by the sealed writing requirement. The easiest case to see is the plaintiff injured by a surgeon in the course of treatment. If he sued in trespass *vi et armis* the objection would likely be raised, at least by around 1365 to 1370, that the wrong, if any, was not really with force and arms since the plaintiff voluntarily put himself into the surgeon's care. Moreover, he could not sue in covenant because he would have no writing in the ordinary case. Nor could he normally obtain a bond defeasible upon a successful or non-negligent application of a cure, so debt was not available.

After 1365 to 1370, when *vi et armis* apparently ceased to be a jurisdictional requirement in the common law courts, a plaintiff ought to have been able to tell a straightforward story "on the case," and get relief. But now a complication arises, for if this were all there were to it, the tort of negligence, or at least professional negligence, would have been born about 1370. However, it was invariable practice for the plaintiff to allege, in addition to negligence, that the defendant "*assumpsit* to cure." At first it seems tempting to think of the phrase as adding nothing, to read it as saying "he started to cure" or "he set about to cure." But issue was commonly taken on the *assumpsit* and the negligence both, thus making it likely that the two allegations were

15. See p. 281 for other difficulties.

regarded as distinct. Moreover, at least one defendant in the 14th century denied the *assumpsit* in such a way as to indicate that it amounted to an actual promise to cure, for he said he only undertook to do the best he could, not actually to cure.<sup>16</sup> Certainly it was later regarded as axiomatic that the *assumpsit* was an allegation of a promise. This makes the action of *assumpsit* look like a very narrow one—an action for the negligent performance of a promise—and returns us to the question of why it was necessary to allege the promise at all.

Perhaps a clue can be found in some cases before itinerant justices which occurred in the earlier part of the 14th century. In the first a Justice in Eyre denied a remedy to a plaintiff whose eye was put out by a doctor who had undertaken to cure. The plaintiff had claimed only by bill of trespass,<sup>17</sup> and the denial of relief seems to have been put in terms of an immunity to suit.<sup>18</sup> But only a year later an action of covenant was successfully brought in Eyre on the same sort of facts.<sup>19</sup> This may indicate that while by general law a doctor was immune from suit, he could always bargain away that immunity. Indeed, the rule requiring a sealed writing for an actionable covenant was sometimes given theoretical basis on the ground that a covenant was a kind of private law, an exception to the common law, which required something extraordinary to prove it—thus the name “specialty” for the sealed writing. *Convencio vincit legem* was the maxim used to encapsulate the idea.<sup>20</sup>

16. See A. KIRALFY, *THE ACTION ON THE CASE 224* (1951). The record of a 1369 case has the defendant saying that “he did not undertake to cure the aforesaid finger, but only that he would apply his cure to that finger in the best way he knew.” *Id.* (reviewer’s translation). See also A. KIRALFY, *A SOURCE BOOK OF ENGLISH LAW 185*, (1957) which notes a case brought in *assumpsit* form, where the allegation is that the defendant “guaranteed” the cure, instead of only “assuming” or “undertaking” it. Obviously, this is a promise.

17. Perhaps one should simply call it a bill. The case is reproduced from manuscript sources in A. KIRALFY, *SOURCE BOOK*, *supra* note 16, at 184.

18. The Justice, in denying the remedy, recounts a case on which he sat involving the indictment of a doctor for his patient’s death. The Justice goes on to say,

I put it to you that if a Smith, who is a man of occupation, drive a nail into your horse’s hoof, so that you lose your horse, you will never have recovery against him, nor shall you have one here.

*Id.* This makes it look as though there was a general tort immunity in favor of “men of occupation”—*i.e.*, professionals. It is just possible that a “man of occupation” is someone who is not qualified to perform the duties of the profession of which he holds himself out as a member. Cf. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW 274* (1969), discussing a case in which a bond was used in London in 1300, perhaps to insure the performance of a covenant to cure.

19. See A. KIRALFY, *SOURCE BOOK*, *supra* note 16, at 185.

20. “Covenant conquers the law.” See, *e.g.*, *Outhinby v. The Prior of Bridlington*, Y.B. Mich. 5 Edw. 2, 63 SELDEN SOCIETY 30, 31 (C. Turner & T. Plucknett, eds. 1947). *Convencio vincit legem* was actually one of several labels used to convey this idea. All appear to be derived from the statute, Westminster II (1285), which contained the words *convencio legi deroget* (“covenant annuls the law”).

## III

The foregoing account is quite speculative and, with respect to the origin of *assumpsit*, entirely personal. Whatever the origin of *assumpsit*, it was destined to become a general promissory remedy by circumventing covenant and, eventually, swallowing debt. Yet the idea of covenant proved fairly difficult to do in; the battle lines were drawn at that mystical border between nonfeasance and misfeasance. The lingering notion was that a mere failure to perform a promise sounded in contract (covenant) and thus required a specialty; only a botched performance sounded in tort (*assumpsit*).

