CHAPTER – I

INTRODUCTION

Even the most rudimentary societies of the world reflect the human innate tendency of “rational maximizer of his self-interest.”¹ In achieving so; persons² enter into various voluntary transactions, the underlying premise of which is promise. This promise is nothing but the exercise of his or her free will, which forms the principal feature of the law of contract. Human beings in exercise of their volition/freewill “today” deny themselves of their freedom “tomorrow.”³ But at the same time, promises can be broken⁴ too, and in such cases, it is for the law⁵ to see that promises are enforced so as to secure the fulfillment of expectations, which were brought about by the promise. All promises are not enforceable, law by way of judicial remedies, come to the rescue of the aggrieved party only in cases of enforceable promises and tend to provide “effectiveness”⁶ to the scheme of law of contract, these remedies in turn “empowers private parties”⁷.

Promises which are enforceable by law take the shape of contracts and the contract so formed, tend to have an “inter temporal aspect”⁸, in as much as it governs our future conduct. One of the purposes of enforcement of contract can be stated in the words of David Daude, who

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² Strictly speaking, person is different from individual. Person is an entity in law to whom law provides capacity to enter into a contract, in contrast to individuals which is a genus and includes the entire humanity. eg. Minors are individuals but not persons in the eyes of law. Plato in Statesman, states that “The best thing of all is not that the law should rule, but that man should rule….because the law cannot comprehend what is noblest or more just, or at once ordain what is best, for all…..” Cited in Robert L. Birmingham, “The Growth of the Law: Decision Theory and the Doctrine of Consideration” 55 ARSP 467 (1969).
⁴ Harold C. Havighurst, states this “freedom” of flouting promise as “spiritual”. Harold C. Havighurst, “Consideration, Ethics and Administration” 42 Colum. L.Rev. 9 (1942).
⁵ “The evolution of law proceeds by a constant struggle, between individuals or groups of individuals, for rights and privileges;……………….”Law” is the resultant of this struggle.” Arthur L. Corbin, “Recent Developments in the Law of Contracts” 50 Harv. L.Rev. 474 (1937).
says that “The ordinary function of any contract⁹ …. is to produce exactly that ‘objective’ situation which is ‘subjectively’ desired by the parties.”¹⁰

A promise, as such, is not legally enforceable.¹¹In order to enforce a promise, one has to first determine the criterion/test which distinguishes between the enforceable promises and unenforceable promises. In the English common law¹², “the chief of these criteria is that amorphous and almost indefinable something called “consideration”¹³. Consideration therefore acts as “signpost”¹⁴ which splits between the enforceable and the unenforceable promises. It provides “commercial utility”¹⁵ to the promise and confers a “good reason”¹⁶ to enforce a promise.

With a view to comprehensively study the concept of consideration under the Indian Contract Act, 1872, the study of English common law is indispensable. It is so because, amongst all the countries in the world, India falls in the category of those countries in which English common law¹⁷ have persuasive value. Therefore, to find the germ of the concept of consideration one had to study the archaic English law and/or even beyond [backwards] that time.

The enactment of Indian Contract Act, 1872 was by the British, when India was its colony; the Contract Act still is in force in India. Since the year, 1872 (year of enactment) till 1947 (year of independence), the matter on contract law were adjudicated by the “extensions” of the English common law courts, as per the enactments made by them in British India.

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⁹ “a contract may be well enough defined as an agreement to which the law annexes an obligation”. Cited in Clarence D. Ashley, “What is a Promise in Law?” 16 Harv.L.Rev. 319 (1903).
¹² The notion of common law evolved in England since around the 11th century and was later adopted in the USA, Canada, Australia and other countries of the British Commonwealth. In contrast to the civil law which is based on legislation, common law is mainly based on case law [Judge made law], under this system precedent (decisions of the Higher Courts) must be respected. CaslavPejovic, “Civil Law And Common Law: Two Different Paths Leading To The Same Goal” 32 V.U.W.L.R.819 (2001).
¹³ Supra note 3.
¹⁷ In the words of Mr. Justice Holmes, in reply to the question, where did this common law come from? “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified….It always is the law of some State.” Cited in E. Merrick Dodd, Jr., “The New Doctrine of the Supremacy of Admiralty over the Common Law” 21 Colum.L.Rev. 657 (1921).
It was not until 1773\textsuperscript{18} that the Parliament of England had began supervision of the East India Company, and it was gradually that the British started intervening in the various spheres of the Indian Society, through various enactments. The charters of eighteenth century established the Courts of Justice in the three presidency towns of Calcutta, Madras, and Bombay which introduced into their jurisdiction the English common and statute law.\textsuperscript{19} Like this English common laws were implanted in the Indian system. Before the enactment of the Indian Contract Act, 1872, the customary laws of the Hindus and the Mohommedans were applicable, in cases where the parties were Hindu and Muslims respectively.

It is therefore evident that study of the English Common Law to know the evolution/origin of the concept of consideration in the English common law was indispensable. Generally speaking, the “English Common Law” is said to have begun during the Norman Period of early twelfth century. However to know the germ of the concept of consideration a study in antiquity prior to the common law was required to know the forces which might have led to the origin of this concept. The English History is said to have begun from the period of the Anglo Saxons in the fifth century A.D. when in 410 A.D. the Romans seceded from the territories of Britain. Before that time Britain was under the sovereignty of the Romans. Romans have said to have ruled Britain for nearly four hundred years, till 410 A.D.\textsuperscript{20}

It is natural for the researcher to begin study the pages of English history from the time of the Anglo-Saxons and onwards. But at the same time, there was a question which was boggling the mind of the researcher; as the Romans ruled Britain for nearly 400 years, it therefore, became necessary for the researcher to also study the Roman law with reference to contracts and see its influence to the English common law and/or the concept of consideration, if any. Accordingly, the researcher initiated its research from the time of Romans, to study their contract law. In the present chapter, the researcher would give a bird’s eye view of the contents that have been discussed in detail in the succeeding chapters.

\textsuperscript{18} Bernard S. Cohn, “From Indian Status to British Contract” 21 \textit{J.Econ.Hist.}613 (1961).
\textsuperscript{19} Frederick Pollock and Dinshah Fardunji Mulla, \textit{The Indian Contract Act, With a Commentary, Critical And Explanatory} 1 (Sweet & Maxwell, Thacker & Company Bombay, 2\textsuperscript{nd} edn., 1909).
The Roman contract law would be discussed henceforth, but the same is dealt in detail by the researcher in her research paper published in the Kurukshetra Law Journal, 2015 as a requirement for her Doctorate in Philosophy (Law). In the present thesis, details on Roman contract law are also dealt in Chapter – II of the thesis titled “Evolution of Concept of Consideration.”

During the course of study, the scholarship of Roman law was found significant, even though it has been contended by various historians that the English Common law embarked on its own path of development, which is unique in its own sense and that it, completely isolated [itself] from the rest of the world. The study of the Roman law was significant because it is also contended with equal force that the “Romanization” of English Law or the “priceless contribution” of the Roman law to the English common law, cannot be at all be discredited, despite “conservatism” of some of the English writers in saying that their common law is not borrowed from the Roman law and is indigenous to the laws of their own country.

It is generally said and believed that Europeans owe as one of their chief elements of their modern civilization to “jurisprudence from Romans.” Roman law is also believed to be the most “innovative and …copied system in the west; and that law of contract was the most original and the most admired part of that system.” In the words of Sir Henry Maine, Roman law provides “a lingua franca”.

The Roman law of contract was an earlier development than the English law and the law of contract being a species of the private law, dealt with private agreement between individuals. These private agreements required state recognition so that such agreements could very well fit

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22 The Common law has said to have originated in England at the Norman Conquest. George Burton Adams, “The Origin of English Equity” 16Colum.L.Rev.89 (1916).
30 By private law is here meant that portion of the law of a State which deals, directly or indirectly, with the mutual relations and transactions of private individuals inter se. A.H.F. Lefroy, History And Institutes Of Roman Law 7 (Toronto University Press, Toronto, 1907).
in the domain of Law of contract. State could either be swift or lethargic in granting such recognition. In case of Romans, such recognition came even before 451 B.C. But in case of English Common Law, this recognition is believed to have come by the late of the twelfth century, since then the courts exercised much of their jurisdiction on property and criminal law and less on contracts.

Even in case of the early Roman Period, this state recognition was restrictive, initially, in as much as they enforced and recognized agreement to exchange goods for money but not agreements to exchange goods for services. It is also said that Romans did not conceive the notion of contract as we do today and that they never developed a system of contract but only of individual contracts.

Under the Roman law, the same legal terms had different meanings at different stages of Roman development. The modern civilian today, sees no line of cleavage between pact, convention or contract, this was not the case under the archaic Roman law, a simple pact created no obligation. The Romans understood a contract as a convention plus an obligation. The idea of obligation and the action were very clearly and concretely impressed on the minds of the Romans. It is said that the commercial law of Rome, especially law relating to contract of sale, was largely developed through the Edict of the Curule Aedile.

Under the archaic Roman Law, predating Twelve Tables (the first and only code of Rome), all private dealings between men were governed by two juristic acts viz. mancipatio
and nexum. Generally speaking, under the chequered history of Roman contract law, the contracts developed and were gradually divided into broadly four classes viz. Verbal, Literal, Real and Consensual. Nexum and stipulatio were some of the verbal contracts; Mutuum, commodatum were some of the real contracts; Emptio-venditio, Locatio-conductio were some of the consensual contracts of the Roman period. The premise on which the Roman contract law stood was the law of “obligation” and the essential ingredient for the formation of contract under the Roman law was “causa”.

