Contract – EC, MM

MM: The twelfth century is often seen as a turning-point in the history of contract. This is meant and taken to mark the departure from the early Middle Ages, when contracts – obligations – were created primarily through the use of rituals. I might for instance shake your hand, and that would be the basis for a contract. From the twelfth century, under the influence of new legal ideas, primarily from canon law and Roman law, contract is thought to have resided more in consent and the free will of the parties.

EC: The change in the European culture brought more subtlety in the construction of a contract, with all its consequences, which can be very important for a society. The church was very keen to preserve the freedom of will of the two parties when they agreed on a certain contract. Roman law taught that every consent also had to have an equitable contract. From an economical point of view, the balance between the advantages of the two parties have to be fair, so that any consent about an unfair contract will be void.

MM: In the customary literature of thirteenth-century France, the *coutumiers*, we often find these Romano-canonical ideas at play in contracts. Beaumanoir, for instance, is very keen on consent, making sure that consent is freely given and that people are not coerced or intimidated into making agreements. This is because coerced agreements may work to the disadvantage of the contracting party. So there is a kind of hybridization of consent and the equitable contract.

EC: But this does not mean that form was completely abandoned. Form remains a very important part of contract. Not only because of the ritual which the law imposed on the concluding of a contract, but also because of the necessity of proof in the provision of a possible trial. The contract started to be mainly written. But theoretically it was not the written document that made the form of the contract. The written document only recorded that there was a ritual form in the moment of the agreement and it listed the names of the witnesses. But by matter of fact, this written document became more and more important in every trial.

MM: I think one of the interesting differences between different parts of Europe and one of the different ways of thinking about how contracting and law of obligations evolved more broadly is looking at the interplay between these rituals and the prominence attached to them in the case of a trial, versus the written document and the written proof in a trial. For example, in twelfth-century northern France, we often find that documents are written recording contracts, but attached to the documents are sticks, little pennies, that contractants would give to the other. It's hard to ascertain in those situations what is more important, whether the written word or some form of memory of the ritual. So that is an interesting contrast across different parts of Europe.

EC: Maybe we could say that in every part of Europe and at every level of law, the Middle Ages transform contract into a complex phenomenon made by consent, equitable content and a particular form.