Simpson tells an interesting story of the gradual decline of the distinction (which is analytically unsound anyway) and of its eventual demise in the 16th century,<sup>21</sup> when the breach of promise became a tort. He makes the interesting suggestion that the rule may have been abandoned in response to the fact that equity began to give remedies in most nonfeasance situations in the late 15th and early 16th centuries.<sup>22</sup> Debt *sur contract* was gradually overcome in the 16th century; *assumpsit* became available in almost all cases where debt *sur contract* previously lay. This was established only after considerable bickering between the courts of common pleas and the King's Bench.<sup>23</sup> The alleged theoretical difficulty in allowing *assumpsit* as an alternative was that actions on the case should be limited to providing only interstitial remedies.

In following the rise of *assumpsit*, we have not returned to the pristine law of 13th century covenants, for it is not every promise that will give rise to an action of *assumpsit*. Only those supported by consideration are actionable. A considerable part of Professor Simpson's book is devoted to examining the origins of this idea. The pedigree of the doctrine seems to include the "equitable" notion of consideration worked out in the context of 15th and 16th century uses.<sup>24</sup> The idea may also owe something to St. Germain's *Doctor and Student*, which helped familiarize common lawyers with the similar Canonist ideas of *vestimenta pacta*<sup>25</sup> and *causa promissionis*.<sup>26</sup> During the course of the

21. Pp. 248-75. Of course, one needs to wonder why the *assumpsit* was not merely to act carefully. The promise in the course of time would tend to become fictional in any case.

22. Pp. 275-80.

23. Pp. 281-315.

24. Pp. 327-74.

25. "Clothed pact."

26. "Cause for the promise." The doctrine of *causa promissionis* "involves the idea that an informal undertaking . . . does not oblige if it lacks a good cause." P. 384. Both Canonical doctrines are discussed at pp. 375-405. On the possible influence of canon law on the common law developments, see Helmholz, *Assumpsit and Fidei Laesio*, 91 L.Q. REV. 406 (1975). On St. Germain and the law of contract, see ST. GERMAIN, DOCTOR AND

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16th and 17th centuries, the doctrine was refined; it was settled, for instance, that a promise could be sufficient consideration for a promise.<sup>27</sup> Yet this is a long way from the proposition that the promises in bilateral contracts are in some measure dependent. Nor does it speak at all to the question of when a promise is binding—that is, as we would say, when an agreement becomes a contract.<sup>28</sup> Making a promise good consideration is nothing more than one way of making another promise actionable.

### IV

Probably no one else has devoted as much time to the study of the history of contract as Simpson has. His book is analytically superb, and it will be an invaluable reference source for students and teachers of the common law for years to come. It would be hard to imagine a better command of the analytical tools necessary to dissect the available sources. A good example of this facility is the distinction drawn several times between when an agreement becomes binding and when it is actionable.<sup>29</sup>

A reviewer bent on complaining must be alert therefore to avoid a charge of temerity. Still, perhaps a few comments may be usefully advanced without seeming to detract from the general evaluation that the book is extremely useful and valuable.

First, there is the matter of the sources consulted. Although Simpson has obviously made systematic use of the printed sources, and in the case of the 16th and 17th centuries has sometimes resorted to the vast number of manuscript reports available,<sup>30</sup> he has entirely passed over the official records of the courts. There are good reasons for that; the bulk of the plea rolls is unimaginably large, and although there are gems, a huge amount of culling is necessary before these can be recovered. For the 14th century alone, the records of the central courts contain four or five million entries, and fully 99% are useless for anything but the most antiquarian purpose. Still, some resort to them will be necessary to write a tolerably complete history of the common law. In the case of *assumpsit*, the job could be limited first to an investigation of the rolls after 1370. It might also be possible to confine one's investigation, in the medieval period at least, to the King's Bench. These rolls are quite small through the middle of the

STUDENT, reprinted in 91 SELDEN SOCIETY IV (T. Plucknett & J. Barton eds. 1974). Both of these appeared too late to be considered by Professor Simpson.