Laws of the Twelve Tables” 13 St.LouisL.Rev.231 (1928). Table 1 related to proceedings in a civil suit. Table 2 fixed the amount to be deposited in the action by wage. Table 3 was in favour of debtors. Table 4 contained about absolute power of the father on children. Table 5 related to inheritance and tutorship. Table 6 referred to ownership. Table 7 contained provisions as to building and plots of land, width of way to be left as to overhanging trees etc. Table 8 dealt with delicts. Table 9 related to public law. Table 10 related to funerals. Table 11 prohibited the marriage of patricians and plebeians. Table 12 has reference to some miscellaneous matters viz. slave who had done injury to a person may be abandoned to the person injured, in lieu of compensation. Thomas Collett Sandars, The Institutes of Justinian With English Introduction, Translation, And Notes xiv (Longmans, Green, and Co., London, 8th edn., 1888). Twelve Tables mark the transition from the system of Fas (law of divine origin) to a system of Jus (law of human origin). R.D. Melville, A Manual Of The Principles Of Roman Law Relating To Persons, Property, And Obligations With A Historical Introduction 7 (W.Green & Son Ltd., Edinburgh, 1915). The Twelve Tables, comprehensive as they were, did not contain the whole law. W.W. Buckland, A Text-Book Of Roman Law From Augustus To Justinian 2 (Cambridge University Press, Cambridge, 1921).


Mancipatio was the solemn sale of early Roman Law. Ibid. As per the transformation theory, mancipatio was originally a sale in barter that later became a form of transmission has become the communis opinio in literature. KaisuTuori, “The Magic of Mancipatio” 55 Rev Intern DrAntiq 521 (2008).


It is the earliest legally enforceable promise, in Roman Law. It was a formal promise binding the party unilaterally, accompanied by some unilateral undertaking by the other party, in commercial context. David Locke Hall and F. Douglas Raymond, “Economic Analysis of Legal Institutions: Explaining an “Inexplicable” Rule of Roman Law” 61 Ind.L.J.403 (1986).

For details on different Roman contracts under different categories please refer Chapter – II of the thesis or research article of Supra note 21.

In the archaic Roman times, obligation meant, “a bond created by law in accordance with laws of our community”. Cited in Supra note 39.

Most dictionaries insist that the expression “causa” has Latin origin, with the possible root “cav-caveo”, meaning something protected or defended. Cited in Nenad Tesic, “Causa And Bona Fides – A Legal And Etymological Study” 415 in Private Law Reform in South East Europe, Liber Amicorum Christa Jessel-Holst, M. Vasiljević, R. Kulms, T. Josipović, M. Stanivuković (eds.), Belgrade 2010, 413-436; Causa
After studying about the contracts in Roman Law, it was deduced by the researcher, that the concept of consideration was not found in the Roman Law, on the other hand it was the concept of “causa” in the Roman law which formed the fundamental building block of any contract in Roman law, in contrast to “consideration” under the English common law, which, we will see in the coming pages, formed the essential element in the formation of contract under the English common law.

The English common law and the Indian law with respect to consideration, contract of indemnity and contract of guarantee are dealt henceforth in the forthcoming sub heads.

1.1 CONSIDERATION IN ENGLISH COMMON LAW

English common law is a judge made law, and it is therefore that the English Courts of common law played a significant role in the gradual evolution of the concept of consideration in contracts. The [concept of] consideration forms a fundamental prerequisite in the English contract law.

At this juncture, it is necessary to know as to what point of time in history one can attribute the beginning of the English common law. The year 1178, during the Normans reign, could be attributed to the ushering of a new era of judicial institutions, leading to the commencement of the history of English common law courts. But at the same time it is also important to know that the seed of equitable jurisdiction was found in the Anglo-Saxon times,

denotes the ground, reason, or object of a promise, giving such promise a binding effect in law. Cited in “Nudum Pactum in Roman-Dutch Law” 9 JSCL 86 (1908).


According to Edward Jenks, As a matter of historical fact, the simple contract and the ordinary tort sprang from the same stock. Edward Jenks, A Short History Of English Law From the Earliest Times To the End Of The Year 1911 133 (Methuen & Co. Ltd., London, 1912). In the most general sense of the term, contract is an agreement which produces an obligation. Frederick Pollock, Principles Of Contract At Law And In Equity 6 (Robert Clarks & Co., Cincinnati, 1881). In modern times, the juristic conceptions of the nature of a contract and of the place of a law of contract in the scheme of things have varied to a remarkable degree. David Hughes Parry, The Sanctity Of Contracts In English Law 1 (Stevens & Sons Limited, London, 1959).


Court of King’s Bench was established in 1178 “as a separate committee of the Curia Regis”. George Burton Adams, “The Origin of the English Court of Common Law” 30 Yale L.J. 798 (1921).

which bore fruit in the Anglo-Norman kings’ time.\textsuperscript{56} Therefore, the study of the Anglo-Saxon period was also necessary. The study in this sub-head is the brief overview of the law of contract and the concept of consideration, during the Anglo-Saxon period and onwards.

The law of contract,\textsuperscript{57} before the advent of the Normans (1066),\textsuperscript{58} was said to be rudimentary\textsuperscript{59} and was hardly distinguished from the law of property,\textsuperscript{60} so was the case with conveyances and contracts, which were practically confounded. Even then it is said that the law of contract did clench a prominent\textsuperscript{61} position in the English law institutions. In the words of Maine, “….. Neither Ancient Law nor any other source of evidence discloses to us society entirely destitute of the conception of Contract. But the conception when it shows itself is obviously rudimentary.”\textsuperscript{62} One cannot therefore, completely deny the existence of contract even in most rudimentary societies. The only limitation is that the law on contract is too confounded or hardly distinguishable. The reason for lack of such differentiation/specialization, is stated by Sir Henry Maine, is that at the infancy of jurisprudence, legal conceptions are general,\textsuperscript{63} specialization occurs at a later stage, which is the result of advancement of society and intellectual congruity.

There have been various submissions by learned jurists, in which they have said, that the law of contract during the Anglo-Saxons period was rudimentary. But Robert L. Henry, Jr. in his paper, “Forms of Anglo-Saxon Contracts and Their Sanctions” has clearly, stated that Anglo-Saxons made great use of contracts. He has talked of eight\textsuperscript{64} forms of contracts prevalent during

\textsuperscript{57} The expression used for contract during the Norman period is “Contraitz”. \textit{A Dictionary Of The Norman or Old French Language} 47 (Edward Brooke, London, 1779). Presently, the law of contract deals with those legal relations that arise because of mutual expression of assent. Arthur L. Corbin, “Conditions in the Law of Contract” 28 \textit{Yale L.J.} 740 (1919); The term “contract” defining it according to the substance…. applies to one large class of transactions. Arthur Corbin, “Waiver of Tort and Suit in Assumpsit” 19 \textit{Yale L.J.} 222 (1910).
\textsuperscript{59} Frederick Pollock, “Contracts in Early English Law” 6 \textit{Harv.L.Rev.} 389 (1893).
\textsuperscript{60} A.H.F. Lefroy, “Anglo-Saxon Period of English Law II” 26 \textit{Yale L.J.} 388 (1917).
the Anglo-Saxon Period. Professor Harold Hazeltine, is also equally sure that English before Normans made abundant use of contract.  

Executed barter is believed to be the most primitive commercial transaction, affecting legal rights during the early English society, in a more advanced society when money was introduced, its place was taken by executed sale. Various forms of contract developed during the Anglo-Saxon period on the time continuum, but we do not find any reference of the expression “consideration” during that period, except some use in “the loose sense” of the word.

We also find that the legal terms varied in their meanings with reference to the context and period in which they were used. The same legal expressions meant differently in different time period. The Latin Maxim  Ex Nudo Pacto Oritur Actio, adopted from the Roman law, in the English common law, signified a different sense to the expression under the English Common law, from what it did at Rome. Similarly, due to varied meaning of the term “contract” Sir Frederick Pollock in his work “Principles of Contract”, published 1876, lamented by saying that “no such thing as a satisfactory definition of Contract is to be found in any of our books.”

The law of contract during the early English period was in the phase of gradual evolution and transition, which lead to the conception of various fundament concepts and principles of the English common law. One of such concept is the concept of consideration in the English common law.

The concept of “consideration” in contracts under the English common law forms the fundamental ingredient in the formation of contract today. The Latin expression Ex Nudo Pacto

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67 “In Doctor and Student legal precepts are called maxims, and are taken to be authoritative premises to be developed syllogistically.” Cited in Roscoe Pound, “Classification of Law” 37 Harv.L.Rev.933 (1924).
70 Under the English common law, it was applied originally to those agreements on which an action of debt could not be brought for want of a quid pro quo, and later when the action of assumpsit was developed it designated those agreements which were unenforceable because they lacked consideration. Ernest G. Lorenzen, “Causa and Consideration in the Law of Contracts” 28 Yale L.J. 636 (1919).
Oritur Actio echoes a remarkable omnipotence of the axiomatic concept of consideration\(^{72}\) in the English Common Law. In the words of Clarence D. Ashley, “No rule is more firmly embodied in our system of law than that involving the technical doctrine of consideration in contract.”\(^{73}\) This doctrine of consideration is historical.\(^{74}\) The enigma of consideration has been an uncanny enchantment to the writers of the English Common Law. Various theories\(^{75}\) of its origin\(^{76}\) have been given by several authors. According to O.W. Holmes, “Debt throws most light upon the doctrine of consideration”\(^{77}\), some attribute its origin to “modified generalization of *quid pro quo*”, others describe it as “a modification of the Roman principle of *causa*” and some others attribute it to “the action of assumpsit” and some state that its origin is obscure.\(^{78}\)

It is submitted that, it is a mistaken belief that concept of consideration in the English Common Law is an “equivalent”\(^{79}\) of the Roman law concept of “*causa*.”\(^{80}\) The expression “*causa*”\(^{81}\) in the continent actually, differed\(^{82}\) from the expression “consideration” in the English Common Law. But they did constitute a test, under the ““pseudonym of “*causa*””\(^{83}\) and

\(^{72}\) Professor Ames defines consideration as “any act or forbearance or promise by one person given in exchange for the promise of another”. Cited in Joseph H. Beale, Jr., “Notes on Consideration” 17 *Harv.L.Rev.* 71 (1903); Consideration, according to the traditional definition, is either a detriment incurred by the promisee or a benefit received by the promisor in exchange for the promise…..Consideration is something of possible value given or *undertaken to be given* in return for something promises. James Barr Ames, “Two Theories of Consideration. I. Unilateral Contracts” 12 *Harv.L.Rev.* 515 (1899); Anything that creates “value in law” is consideration. John Barker Waite, “A Definition of Consideration” 14 *Mich.L.Rev.* 572 (1916).

