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“God’s Penny” as Earnest Money: The Historical Meaning of Earnest Money

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1. Introduction

If you are a buyer, you can cancel a contract by the renunciation of the earnest money. If you are a seller, you can cancel a contract by paying the buyer twice the amount of the earnest money you received. This is the case in Japan’s law of contract. We call this earnest money a cancellation deposit. Here the legal binding force of the contract is weakened. This is because the convenience of economic dealings is taken seriously. The modern treatment of earnest money is a significant modification to the long-established principle “*pacta sunt servanda* (Contracts are to be kept)”. However, when the occurrence of an earnest money is seen from the historical viewpoint, it will be found that an earnest money should be granted originally to strengthen the binding force of the contract.

We can see another phase of the earnest money by researching its history. A “God’s penny (*denarius dei*)” as earnest money was found in Italy, Germany, France, and England in the Middle Ages. There are a lot of God’s pennies in the judicial precedents of the fair courts of medieval England.

It can be said that Christian spirituality was permeating into the concept of the contract. I would like to examine the God’s penny and the legal binding force of contract from the viewpoint of the history of contract. We must begin with the Anglo-Saxon customary laws of contract.

2. Anglo-Saxon Customary Laws of Contract

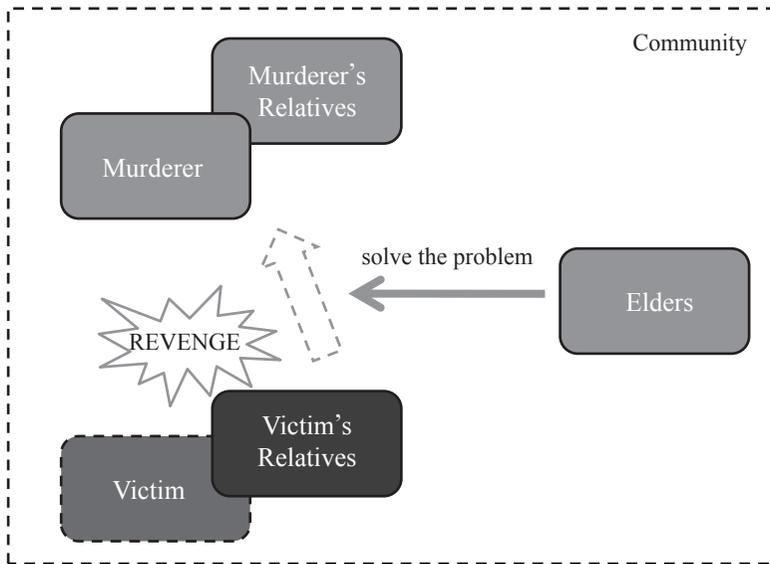
The oldest type of contract is the atonement contract of the Anglo-Saxon era (from the mid-fifth century to 1066 A.D.)¹. That contract was the method to ease revenge between the clans. The contract was concluded without the involvement of a court. The important matter is that the customary law of the atonement contract began in the contract between the clans. Such a contract was not necessary inside the clan. This is because revenge did not exist between the members of the same clan. Clan elders solved problems when necessary and anyone who resisted the solution of the elders was excluded from the clans².

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1 Max Weber, *Wirtschaft und Gesellschaft, Grundriß der verstehenden Soziologie*, fünfte, revidierte Auflage, besorgt von Johannes Winckelmann, Studienausgabe, 1972, zweiter Teil, Kapitel VII, S. 422.

2 Weber, *a. a. O.*, S. 420.

1. Atonement Contract in Anglo-Saxon Society (Figure 1)



The same phenomenon was applied to commodities transactions as well. Exchanges of commodities originally did not occur inside of the community, but rather occurred between one community and another.

Harold Hazeltine tells us that a *wer*-contract (an atonement contract) was concluded as follows:

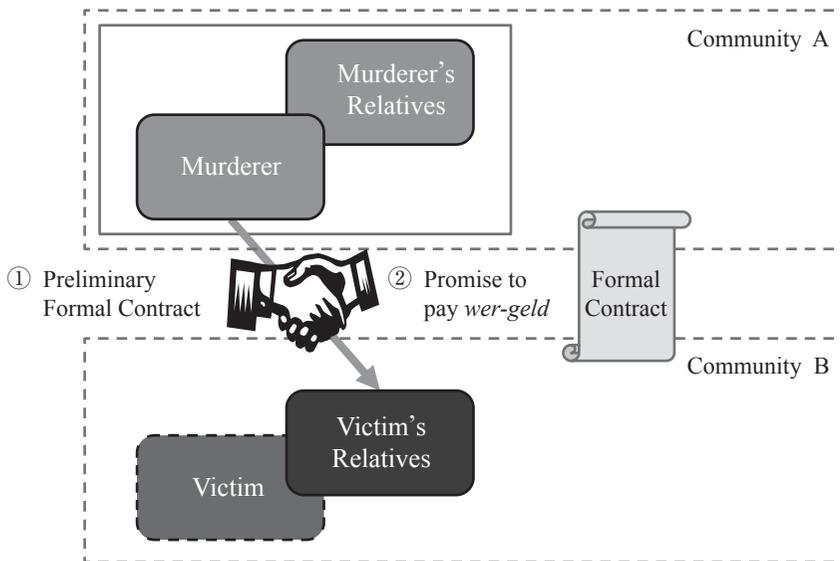
‘Preliminary formal contracts between the murderer and the relatives of the murdered are first concluded by handgrasp, the intermediary in the formation of these contracts being the procurator, the representative of the murderer. The murderer promises that he will recompense the relatives of the man he has slain; and they in turn promise the murderer that he may come forward in peace and himself enter into the formal contract for the payment of the *wer-geld*. Then the second stage comes in the proceedings. The parties meet face to face and conclude the formal *wer*-contract itself. By the delivery of a *wed* of trifling value the murderer promises to pay the *wer-geld* to the relatives [of the victim], and at the same time he furnishes his sureties (*wer-borh*).’³

The *wed* was originally a fetish. It was a thing like a cane, a stick or a spear that symbolized the character of the possessor. The murderer handed his *wed* over to the relatives of the victim. Those relatives handed the *wed* over to the *borh* (surety) who was a representative of the relatives of the murderer in exchange for the promise to pay the *wer-geld* (atonement money). In fact the relatives of the murderer concluded a contract to pay the *wer-geld* to the relatives of the victim. It means that atonement was not directly performed by the murderer himself but by his relatives. The atonement contract was concluded and fulfilled between two communities and was a kind of means of communication between them.

In this way, the Anglo-Saxon atonement contract was a formal contract, and was assured by the possessor’s spirit in the *wed* and the *borh*. The *wed* was not transformed from an eco-

3 Harold D. Hazeltine, ‘The Formal Contract of Early English Law’, *Col. L. Rev.*, Vol. 10, 1910, p. 610.

1. Atonement Contract in Anglo-Saxon Society (Figure 2)



nominically valuable thing into a valueless one. It was originally a symbol of the spirit of the possessor. Therefore, if the obligation was not fulfilled, the *wed* was forfeited and the spirit of the possessor was considered to be abandoned. In that case, the possessor, that is, the obligor, was under the control of the obligee until the obligation should be fulfilled⁴. The economic value of the thing was not regarded as important. It is certain that the atonement contract was originally a contract related to Anglo-Saxon rituals. The payment of the atonement money was originally a ritual to heal the wounds of the community of which the victim was a member and to calm down the gods of the community. Atonement money did not serve an economic function, but a mystical or religious one. It was money to clear the curse of the gods.

Harold Hazeltine explains such a ritual as follows:

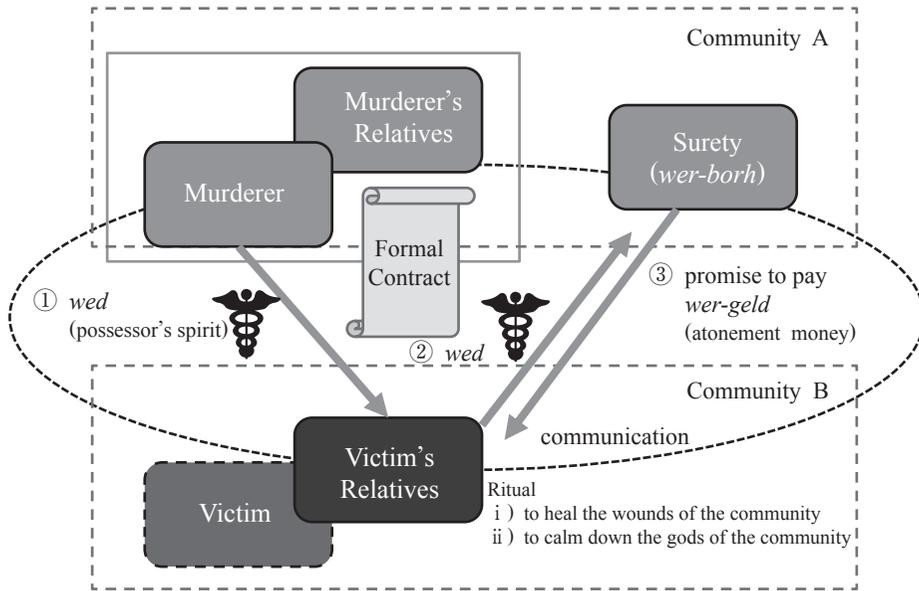
‘After the conclusion of the *wed* and *borh* contract in settlement of the blood-feud all those of either family who were present formally restored the peace that had been broken by the feud. With united hands upon a weapon they all promised the arbitrator (*semend*, mediator) that in the future they would preserve the king’s peace.’⁵