27. Pp. 459-65.

28. Pp. 465-88.

29. See, e.g., pp. 152-53, 162-68, 465-88.

30. There is an appendix, pp. 623-40, in which some of the manuscript cases which Simpson discusses are printed in full.

16th century, and a few months spent with them in the Public Record Office could probably be made to reveal something significant about the history of contract. Simpson also did not consult the unprinted Year Books of Richard II, which contain interesting matter about the history of the buyer's action for defective goods.<sup>31</sup> An interesting and useful series of articles by Professor McGovern also received no attention.<sup>32</sup>

Second, one very occasionally has the feeling that Professor Simpson makes conclusions beyond those his sources can support. An example may be his treatment of covenants running with the land: although he says that to "extract any clear doctrine from [the cases] is impossible,"<sup>33</sup> he nevertheless sets out some propositions which I think may transcend the information available in the paltry precedents.<sup>34</sup> Obviously there can be disagreement over this kind of appraisal; and certainly Professor Simpson never fails to extract every ounce of usable substance from his materials. But it is particularly easy to be wise above what is written in medieval legal sources, given the lack of control exercised over the compurgators in wager of law or the jury. It may, in other words, be wrong to think of substantive law in the abstract when the trial mechanism had so much authority to decide legal questions. However, Simpson is alert to this very real difficulty.<sup>35</sup>

Third, there is no concerted attempt to answer the elementary question of what policy was forwarded by making the profound change in contractual theory which the doctrine of consideration represents. Its *function* is plain enough. Without it, promises are not actionable. But what is its *purpose*?

31. The best manuscript is probably Hale 77 in the Lincoln's Inn Library.

32. McGovern, *Contract in Medieval England: Wager of Law and the Effect of Death*, 54 IOWA L. REV. 19 (1968); McGovern, *Contract in Medieval England: The Necessity for Quid pro Quo and a Sum Certain*, 13 AM. J. LEGAL HIST. 173 (1969); McGovern, *The Enforcement of Oral Covenants Prior to Assumpsit*, 65 NW. U.L. REV. 576 (1970); McGovern, *The Enforcement of Informal Contracts in the Later Middle Ages*, 59 CAL. L. REV. 1145 (1971).

33. P. 40.

34. See pp. 38-40. The interpretation of the medieval cases on covenants running with the land caused an enormous controversy when the American Law Institute considered its RESTATEMENT OF PROPERTY in 1944. See C. CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 266 (2d ed. 1947); Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. (1944). The question was whether the burden of covenants ran at common law. At its annual meeting in 1944, the Institute rejected the contention that they did run, by virtue of a tie vote of 17 to 17. Clark termed this "a peculiarly American way of settling a disputed point of English legal history—a tie vote at the tag end of a long convention." C. CLARK, *supra* at 270. The really peculiar thing is that 30 years ago anyone should have thought medieval precedents could matter; such a view supposes a rather literal meaning to the word "Restatement."

35. See, e.g., pp. 245-46, 407.

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Simpson says that consideration was something like motive and that requiring inquiry about whether there is consideration was a way of discovering why the promise was made.<sup>36</sup> But why should one care why a promise was made?<sup>37</sup> The Canonists cared because if there was no reason to make a promise, then one may assume it was made, in a vague sense, mistakenly.<sup>38</sup> Another reason for caring about *why* a promise was made is that motive is relevant in ascertaining *whether* it was made; the doctrine may be viewed as evidentiary.<sup>39</sup> Simpson seems content with trying to demolish previous explanations and does not attempt to provide a substitute.<sup>40</sup> It may be that no good explanation for the doctrine of consideration suggests itself. If so, the complaint may only be that Simpson did not say so, or that he did not devote a connected portion of the book to the problem. Most of his comments on the policies behind the rule are scattered among long discourse of an entirely doctrinal nature and are hard to connect.

Simpson's book is avowedly doctrinal. He says in his preface:

In general . . . I have avoided explicit discussion of general theories of legal history, especially of the type favoured by legal sociologists; the omission is deliberate. Such theories are of scant value unless based upon regular historical investigation and attention to evidence; at this stage my aim has merely been to provide the basis which much theorizing has conspicuously lacked.<sup>41</sup>

The book is indeed heavily doctrinal, which may help to explain why so little attention was paid to policy matters or to explanations of legal change. Perhaps we can look forward in the future to more speculations of an interpretive nature, since Professor Simpson has said that his concern was doctrinal "at this stage." But certainly it is true that he has in the past thought "the pure history of legal doctrine" a sufficient explanation in itself.<sup>42</sup>

36. P. 321.

37. On p. 326, Simpson says that a theory of liability depending on motive is a "curiosity."

38. P. 385.

39. P. 407.

40. On pp. 487-88, for instance, Simpson rejects Fifoot's argument that the requirement of consideration reflects a desire to hold only commercial agreements actionable. It is hard to disagree with Simpson's evaluation, since obviously the common law enforced "a host of petty transactions which had little to do with big business." *Id.* A suggestion made by Milsom as to the origin of the doctrine is perhaps not so convincingly dealt with. Pp. 380-81.

41. P. v.

42. See, for instance A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 195 (1961), in which he states that cases dealing with the freedom to alienate land "are extremely difficult to explain in sociological terms" and suggests that their "explanation may perhaps be found more in the pure history of legal doctrine." *Id.* at 196.