\(^{73}\) Clarence D. Ashley, “Offers Calling for a Consideration Other Than a Counter Promise” 23 *Harv.L.Rev.* 159 (1910).

\(^{74}\) Oliver Wendell Holmes, “The Path of the Law”, 10 *Harv.L.Rev.* 472 (1897).


\(^{76}\) Two agencies which shaped the common-law doctrine of consideration are 1. Jurisdiction of the chancellor over parol contracts before assumpsit. 2. Enforcement of parol contract in local courts……At the same time it is said that the origin of the doctrine of consideration may be traced back to Anglo-Saxon contracts. Both Holmes in *The Common Law* and Pollock and Maitland in *the History of English Law* come close to such conclusions. Robert L. Henry, “Consideration in Contracts 601 A.D. to 1520 A.D. 26 *Yale L.J.* 664, 675 (1917).


\(^{80}\) Most dictionaries insist that the expression “*causa*” has Latin origin, with the possible root “cav-caveo”, meaning *something protected or defended*. Supra note 50.

\(^{81}\) *Causa* denotes the ground, reason, or object of a promise, giving such promise a binding effect in law. *Ibid*.

\(^{82}\) In some aspects *causa* is broader than consideration, on the other *causa* is narrower than consideration. Joseph H. Drake, “Consideration v. Causa in Roman-American Law” 4 *Mich.L.Rev.* 23 (1905).

\(^{83}\) Arthur L. Corbin, “Non- Binding Promises as Consideration” 26 *Colum.L.Rev.* 551 (1926).
“consideration” for determining the enforceability of a promise in the civil law\textsuperscript{84} and common law\textsuperscript{85} countries respectively. Under the English common law, the principle of law which was deeply fortified by time was the lack of enforceability of the agreement unless, either it was contained in a sealed instrument or was supported by a valuable consideration.\textsuperscript{86}

We find that during the fifteenth and sixteenth century,\textsuperscript{87} the conflict for jurisdiction between the common law courts and equity courts was apparent, it was in this backdrop, that the officers of the common law courts, felt an appalling need to yield an appropriate cure/remedy for the enforcement of simple contracts, failing which the equity would absorb this “lion’s share” under its realm. The action of assumpsit\textsuperscript{88} came as answer to their quest.

Another possible reason for the conception of the action of assumpsit was that prior to the occurrence of Assumpsit, the contractual remedies in English Law were Debt,\textsuperscript{89} Detinue, Account\textsuperscript{90} (limited to movable property),\textsuperscript{91} and Covenant.\textsuperscript{92} The oldest forms of contract known to English common law were covenant and debt.\textsuperscript{93} The old action of debt could be brought for a fixed sum in money and the expression “\textit{quid pro quo}” increasingly started to be used in the action of debt, and became an essential for the successful action of debt. Another action was

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\item Civil Law has its origin in Roman Law, as codified in the \textit{Corpus Iuris Civilis} of Justinian. Civil law is contained in civil codes, which developed in Continental Europe and in many other parts of the world. The doctrine of stare decisis does not apply in case of civil law courts. \textit{Supra} note 12 at 818.
\item The notion of common law evolved in England since around the 11\textsuperscript{th} century and was later adopted in the USA, Canada, Australia, New Zealand and other countries of the British Commonwealth. In contrast to the civil law which is based on legislation, common law is mainly based on case law and that precedent (decisions of the Higher Courts) must be respected. \textit{Id.} at 819.
\item \textit{Supra} note 70 at 622.
\item Initially the action of debt was available for the recovery of money or chattels, but later it broke up into debt for money and detinue for chattels. The action of debt is believed to be an action older than covenant. Hugh Evander Willis, “Consideration in the Anglo-American Law of Contracts” 8 \textit{Ind.L.J.} 94 (1932).
\item After the opening of the thirteenth century, the only remedy available in case of refusal to perform the duty was “action of account”. Since action of debt was available in cases where the amount due was liquidated. Detinue, sister of debt was confined to recovery of specific chattels. And Covenant, was limited to actions upon agreement evidenced by sealed writings. Cited in Edmund O. Belsheim, “The Old Action of Account” 45 \textit{Harv.L.Rev.} 469 (1932).
\item \textit{Id.} at 472.
\item J.B. Ames, “Parol Contracts Prior to Assumpsit” 8 \textit{Harv.L.Rev.} 252 (1894); The action of Covenant was available before the year 1201. In an action of covenant, to begin with the breach of every kind of promise, both oral and written were covered, but by the reign of Edward I (1307), a covenant necessarily needed to be in writing and sealed, no consideration was required, what was required was writing, sealing and delivery. \textit{Supra} note 89 at 93.
\item \textit{Supra} note 77 at 247. The only action of contract in Glanville’s time [c.mid of the twelfth century] was debt. O.W. Holmes Jr., \textit{The Common Law} 260 (Little, Brown, And Company, Boston, 1881).
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action of Covenant,\(^{94}\) which first appeared in the twelfth century,\(^{95}\) and did lie in cases of sealed instruments. Due to the inherent limitation of these old actions, a new action came on the forefront for the enforcement of parol promises, called assumpsit.

According to the researcher, the action of assumpsit and its subsequent gradual enlargement\(^{96}\) strengthened the concept of consideration in the English Common Law. The first actions of assumpsit bore resemblance to delictual actions, under the guise of trespass on the case.\(^{97}\) From 1588,\(^{98}\) the courts started labeling promise as consideration for the counter promise, in case of bilateral contracts. One of the earliest references of the word “consideration” is found in the Year Books\(^{99}\) of fifteenth and early sixteenth century.\(^{100}\) But this might also be of interest to know that Richard H. Hiers, in his work “Ancient Laws, Yet Strangely Modern: Biblical Contract and Tort Jurisprudence” states that “Several biblical narratives describe contractual agreements. In each case, there was some “consideration,” that is, something of value that one party proposed to exchange for something that the other valued.”\(^{101}\)

\(^{94}\) It is argued that writ of covenant was originally restricted to agreements concerning land, and in particular leases. David J. Ibbetson, “Words and Deeds: The Action of Covenant in the Reign of Edward I” 4.1 LHR 71 (1986).


\(^{96}\) Indebitatus Assumpsit, was a concurrent action with debt; implied promise deemed sufficient to support the action; Indebitatus Assumpsit was an appropriate action upon constructive obligations or quasi contracts. J.B. Ames, “The History of Assumpsit. II. Implied Assumpsit.” 2 Harv. L.Rev.54 (1888).


\(^{99}\) It may of interest to know that over a million sheep, during the six centuries, made their selfless contribution to the administration of justice by donating their hides for the making of what is known as plea rolls. These were the formal parchment record of the proceedings which ran continuously from (at least) 1194 until the reign of Queen Victoria. They were written in Latin which was the language of record until 1732. Due to inherent limitation of the pleas rolls in as much as they only recorded who won the case and not the reasons and/or the arguments of the case, one had to turn to the year books. The year books recorded what the judges actually said in court, and so may be considered the earliest form of law reports. The earliest identifiable year book was published in 1268 and were published until the 16th century. Most of the year books were published in English version of French known as Anglo-Norman. Since the year books ceased to be published in the 16th century, the task of law reporting was succeeded by reports published by individual barristers. One of the earliest and greatest reports was Edmund Plowden. The most significant series of reports in the early 17th century is Coke’s reports. Some of the other law reporters were Holt and Burrow. Michael Bryan, “Early English law Reporting” University of Melbourne Collections 45 (2009).

\(^{100}\) Supra note 95.