As time passed, the custom of concluding the atonement contract was used for other types of contracts, including the loan for consumption contract, sales contract and earnest contract. It is said that the *Arrha* (earnest money) in Germanic law came into existence as a modification of the real contract. The real contract was originally effective when the object was delivered. The delivery of only a part of the object became enough to make the contract effective in the course of time. This *arrha* already existed in the age of the Franks. When the *arrha* was delivered, the grantee became bound by an obligation. The grantor was *not* obliged by that delivery. Therefore the *wed* was delivered by the *arrha*’s grantor to the *arrha*’s grantee to bind the grantor to do

4 Robert L. Henry, *Contracts in the Local Courts of Medieval England*, London, 1926, cap. 6, § 6.

5 Hazeltine, *op. cit.*, pp. 613-614.

1. Atonement Contract in Anglo-Saxon Society (Figure 3)



something. This is a mixture of a real contract and a formal contract. The delivery of the *wed* gradually became unnecessary, as the *arrha* came to assume the function of the *wed*. That is to say, the *arrha*'s grantor was thought to become bound by obligation through the delivery of the *arrha*. This is a fusion of a real contract and a formal contract. In the next section, we will apply this phenomenon to the God's penny as earnest money.

3. "God's Penny"

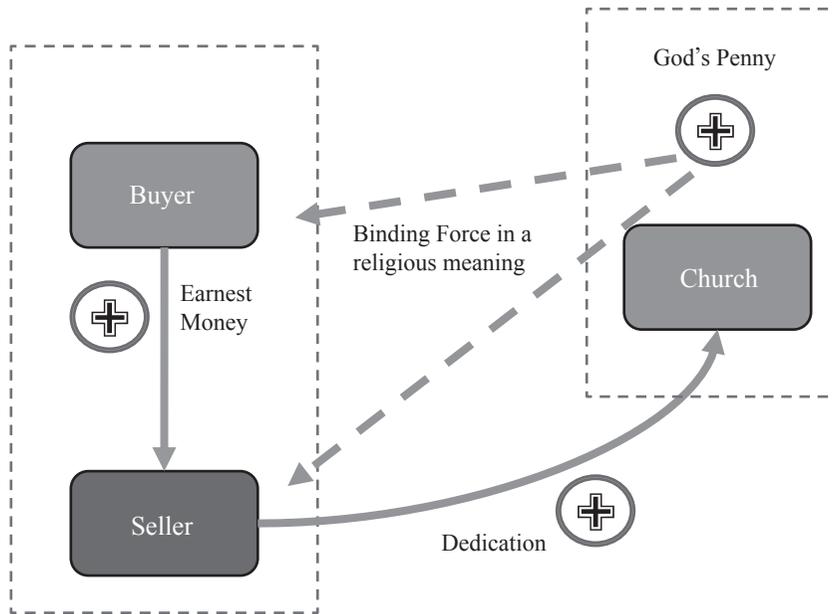
The earnest money that we can find in the rolls of the fair court of St. Ives in Huntingdonshire in England in the thirteenth and fourteenth centuries was called an *argentum dei* (a God's silver coin) (Document 1). Such an earnest money was called a *denarius de domo dei* (a denarius of the God's house) in the Italian document of 1233⁶, a *denarius sancti spiritus* (a denarius of spirit's sanctum) in Germany⁷ and a *denarius dei* (a God's denarius) in France⁸. Only silver coins were minted in Western Europe from the eighth to the early thirteenth centuries. In England, the silver coin was one penny. Accordingly the earnest money was called a "God's penny" in England. Alex Franken, a German legal historian, tells us about the occurrence of a God's penny as follows: A *denarius dei* was originally dedicated to a Christian church. Originally, it did not function to require the party to a contract to do something. But when the receiver of the *Handgeld* (earnest money) customarily had to transform the money into a *denarius*