It was in the year 1429-30,\textsuperscript{102} that the expression consideration came to be used as a “noun” in a general sense meaning, the act of considering. In the early fifteenth century,\textsuperscript{103} the term “consideration” was not generally used in its noun form in the legal contexts. The researcher has found the work of A.W.B. Simpson in “The Equitable Doctrine of Consideration and The Law of Uses” in this regard, extremely useful in as much as it makes some relevant and precise references [oldest amongst what the researcher could find from other sources] of the first/earliest cases on consideration. Relevant excerpts from his work are as follows:

“The earliest known case in which there is an express averment of consideration in the pleadings is in 1549 [Newman v. Gylbert (K.B. roll Mich. 3 Edw. VI, m. 135, Devon)] and if we discount a dubious reference in 1527 [John Stile’s Case, from Spilman’s MS Reports, B.M. Harg. 388, f. 215r.] the earliest reported case which mentions consideration in assumpsit is Joscelin v. Shelton in 1557 [3 Leon. 4, Benloe 57, Moore K.B. 13, Brooke, Action sur le Case, pl. 108] The first case in the printed reports in which a rule about consideration is laid down is Hunt v. Bate, reported by Dyer in 1568 [Dyer 272a]. Two years before this in Sharrington v. Strotton [Plowden 298] the idea that the scope of liability for breach of promise or breach of an agreement should be defined by reference to the consideration for the agreement features in the arguments of counsel, though the case itself does not involve an action of assumpsit, directly or indirectly”.\textsuperscript{104}

During the late fifteenth and early sixteenth century, the expression “consideration” was fairly known to lawyers but it had not yet acquired a “special legal meaning”, though it had “begun to develop legal associations”.\textsuperscript{105} The earliest appearance of the division of consideration into past/executed; present, continual, future/executory came in Hunt v. Bate (1568).\textsuperscript{106}

Out of fifteen thousand pages in the twenty-three volumes of the Abridgement of Charles Viner (1678-1756), only seven pages constituted decisions on consideration.\textsuperscript{107} Very often, the

\textsuperscript{103} Id. at 5.
\textsuperscript{104} Id. at 1.
\textsuperscript{105} Id. at 4.
\textsuperscript{106} Id. at 32.
difference between valid and invalid consideration was contended as the difference between “tweedle-dum and tweedle-dee”.\textsuperscript{108}

According to Ames, during the sixteenth century, consideration was divided into two classes, detriment and precedent debt. The former developed with special assumpsit and the latter developed with an action which developed in the middle of sixteenth century\textsuperscript{109} called \textit{indebitatus assumpsit}. Slade’s case of 1603\textsuperscript{110} is believed to be the origin of the action of \textit{indebitatus assumpsit}, which laid that precedent debt was a valid consideration. The earliest recognitions of the rule that promise to do or not to do an act is as much a sufficient consideration for a promise as the act or forbearance itself would be, came in the year 1555.\textsuperscript{111}

Accordingly, origin of the detriment to the promisee, aspect of consideration could be attributed to special assumpsit; the origin of the benefit to the promisor, aspect of the consideration could be attributed to the \textit{indebitatus assumpsit}.\textsuperscript{112} The expression consideration evolved various facets of the term, in the course of its evolution and development “as an inducing cause”, “as a benefit to the promisor”, “as a detriment to the promise”, “in context of public policy”, “in case of bilateral contracts”, “recognition of moral consideration”\textsuperscript{113} to name a few.\textsuperscript{114} Various controversies arose with reference to mutual promises forming consideration for each other\textsuperscript{115}, later in time the concept of moral obligation in the doctrine of consideration came to the forefront, which was professed by Lord Mansfield, under which some of the moral obligations constituted valid consideration in the eyes of law and some other moral obligation did not.\textsuperscript{116} One does not find any evidence in the printed reports before the early nineteenth century,\textsuperscript{117} when the lawyers started equating moral obligation with good consideration.

\begin{footnotes}
\item[109] \textit{Supra} note 100 at 163.
\item[110] \textit{Id.} at 164.
\item[111] \textit{Id.} at 165.
\item[112] \textit{Id.} at 166.
\item[115] C.C. Landgell, “Mutual Promises as a Consideration for Each Other” 14 \textit{Harv.L.Rev.} 496 (1901).
\end{footnotes}
We see a gradual development in the concept of consideration over the years viz., act done at the request of another formed sufficient consideration for the promise, (1616); forbearance constituted consideration, (1864); to promises which are intended to create legal relationship must be enforced and not otherwise (1923). Various theories of consideration have been given by several learned jurists viz., Bargain theory, Equivalent theory, Injurious Reliance theory, Moral Consideration Theory, Detriment Theory, Benefit Theory, Will Theory. Some other deal with the Peppercorn theory of consideration on one hand and the Doctrine of Fair Exchange in the Contract Law on the other, claiming consideration to be only a form or that “consideration” assures fair exchange, respectively. Several attempts have also been made to “define” the expression consideration, Cheshire puts consideration as, “A consideration meant a motivating reason. The essence of the doctrine was the idea that the action ability of a parol promise should depend upon an examination of the reason why the promise was made. The reason for the promise became the reason why it should be enforced or not enforced”.

One of the earliest attempts made to define the “legal” expression “consideration” was made in Currie v. Misa, L.R. 10 Exch. 153 [1875] by Lush, J.,

“A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other”.

By the eighteenth century and onwards, various interpretations of the concept of consideration were given under the English common law, one of it being, that consideration

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119 Alliance Bank, Ltd. v. Broom (1864) 2 Dr. & Sm. 289; Wigan’s Case [1909] 1 Ch. 287. *Ibid.*
“test(s) the content of the promise” and not to make the promise enforceable. It is also sometimes stated that the consideration under the English common law may have both “formal” and “substantive” aspect. By formal aspect we mean, that the doctrine of consideration performs various functions viz. Evidentiary Function, Cautionary/Deterrent Function, and Channeling Function. And by substantive aspect we mean, Private Autonomy, Reliance, Unjust Enrichment, and Substantive Deterrents to Legal Intervention to Enforce Promises; the relation of form to the substantive bases of contract liability.

By the twentieth century, we have also come across some “antagonistic” views against the doctrine of consideration. Recommendations have been made by various learned jurists (Lord Wright, in the year 1936) for the abolition of the concept of consideration from the law of contracts. The said concept is under “increasing attack”, which of course has received mixed responses. According to Fuller, the doctrine of consideration is a “substantive restriction on the freedom of contract.”

Despite all upheavals and topsy-turvy phases, dating from the evolution of the concept of consideration, till today, consideration forms an essential element in the formation of contracts under the English common law, on the principle that no obligation arises from a nude pact. No matter what ever have been the interpretation to the concept of consideration in the English law, it is undeniably true that the concept of consideration has been deeply fortified in the English Common Law, as has been rightly said that “No doctrine of the common law of England is more firmly established at the present date than the doctrine of consideration”.

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126 Lon L. Fuller, “Consideration and Form” 41 Colum. L.Rev. 799 (1941).
127 For details refer Id. at 800 [onwards].
128 For details refer Id. at 806 [onwards].
131 Mindy Chen-Wishart, “Consideration And Serious Intention” Sing JLS 434 (2009).
132 Cited in Duncan Kennedy, “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form” 100 Colum.L.Rev. 103 (2000).
133 The law refuses to annex obligation of contract to acts of the parties which lack the essential element of consideration. Clarence D. Ashley, “The Doctrine of Consideration” 26 Harv.L.Rev.434 (1913).
135 Cited in Francis Bennion, “Want of Consideration” 16 MLR 441 (1953).
consideration is unique to the English common law and finds no mention in the “highly
formalistic Roman law.”

We have had a bird’s eye view of the origin of the concept of consideration, in the
English common law; and its subsequent advancement under the English Common Law, under
this head. We may say that, consideration establishes a bilateral nexus between the parties.
Before proceeding to the contract of indemnity and guarantee under the English law and Indian
law, I would like to mention here that today; the world is not the same as it was few decades
back. Today is the age of fast-paced electronic communication and digital products. In today’s
world, electronic agreements are entered into, and this digital “Tsunami” has completely
revolutionized and created new challenges for the contract law. At this juncture it becomes
indispensable to rethink and revisit “consideration” in the electronic age. As we move from
document to electronic world, the doctrine of consideration has taken a gigantic leap in terms of its
meaning and role. However, the said study is beyond the scope of my thesis. I therefore, do not
venture to go in detail on this subject. But details on the topic of consideration may very well be
found in the subsequent Chapter – II (Evolution of Concept of Consideration).

1.2 THE LAW ON INDEMNITY AND SURETYSHIP/GUARANTEE UNDER THE
ENGLISH COMMON LAW

With the view to understand the present law on indemnity and suretyship/guarantee,
under the English common law, it was important to first know the legal boundaries of the
English common law in the United Kingdom. The territories of United Kingdom constitute,
England and Wales; Scotland, Northern Ireland and The Republic of Ireland. Since England and
Wales form a single legal unit, it would therefore be referred to an England under this sub head.
In England and both parts of Ireland, common law prevails and is normally same, except
different legislations. Therefore it is the law of England that would be dealt with primarily which
is similar to Northern Ireland and The Republic of Ireland. The Scottish legal system is primarily
based partly on Roman law but in case of law of indemnity and guarantee is often similar to that

137 Supra note 51.
139 Robert A. Hillman and Maureen O’Rourke, “Rethinking Consideration in the Electronic Age” 61 Hastings
in England. Therefore, the study would deal with the law of England primarily and laws of other territories would only be mentioned in case the law differs from that of England.\(^{140}\)

### 1.2.1 Definition of The Contract Of Indemnity And Suretyship/Guarantee Under The English Law

The law of indemnity is not very well developed unlike the law of suretyship and insurance\(^ {141}\) under the English law. According to the law of England, the contract of indemnity\(^ {142}\) may be defined as follows:

“A contract in which the indemnifier undertakes to make good any loss suffered by the person indemnified as a result of his entering into a given transaction. The difference between an indemnity (in this sense) and a suretyship is that the indemnity is an independent (primary) obligation; the suretyship is a collateral, accessory or secondary obligation.”\(^ {143}\)

Under the English law, even the losses caused by non-human agency are covered. It is wider in comparison to the contract of indemnity under the Indian Contract Act,\(^ {142}\)

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\(^{141}\) *Id.* at 6.

1872 under section- 124 which only covers the losses caused by human agency and not by non-human agency.

According to the law of England, the contract of suretyship/guarantee\textsuperscript{144} is defined as follows:

“It is a contract where the surety (guarantor) undertakes to be answerable to the creditor for the liability of the principal debtor whose primary liability to the

\textsuperscript{144} According to Leonard H. West and F.G. Neave, Mozley and Whiteley’s Law Dictionary 146 (Butterworth & Co., London, 2\textsuperscript{nd} edn., 1904).

GUARANTEE, in the strict sense, is where one man contracts as surety on behalf of another an obligation to which the latter is also liable as the proper and primary party. See the Statute of Frauds (29 Car. 2, c. 3) and Mercantile Law Amendment Act, 1856 (19 &20 Vict. c.97). 2 Steph.Com.; 3 Steph. Com.


Guraranty. A collateral promise to answer for the debt, default or miscarriage of another, as distinguished from an original and direct contract for the promisor’s own act. By the Statute of Frauds, s. 4, every guaranty must be in writing, but the consideration need not be stated (Mercantile Law Amendment Act, 1856, s. 3).


GUARANTEE. One to whom a guaranty is made. Dallas v. Wagner, 204 N.C. 517, 168 S.E. 838, 839. This word is also used, as a noun, to denote the contract of guaranty or the obligation of a guarantor, and, as a verb, to denote the action of assuming the responsibilities of a guarantor.

GUARANTY, v. To undertake collaterally to answer for the payment of another's debt or the performance of another's duty, liability, or obligation; to assume the responsibility of a guarantor; to warrant. See Guaranty, n.


Guarantee. One to whom a guaranty is made. This word is also used, as a noun, to denote the contract of guaranty or the obligation of a guarantor, and, as a verb, to denote the action of assuming the responsibilities of a guarantor.

Guaranty, v. To undertake collaterally to answer for the payment of another's debt or the performance of another's duty, liability, or obligation; to assume the responsibility of a guarantor; to warrant. See Guaranty, n.

Guaranty, n. A collateral agreement for performance of another's undertaking. An undertaking or promise that is collateral to primary or principal obligation and that binds guarantor to performance in event of nonperformance by the principal obligor. Commercial Credit Corp. v. Chisholm Bros. Farm Equipment Co., 96 Idaho 194, 525 P.2d 976, 978.

In the above mentioned versions of dictionaries, it is found that the expression “guarantee” is said to mean a person in whose favour guarantee is given. But that is not the case under Indian law, the expression “guarantee” does not signify a person rather a contract of guarantee, which is synonymous to “guaranty”.

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creditor must exist or be contemplated. There must therefore be an existing or contemplated obligation on the part of the principal debtor to the creditor and the validity of the contract of suretyship is normally dependent on that of the principal obligation."

Under the law of England, as per the given definition, primary obligation can be created either before or after the suretyship. In case it is created after the suretyship, it can be made for a series of future transactions and is called continuing guarantee. The law in Scotland is same as in England except the difference in terminologies. The term for suretyship is “cautionary obligation” and the surety is called “cautioner”.

1.2.2 Difference Between The Contract Of Indemnity And Suretyship/Guarantee – Under The English Law

Under the law of England, there are two fundamental differences between the contract of indemnity and contact of suretyship/guarantee: 1) The contract of indemnity may be valid even though the “principal” obligation is invalid. 2) The contract of suretyship must be in writing, no such requirement is there for the contract of indemnity. The contract of indemnity is not an accessory/secondary/collateral contract. It is independent and the liability of the indemnifier is primary.

In contrast, the contract of suretyship is an accessory/secondary/collateral contract, which means that the contract of suretyship cannot stand by itself, there, must be some other contract to which it relates. But, at the same time it does not mean that the contract of suretyship can come into existence only after the principal obligation has come into existence. It is sufficient that at the time of entering into the contract of suretyship, the principal obligation is envisaged and it is also true that if the principal obligation never comes into existence, there cannot be any contract of suretyship. That is to say, if the principal obligation is invalid, the contract of suretyship will be of no value and would be equally invalid. In the contract of suretyship, the liability of the surety is secondary.

Under the law of England, this distinction is of importance in cases where the primary debtor is a minor, and a contract of suretyship has been entered into. The surety would not be liable to pay, as its liability is co-extensive with that the principal debtor. Since in the given case,

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145 Supra note 143 at 6.
the bank cannot recover anything from the minor. It cannot also proceed against the surety as the primary obligation is invalid and therefore the surety stands relieved.

1.2.3 Difference between Joint Debtors, Several Debtors and Joint and Several debtors.

Under the law of England/English Law, to know the difference\(^\text{146}\) between joint debtors, several (separate) debtors, and joint and several debtors is essential. It can be explained by way of an illustration.

a) In case of several (separate) Debtors – Several debtors are subject to separate obligations. i.e. If there are two debtors and debtor1 agrees to pay Rs.10/- to the creditor and debtor2 also agrees to pay separately Rs.10/- to the same creditor. Then there exist two separate obligations, even though it is contained in a single document. In the present case, the creditor would be entitled to get a total of Rs.20/- (Rs.10/- each from debtor1 and debtor2). In case either of the debtors dies, his obligation would pass to his personal representative and not to anybody else.

b) In case of Joint Debtors – If debtor1 and debtor2 “jointly” agree to pay Rs.10/- to the creditor. Then it means that there is only one debt of Rs.10. And the creditor is free to recover it from either debtor1 or debtor2 or from both at the same time, but in no case can he (creditor) get more than Rs.10/- in total. If either of the debtor pays Rs.10/-, other stands automatically discharged. There also exists a right of contribution between the joint debtors, in case one of the debtors pays the total amount, he can claim from the other debtor his [other debtor’s] share. In case joint debtor(s) dies, his obligation would not pass to his personal representatives, but the debt remains solely with the other surviving joint debtors. In case the creditor sues one of the joint debtors and obtains a judgment against him, then creditor cannot sue the other joint debtor even if the judgment is not satisfied. If the creditor releases one of the joint debtors, the other(s) debtor(s) stand automatically released.

c) In case of Joint and Several Debtors – If debtor1 and debtor2 agree jointly and severally to pay Rs.10/- to the creditor. In this case, there is only one debt of Rs.10/-, which creates three promises. (i) Several promise of debtor1 to creditor (ii) Several promise of debtor2 to creditor (iii) Joint promise of debtor1 and debtor2 to creditor. In case of joint and several debtors, if any of the debtors die, his obligation would pass to his personal representatives (in contrast to joint debtors. In case of joint and several debtors, if the creditor proceeds against

\(^{146}\) Id. at 8.
any of the debtor(s) and obtains a judgment against him/them, and if the judgment remains unsatisfied, C can sue the remaining debtors on the principle that even if there is one debt, there are as many causes of action as there are promises. As the debtors in the given case are also several debtors, they can very much be sued on the basis of their several promises. But if the judgment is satisfied, then the debt is discharged and other debtors cannot be sued.

1.2.4 Relation Vis-À-Vis Joint Debtors/Joint and Several Debtors and Surety

A surety on payment to the creditor is entitled to recover the sum from the principal debtor. In case there are joint debtors, then the joint debtors are entitled to pay the proportion of their share (half in case of two joint debtors), unless the agreement specify otherwise.

If one of the joint debtors is released by the Creditor, the other joint debtor(s) stands discharged. And if the Creditor releases the principal debtor, the surety stands automatically discharged. But if the surety is discharged by the creditor it would not affect the obligation of the principal debtor to pay of the creditor.

Surety stands discharged in case the principal debtor is not liable to pay, even when the debtor escapes liability on ground of incapacity but if one of the joint debtors escapes liability on ground of incapacity, the liability of other joint debtors stand unaffected. A joint debt need not be in writing, but the contract of guarantee must be in writing under the English Law.

In case of death of one of the joint debtors, the liability does not pass to the personal representatives of the dead (not true in case of joint and several debtors). But in case of contract of guarantee, on the death of either or both of the surety and the principal debtor, the liability passes to their personal representatives.

When the creditor obtains a judgment against one of the joint debtor, the creditor cannot proceed against the other joint debtor even if the judgment remains unsatisfied. But in case of contract of suretyship, even if the creditor has obtained a judgment against the principal debtor even then the creditor can proceed against the surety provided the judgment remains unsatisfied. Same rule applies for the principal debtor, if the creditor first proceeds against the surety. It must be clearly understood that joint debts and guarantee are not same.

The Law in Scotland is different to the law in England. Under the law of Scotland, the debtors are either bound in pro rata or in solidum. Under pro rata, each debtor is liable to pay only his share of debt to the creditor, unless agreed otherwise. In case the debtors are bound to

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147 Id. at 9.
pay in solidum, each debtor is liable to pay the whole debt to the creditor. Once any of the
debtors pays the whole debt, he can claim from the other debtors for their respective share
(which is equal unless agreed otherwise).

The liability of debtors in solidum under the Scotland Law is equivalent to the joint
liability under the English Law. Under the law of Scotland the expression “pro rata”; “in
solidum” would mean bound pro rata; liable in solidum respectively. If the parties are not clear
whether the obligation is pro rata or in solidum, it would generally be taken as pro rata, as
applicable in case of cautionary obligation/suretyship, but this general principle is subject to
exceptions too.

Under the Law of Scotland, if the creditor frees one debtor in solidum then other gets
automatically discharged unless agreed otherwise. This is similar to the principle laid down
under English Law in case of joint debtors. Further, the distinction between “joint liability” and
“joint and several liability” does not seem to apply in Scotland.

1.2.5 Consideration\textsuperscript{148} in the Contract of Indemnity and Suretyship Under The English
Law

The doctrine of consideration is unique to the English Common Law. In UK, its presence
can be found in England, both parts of Ireland but not in Scotland. As a matter of general rule, no
contract is enforceable unless it is impregnated with consideration. In case of contract of
indemnity, also this element forms one of the essential elements in the formation and execution
of the contract. The obligation in case of contract of indemnity remains valid, even when the
“principal” obligation is invalid. The contract of indemnity is not an accessory contract but is
independent and the liability of the indemnifier is primary under the contract.

In case of contract of guarantee, when the contract of guarantee is in a deed there is no
question of consideration. Otherwise the creditor must give consideration to the surety, in return
of his [surety’s] obligation to guarantee the debt. In most cases, the benefit accruing to the
principal debtor is taken to be consideration for the surety for entering into the contract of
suretyship, provided that the agreement with surety precedes the granting of credit, since past
consideration is no good consideration under the English law.

There can also be an instance, where the creditor demands from the surety that the surety
must guarantee both past and future debts in return for the creditor’s granting future credit to the

\textsuperscript{148} Id. at 12.
principal debtor. It is not necessary under the English Law that some benefit must come to the surety from the creditor in lieu of the surety entering in the contract of surety ship. It is sufficient that that some benefit comes to the principal debtor, it [benefit] must however, come from the creditor only.

Under the contract of suretyship, when the Surety agrees to become a surety in return for Creditor’s “promising” to give credit to the debtor, it is a case of executory consideration and the agreement becomes binding immediately. But when the surety agrees to become surety, on the creditor’s “granting” credit to the debtor, it is the case of executed consideration cannot be enforced unless the creditor grants credit to the debtor, since there is no consideration till the credit is granted by creditor to the debtor and therefore the surety is not bound. The difference between executed and executory consideration is of greater relevance in cases when the surety agrees to guarantee both past and future debts in consideration of the granting of future credit by the creditor. In such a case, unless the credit is granted by the creditor to the debtor, the agreement is not enforceable, not even for the past debts.

It is not necessary under the English law, that the consideration be mentioned in the document containing the agreement of suretyship.\textsuperscript{149} The doctrine of consideration does not apply in Scotland. The general principle under the English Law is that the surety stands discharged, if the debtor is discharged. Partial performance by the debtor discharges the surety pro tanto. Variation in the terms of the contract, novation, breach of contract by the creditor, creditor guilty of conduct which prejudices the right of the surety are some of the grounds in which the surety stands discharged, unless the consent of the surety is taken. The position in Scotland is basically the same with reference to the principles so laid in the present paragraph.

1.2.6 Subrogation in Contract of Indemnity and Suretyship under the English Law

Under the English law of guarantee, surety has an implied right to indemnity and subrogation on payment of debt to the creditor, provided the debt was enforceable against the principal debtor. The surety on payment becomes entitled to all the rights which the creditor had against the debtor. The surety is entitled to all securities held by the creditor, which are charged with the debtor, whether given after or before the contract of suretyship. The Right of Subrogation under the English Law is an equitable right unlike the right of assignment which is a statutory right. The right of subrogation and right of assignment is conferred under the Law of

\textsuperscript{149} Mercantile Amendment Act, 1856. [English Act]
Scotland by the principles of equity. Under the English law, in the contract of indemnity, the right of subrogation is an equitable right.

1.3 THE CONCEPT OF CONSIDERATION UNDER THE INDIAN CONTRACT ACT, 1872

To have an overview of the concept of consideration, under the Indian Contract Act, 1872 reference to section 2(d), 10 of the Indian Contract Act, 1872 is required. Section 2(d) of the Indian Contract Act, 1872 states the “sense” of the word consideration as:

“When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise”

The Indian Contract Act, 1872 makes it amply clear by virtue of section- 25 of the Act, that agreement without consideration is always void, unless it falls under any of the exceptions given under it.

150 Section 10 of the Indian Contract Act, 1872, S.10 What agreements are contracts - All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

151 Section 25 of the Indian Contract Act, 1872, S.25 Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law - An agreement made without consideration is void, unless –

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless.

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.

(3) it is a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay wholly or in part debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.

Explanation 1: Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2: An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

152 Section 2(d), Indian Contract Act, 1872.
The essentials of the concept of consideration, under the Indian Contract Act, 1872 can be laid as follows:

a) Consideration must be supplied on the request or desire of the offeror or promisor and nobody else.

b) Consideration may be supplied by the acceptor or by any other person. – The law of United Kingdom is different in this respect, as it says that the consideration must “only” be supplied by the acceptor.

c) Consideration may be in the form of any act or omission.

d) Consideration may be past, present or executory. However, in United Kingdom, past consideration is always void.

e) Consideration must have some value in the eyes of law.

f) Consideration must be lawful and legally enforceable in the Court of law.

g) Anything done in pursuance of an existing contractual duty in lieu of some additional payment is no consideration in the eyes of law.

Along with differences between the English law and Indian law on the concept of consideration, another important area of interest for the researcher is to analyse the “sense” of the expression under the Indian Contract Act, 1872. It is humbly submitted that according to the researcher, the nature of the “sense” as given under section 2(d) of the Act, 1872 is procedural and not substantive. It fails to state the future, fluctuating aspect of the consideration, which is of great relevance under the contract of indemnity and guarantee.

The concept of consideration is an English common law concept, which has recently received criticism on various grounds from several learned jurists. Some of which have recommended its abolition. The researcher is not in support of the idea of abolition of this concept or relegating it to a position lower that what it holds today. Similar are the views of the Law Commission in its thirteenth report, 1958.

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1.4 CONTRACT OF INDEMNITY AND CONSIDERATION IN THE CONTRACT OF INDEMNITY UNDER THE INDIAN CONTRACT ACT, 1872

It is an admitted fact that Indian Contract Act, 1872 is not a complete code on the law relating to contracts and one has to resort to the English Common Law principles of justice, equity and good conscience to fill the gaps. On the same corollary, sections 124 and 125 of the Indian Contract Act, 1872 which deals with the law of indemnity does not comprehensively cover the law on indemnity. It has also been held in Gajanan v. Madan,\(^{155}\) that sections 124 and 125 of the Act, does not lay down the whole law of indemnity.

According to the researcher, section – 124 of the Act is restrictive in nature as it only covers loss caused due to human agency, which is in contrast to the English law of indemnity which is large enough to cover losses caused by both human and non-human agency. The study of the researcher revolves around the analysis of the provisions of the Indian Contract Act, 1872 dealing with the contract of indemnity. According to the researcher, for the coming into being of a contract, consideration is must; it promotes the agreement to a status of contract. But under the Act, only two sections [Section 124 and 125] profess to cover the law on indemnity. Part – II of the Indian Contract Act, 1872 which deals with special contracts, do not bear a separate section on ‘consideration for indemnity’.

Even if we assume that the “sense” of the expression “consideration” as given under section 2(d)\(^{156}\) of the Act applies/or holds good to Part II of the Act, which deals with special contracts, even then it does not resolve the issue. The expression “consideration” is limited to the extent in as much as it does not “define” the expression. In response to the question, what is consideration, the legislature has answered it by using the word “something” under section 2(d) of the Indian Contract Act. The word “something” used in section 2(d) of the Act, does not actually “define” the term. Section 2(d) so given under the Act is “procedural” in nature and not “substantive”. As has been mentioned supra, one of the earliest attempts to “define” the expression consideration, under the English common law was made in Currie v. Misa case [English law] by Lush, J. But the same was not incorporated in the Act, since the Act preceded

\(^{155}\) A.I.R. 1942 Born.302 (303).

\(^{156}\) Section 2(d) of the Indian Contract Act, 1872 S.2(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.
the decision. The Act was enacted in the year 1872 and the Judgment was delivered in the year 1875.

If we assume the definition given by Lush, J., as the definition under 2(d), even then the “definition” given by him is not free from fallacies. The said definition also fails to clearly mention the past, present, future and fluctuating aspect of the consideration. It is submitted that the Indian statute, does not define the expression “consideration” nor does not cover in its ambit the future and fluctuating aspect of consideration as under the special contract specially contract of indemnity and contract of guarantee.

The researcher now endeavors to explain the future and fluctuating aspect of consideration in the contract of indemnity. It is very much known and understood, that the clause of indemnity in the agreements are attractive clauses, under which the person promise to indemnify the other for the loss. The aspect of consideration in the contract of indemnity is dual in nature firstly it has future aspect and secondly its nature is fluctuating. When one enters into a contract of indemnity, the parties enter objectively, and at this stage of formation of contract the parties are not in contemplation of the point of time when the loss would occur, what and when it has to be paid etc. This “uncertainty” at the time of formation of contract is the “future” and “fluctuating” aspect of consideration in the contract of indemnity. Since, none is sure as to how and when a person would be asked to pay under the contract, it may also happen, that the party who has promised to pay for the loss, may never be required to pay for the loss, since the loss never happened. This being the case the consideration under the contract of indemnity has a future and a fluctuating aspect.

We also know that the provision of consideration for indemnity is missing from Part II of the Act, which deals with special contracts, even then section 124 of the Act, which defines the contract of indemnity, clearly manifest an attribute of consideration in its definition. The attribute of consideration so mentioned in the contract of indemnity is “loss”. Since the attribute of consideration is present in the definition of the contract of indemnity, it is therefore impossible to visualize a contract of indemnity without\(^\text{157}\) consideration. According to the researcher, the expression “consideration” has not been defined under the Indian Contract Act, 1872

\(^{157}\) Section 25 of the Indian Contract Act, 1872, may support the point, in as much as it says that agreement without consideration is void. For details refer Supra note 151.
appropriately in as much as it expresses its “sense” only procedurally and not substantially. On the other hand, it does not deal with the “future” and “fluctuating” aspect of the consideration, which forms the premise of the contract of indemnity.

Another area of interest for the researcher in the study of sections 124 and 125,\textsuperscript{158} of the Indian Contract Act, 1872, which deals with the law on indemnity, with reference to their “inexhaustive” nature. On analysis of section 124, which defines the contract of indemnity, certain flaws have come to light. The said section, which defines the contract of indemnity is not exhaustive,\textsuperscript{159} it is infused with some inherent follies and fallacies. The said section only covers one class of indemnity and it is therefore restrictive in approach. Under the section, when one party promises to save the other from the loss caused to him “by the conduct of the promisor himself, or by the conduct of any other person” the parties enter into the contract of indemnity. We find the use of words “promisor himself” or “any other person”. It means that loss caused to the party from anything other than “person” would not be covered under the definition of the contract of indemnity. As a corollary, it means that loss caused due to natural disasters, flood, earthquake etc. would not be covered under the section 124 of the Act. But, at the same time it is also true that, even such contracts in which the party promises to save the other from loss caused due to events not caused by persons are referred at contract of indemnity, in the loose sense of the term. Such transactions may also be called as the contract of indemnity, under the provisions of the specific legislation which may apply to the given circumstances of the case. But, unless we have something, by way of specific legislations or otherwise, which supports the promise of the party to save the other from the loss caused by non-human events, such contracts would not be called as a contract of indemnity in the strict sense of the terms under section - 124 of the Indian

\textsuperscript{158} Section 125 of the Indian Contract Act, 1872 S.125 Rights of indemnity-holder when sued - The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor: (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies; (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit; (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

\textsuperscript{159} The Indian Contract Act, 1872 does not profess to be a complete code dealing with the law relating to contracts. There is nothing to show in the Act that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts in the Act. \textit{Supra} note 19 at 6.
Contract Act. The Calcutta High Court, in its decision in Chandmull Jain v. General Assurance Society Ltd.,\textsuperscript{160} has not endorsed the loss caused by non-human events viz. floods etc. is the contract of indemnity under section - 124 of the Indian Contract Act, though it did say that the contract of fire insurance was a contract of indemnity\textsuperscript{161} in the loose sense of the term, to be covered under section - 31\textsuperscript{162} of the Indian Contract Act. 1872. This being the situation, it is important to bridge the drift created by the restrictive nature of section - 124 of the Indian Contract Act, 1872. The section must therefore be amended to include losses covered due to non-human agency. In contrast, even the English law on the subject is wider in approach, it covers within its ambit losses caused, irrespective of human or non-human agency i.e. to say that a promise by a party to save the other from loss caused by human or non-human agency viz. Act of God, would very much be covered under the definition of the contract of indemnity under the English Law. Section - 124 of the Indian Contract Act, 1872 is also silent on whether the contract of indemnity need to be expressed or it covers within its ambit implied contracts of indemnity also. A clarification in this regard by way of addition of the words “expressed or implied” to the definition under section - 124 of the Indian Contract Act, 1872 would also be appreciated.

The next section -125\textsuperscript{163} of the Indian Contract Act,1872 deals with rights of the indemnity-holder when sued. Again this section is restrictive in nature in as much as it states the rights of the indemnity-holder “when sued”. The law does not mention other rights of the indemnity holder, in case of not being sued. Other issues, viz. Can the indemnity holder proceed against the indemnifier once the liability to pay has become absolute, even though actual loss has not resulted?, have remained unsettled under the Act. There have been divergent opinions of various High Courts, which have led to the law not being stable. Therefore, it is necessary to incorporate the rights and remedies of the indemnity holder in case of not being sued by way of a separate section after section- 125 of the Indian Contract Act, 1872 and the rights of the indemnity holder be more elaborately defined to cover rights and remedies, when not being sued.

\textsuperscript{160} AIR 1959 Cal 558; reversed on another point in General Assurance Society Ltd. v. Chandmull Jain, AIR 1966 SC 1644.

\textsuperscript{161} Cited in Nilima Bhadbhade, Pollock & Mulla The Indian Contract Act, 1872 1336(LexisNexis Butterworths Wadhwa, Nagpur, 14\textsuperscript{th} edn. 2013).

\textsuperscript{162} Section 31 of the Indian Contract Act, 1872 S.31 “Contingent contract” defined - A “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

\textsuperscript{163} Supra note 158.
Also expressly providing for the time when the liability of the indemnifier arises – at a point of time when the liability of the indemnity-holder to pay becomes absolute, irrespective of the sufferance of the actual loss by him [indemnity-holder].

Another area of interest for the researcher is the non-incorporation of the doctrine of subrogation in the contract of indemnity. Unlike section 140 of the Act, which expressly provides for the doctrine of subrogation for the contract of guarantee, we do not find any section on subrogation under the contract of indemnity. Recently, the Hon’ble Supreme Court, in the case Economic Transport Organization v. M/s Charan Spinning Mills (P) Ltd.\textsuperscript{164}(Landmark Judgment of the Constitutional Bench) has evolved a principle of subrogation in the contract of indemnity on grounds of equity, by way of judicial innovation. It has expressly provided for the right of subrogation to be inherent and innate in the contract of indemnity. The judicial decision is a reflection of the gradual advancement in society and the changes in the principles of law. According to the researcher, the Act must also be amended to expressly provide for the principle of subrogation under the contract of indemnity. Details on the topic of law of indemnity/contract of indemnity may also be found in Chapter – III (Changing Trends of Consideration Under Law of Indemnity).

1.5 \textbf{CONTRACT OF GUARANTEE AND CONSIDERATION IN CONTRACT OF GUARANTEE UNDER THE INDIAN CONTRACT ACT, 1872}

Under the contract of guarantee, there are three parties viz. surety, principal debtor and creditor. The surety under the contract undertakes either to perform the promise or to discharge the liability in case of default of the principal debtor. The party who undertakes to guarantee is the surety, to whom the guarantee is given, is the creditor and in respect of whose default guarantee is given is the principal debtor\textsuperscript{165}.

Out of 22 sections on the Law of Guarantee in the Indian Contract Act, 1872 opening from Section 126 – 147, the researcher has focused on section 126, section 127\textsuperscript{166}, section 139\textsuperscript{167}, section 140\textsuperscript{168} and section 141\textsuperscript{169} of the Indian Contract Act, 1872.

\textsuperscript{164} [2010] 2 S.C.R. 887.
\textsuperscript{165} Section 126 of the Indian Contract Act, 1872
\textsuperscript{166} Section 127 of the Indian Contract Act, 1872 S.127 Consideration for guarantee - Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.
As per section 126 of the Act, on plain reading of the provision it may appear that default by the party forms an essential ingredient in the contract of guarantee. But it has been seen in Maharashtra State Electricity Board, Bombay v. Official Liquidator, High Court, Ernakulam, Anr.\textsuperscript{170} a decision by the Hon’ble Supreme Court, that the contract of guarantee can very much be invoked even without default by the party and the creditor can demand the debt amount from the surety, without default from the principal debtor. The researcher is of the view that to that extent the definition of the contract of guarantee under section 126 of the Act be enlarged to include cases of “demand” under it.

Further, in contrast to the provisions on law of indemnity, under which no separate provision for consideration in the law of indemnity is provided for, Section 127 of the Indian Contract Act, 1872 deals with the consideration for guarantee. Section 127 of the Indian Contract Act, 1872 states as follows:

Section 127 - Consideration for guarantee - Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

There is no provision under the law of indemnity which deals with the consideration for indemnity; however, we do find reference of the aspect of consideration in section- 124 of the Indian Contract Act, 1872 which deals with the definition of the contract of indemnity. The term in the said section which refers to the aspect of consideration is “loss”. Under section 127 of the Indian Contract Act, 1872, which deals with the consideration for guarantee, the expression used to refer to the aspect of consideration is “benefit”; and to define consideration is “anything”. The use of the expression “anything” used to signify the consideration in the contract of guarantee is synonymous to the term “something” used in section 2(d) of the Indian Contract Act, 1872.

\textsuperscript{167} Section 139 of the Indian Contract Act, 1872 S.139 Discharge of surety by creditor’s act or omission impairing surety’s eventual remedy - If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

\textsuperscript{168} Section 140 of the Indian Contract Act, 1872 S.140 Rights of surety on payment or performance - Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

\textsuperscript{169} Section 141 of the Indian Contract Act, 1872 S.141 Surety’s right to benefit of creditor’s securities - A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

\textsuperscript{170} AIR 1982 SC 1497
which explains the “sense” of the term “consideration”. Both the expression “anything” and “something” leave the doors open for the judiciary to interpret the term on various grounds viz. having value in the eyes of law, right, deterrent, forbearance etc. Accordingly the expression is left to the mercy of the judiciary with no precise definition. A definition of the grounds of Currie v. Misa (supra mentioned), can be looked into for incorporation in the Indian Contract Act, 1872 under section- 127 of the Act, together with the essentials laid down in the section 127 of the present Act and the fluctuating, future aspect of consideration. Since section 127 only deals with the consideration of one party in one contract, under the contract of guarantee. It must be enlarged to provide for the consideration for each party in the three contracts in the contract of guarantee and also to provide for the “dual applicability” of the same/single consideration at two instances. *(For details refer to sub-head 4.3 of Chapter – IV).*

For sections 139 and 140; the researcher does not suggest any amendments but they are read with section 141 to comprehensively understand the law under section 141 of the Act. On analysis of the section 141 of the Indian Contract Act, 1872 which deals with the surety’s right to the creditor’s securities, it has come to light, that the said section is limited in as much as it entitles the surety of such surety’s which are the creditor had at the time of his becoming the surety. On the other hand, under the English law, in contrast, “a surety has on payment and not before, a right to the benefit of all the securities, whether known to him or not at the time when he became surety, which the creditor has received from the principal-debtor, before, contemporaneously with or after the creation of suretyship and whether or not such sureties existed at the time when the guarantee was given.”\(^\text{171}\) It is therefore recommended that the scope of section 141 be enlarged on the lines of English law, which is wider that the present Indian law.

Section 141 of the Act also raises another bone of contention, with reference to time at which the surety is entitled of the securities with the creditors. Whether the surety is entitled to the portion of the sureties with reference to the portion of debt paid by the surety for which he guaranteed, irrespective of the fact whether the debt is paid in full or not. Most of the High Courts have decided in favour of the entitlement only when the creditor is paid in full. The researcher is in support of this view and suggests that the same must be incorporated by way of amendment in section 141 of the Indian Contract Act, 1872, at the same time, the domain of the section should be enlarged to cover in its ambit the benefit of all securities which the creditor has

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\(^\text{171}\) Halsbury: Laws of England (2nd edn.), Vol. 16, 92-93
on the date the creditor is paid, irrespective of whether it existed at the time of entering the contract of the suretyship, whether it was received, before, simultaneously or after entering in to the contract of suretyship. Any loss of such security by the creditor without the consent of the surety would discharge the surety to the extent of the value of the security lost/parted off by the creditor. Details on the topic of Law of Guarantee/Contract of Guarantee are covered under Chapter – IV (Changing Trends of Consideration Under Law of Guarantee).

1.6 DIFFERENCE BETWEEN CONTRACT OF INDEMnty AND GURANTEE UNDER THE INDIAN CONTRACT ACT, 1872

Some of the basic differences between the contract of indemnity and guarantee under the Indian Contract Act, 1872 are as follows:

a) The contract of indemnity requires two parties, the indemnified/indemnity-holder and the indemnifier; In contrast to the contract of guarantee which necessarily requires three parties viz. principal debtor, creditor and surety.

b) The liability of the indemnifier in case of the contract of indemnity is primary; In contrast to the contract of guarantee where the liability of the surety is both co-extensive with the liability of the principal debtor and is secondary.

c) The contract of indemnity is the contract to cover up the loss of one party [indemnified/indemnity-holder] by the other [indemnifier]; In contrast to the contract of guarantee, where the surety promises to perform or discharge the liability of the principal debtor only in case of default and/or demand as the case may be.

d) There is only one contract in case of contract of indemnity between the indemnifier and the indemnified/indemnity-holder. But in case of contract of guarantee there are three contracts namely, contract between the principal debtor and the creditor; contract between the creditor and surety and contract between the surety and principal debtor. The former two are expressed and the latter is an implied contract.

e) The doctrine of subrogation is expressly provided in the contract of guarantee under section 140 of the Act, but no such mention of subrogation is provided for the contract of indemnity. Recently in one the decision172 of the Hon’ble Supreme Court (Constitutional Bench), in the year 2010, it has provided that the doctrine of subrogation also applies to the contract of indemnity and is very much innate and inherent in the contract of indemnity.

172 Supra note 164.
f) The provision for “consideration for guarantee” is expressly provided under section -127 of the Indian Contract Act, 1872 (Though, it is submitted that it is not free form inherent follies). In contrast to the contract of indemnity where there is no provision for the consideration for indemnity.

1.7 HYPOTHESIS

The researcher feels that since the sense of the expression “Consideration for the promise” given in the Indian Contract Act, 1872 in Section 2(d) is applicable only to present and executed form of agreements, it has no applicability in the Formation of Future Contracts. Due to no precise definition/sense of the expression “Consideration for the promise” dealing with Formation of Future Contracts in the Indian Contract Act, 1872 (Act no. 9 of 1872). The researcher feels that there should be an amendment in the Indian Contract Act, 1972 incorporating the definition/sense the expression “Consideration for the promise” covering the Formation of Future Contracts. The researcher further states that since the concept of consideration forms an essential element in the formation of contract. It is therefore, very much present in the contract of indemnity and contract of guarantee. However, the nature of the consideration in such contracts is both future and fluctuating in as much as the parties enter in to contract but none is sure as to what amount will actually be paid in the future time to come, or will not at all paid at all, at the same time none of the them is sure at to the time when the parties could be called to honour the contract. The focus therefore is on the future and fluctuating aspect of the consideration in the special contracts of indemnity and guarantee.

1.7.1 Research Problems

a) The Indian Contract Act, 1872 (9 of 1872) does not attempt to define the expression “Consideration for special contracts”.

b) The “sense” of the expression “Consideration for the promise” as mentioned u/s 2(d) in the Indian Contract Act, 1872 (9 of 1872) does not apply to Formation of Special Contracts.

c) The “sense” of the expression “Consideration for the promise” as mentioned in the Indian Contract Act, 1872 (9 of 1872) does not “define” the said expression.
d) The “sense” of the expression “Consideration for the promise” as mentioned in the Indian Contract Act, 1872 (9 of 1872) does not deal with the future and fluctuating aspect of consideration in case of special contracts viz. contract of indemnity and guarantee.

e) Section – 124 (“Contract of indemnity” defined) and S-125 (Rights of indemnity holder when sued) of the Indian Contract Act, 1872 (9 of 1872) does not comprehensively define the contract of indemnity and also does not deal with rights of the indemnified when not sued respectively.

f) Section – 124 (“Contract of indemnity” defined) and S-125 (Rights of indemnity holder when sued) is not comprehensive in as much as it does not deal with the rights of the indemnifier viz. right of subrogation.

g) Section -127 (Consideration for guarantee) of the Indian Contract Act, 1872 does not comprehensively deal with consideration in the Contract of Guarantee.


i) Difference between Future aspect of Consideration and Executory Consideration is not defined or explained in the Act.

1.8 AIMS AND OBJECTIVES

AIM - To identify provisions in the Indian Contract Act, 1872 which relate to concept of consideration in the contract of indemnity and guarantee and to assess the feasibility of the said provisions in the contract of indemnity and guarantee under the Indian Contract Act, 1872.

OBJECTIVES

• To analyse the concept of consideration and identify the roots of the concept of consideration.

• To analyse the concept of consideration under the Indian Contract Act, 1872

• To analyse the definition of the contract of indemnity and guarantee under the Indian Contract Act, 1872.

• To analyse the recommendations made by the Law Commission of India on the subject.
To analyse and evaluate the concept of consideration under the contract of indemnity and guarantee by way of judicial decision of the Hon’ble Supreme Court of India.

1.9 RESEARCH METHODOLOGY

With the view to seek answers to the questions put forward in the hypothesis and systematically solve the research problem. The methodology of the study to be used by the researcher shall primarily be doctrinal. The study encompasses doctrinal method of research by using both primary and secondary sources. The sources include – Acts (Statutes); Case Laws; Text Books; Journals; Articles/Research Papers; Magazines; Power Point Presentations on the subject. The tools used are e-tools and Libraries, Legal Databases viz. JSTOR, Manupatra, Westlaw, E-Books, E-Journals, E-Articles, E-Dictionaries, Legal Dictionaries, Thesaurus, various National and International Repositories etc. to mention a few.

1.10 SIGNIFICANCE OF THE RESEARCH

The research was undertaken:

• To resolve theoretical questions in the areas of research
• To provide a better understanding of the concept of consideration with special reference to the contract of indemnity and guarantee.
• To highlight deficiencies in the law of contract w.r.t concept of consideration in the contract of indemnity and guarantee and its applicability to the said contracts.
• To demonstrate the need to review the law of contract under the Indian Contract Act, 1872 with reference to concept of consideration in the law of indemnity and guarantee.
• To influence government law making in the area of law of contract.

1.11 FRAMEWORK OF THE STUDY

The work of the researcher had been divided in five chapters in the thesis as follows:

1. Chapter I – Being the first chapter, in this chapter the researcher has tried to give a bird’s eye view of the topic in question. This chapter is an introduction to the chapters which have been
discussed in detail in the following chapters. It also covers the hypothesis, aims and objectives, research methodology and framework of study.

2. Chapter II - In this chapter, the researchers has worked on the origin of the concept of consideration. With the view to locate the origin of the concept of consideration, the researcher studied the Roman law on contracts, since Britain was Roman Colony, and gradually studied Anglo-Saxon Law and English common law from advent of the Normans. Various forms of actions prevalent during that time were studied, which eventually resulted in the birth of the concept of consideration in the English Common Law. Various theories given with reference to the evolution of the concept of consideration have been looked into. In almost all such theories, the relevance of action of assumpsit holds great importance. Relevant forms of the actions have been discussed and its gradual enlargement to cover cases of parol contracts and leading to the birth of “consideration” as forming on the essential element in the formation of contract under the English law has also been looked into. On the time continuum the study relates back from the Roman Period till the English Common law in the nineteenth century.

3. CHAPTER III – Chapter III relates to the study of the contract of indemnity with reference to the future and fluctuating aspect of consideration by way of changing trends reflected through Supreme Court decisions. Analysis of the Supreme Court decision to study nature of consideration in the contract has been made. Before analyzing the Supreme Court decisions, the point of view and recommendations of the Law Commission of India has also been looked into and analysed. And how far the Law Commission of India has addressed to the questions put forward by the researcher in the hypothesis. Important decisions of the Supreme Court on the concept of subrogation under the contract of indemnity have also been referred in the chapter.

4. CHAPTER IV – Chapter IV deals with the contract of guarantee, with reference to the future and fluctuating aspect of the consideration by way of Supreme Court decisions and the changing trends in the contract of guarantee. It is also seen, how far the judiciary has by way of judicial innovations imbibed modification in the contract of guarantee and enlarged its scope. The recommendations of the Law Commission on the law are also studied and analysed. And it is also seen, how far the Law Commission has addressed to the issues put forward by the researcher in the hypothesis. All of which is duly analysed with meticulous
planning. Important judgments, decided by Hon’ble Supreme Court, have also been incorporated in the chapter.

5. CHAPTER V – Chapter V is the conclusion on the topic supplemented by necessary suggestions after going through the enormous expanse of information on the subject.