6 Antonio Pertile, *Storia del Diritto Italiano*, Bologna, 1894, p. 473.

7 Andreas Heusler, *Institutionen des Deutschen Privatrechts*, Bd. 2, Leipzig, 1886, S. 255; Rudolf Sohm, *Das Recht der Eheschliessung aus dem deutschen und canonischen Recht geschichtliche entwickelt*, Weimar, 1875, S. 30.

8 Paul Ourliac et J. De Malafosse, *Histoire du Droit Privé I*, Paris, 1969, pp. 81, 283, 289.

2. God’s Penny (Figure 4)



dei by delivering it to the church, the *Handgeld* itself produced the cause of a legal action. God would never accept the money just as a God’s penny, when the deliverer breaks his promise⁹.

God’s penny did not originally have the meaning of earnest money. It was dedicated to the church, used for a candle for the altar of a patron saint, or used as a donation for the poor¹⁰. A God’s penny was the coin which had a mystical or religious characteristic. The person who contributed money to the church or made a donation to the poor was able to expect to get an eternal life in the world after death. Such a coin including this characteristic functioned as earnest money. In other words, the earnest money came to have a mystical or religious characteristic when it was contributed to the church.

If you compare the God’s penny with the *arrha* of the Anglo-Saxon customary contract law, you will notice that the characteristic of the real contract was diminishing and the characteristic of the formal contract was becoming dominant. As stated above, the formal contract with *wed* had its origin in the atonement contract. However, the spirit of the original possessor of the God’s penny did not guarantee the binding force of the contract. If the receiver of a God’s penny as earnest money had an obligation to consecrate it to the church, but he did not perform this obligation, it meant that he betrayed God and could not expect salvation in the life after death. The grantor of a God’s penny might be also affected by divine spirituality. In addition, the grantor could at the same time have an obligation to do something. The obligation of the grantor of a God’s penny in the customary laws of merchant guilds and boroughs (Documents

9 Alex Franken, *Das Französische Pfandrecht im Mittelalter*, Berlin, 1879, S. 61–62.

10 Sohm, *a. a. O.*, S. 30; J. L. Laughlin, ‘The Anglo-Saxon Legal Procedure’, *Essays in Anglo-Saxon Law*, Boston, 1905 (1972), p. 189; Sir Frederick Pollock & Frederic W. Maitland, *The History of English Law before the Time of Edward I*, 2nd ed., 2 vols., Cambridge U. P., 1898, reissued with a new introduction and select bibliography by S. F. C. Milsom, C. U. P., 1968, Vol. 2, p. 209; Henry, *op. cit.*, p. 228.

5, 6), and in *Carta Mercatoria* in 1303 is understandable in this context. At any rate, a sense of Christian spirituality took the place of a sense of Germanic spirituality in the Anglo-Saxon society when a God's penny as earnest money came into existence. It is important that a sense of the next world or life after death was coming to play a role in transactions between sellers and buyers. In other words, God mediated between sellers and buyers.

A God's penny worked effectively as long as merchants had the Christian faith. The religious belief in Christianity was widespread throughout medieval Europe and therefore the God's penny as earnest money played an important part in foreign trade.

On the other hand, customs related to Germanic spirituality were more localized. In order for the *wed* to have the mystical effect of binding someone to keep his promise in an atonement contract in the Anglo-Saxon society, members of different clans had to hold common feelings to accept the spirituality. Use of certain words, an expression by a certain gesture, and delivery of a certain symbol spiritually caused the parties to perform the promise. These behaviours effectively worked in the community where people believed the same mystical faith.

People had the same mystical sense in their communities in Anglo-Saxon society, so mystical acts were accepted there. On the other hand, foreign merchants came and went from many districts of Europe in the time when the God's penny spread. It was hard for foreign merchants to get used to the Anglo-Saxon mystical behaviours. The guarantee of the transaction security was missing between the communities that did not have common rituals. The appearance of a God's penny in the sales contract was very important in those days. As Christianity spread almost all over Europe, a God's penny became the effective means to require the parties to abide by the contract on the basis of Christian spirituality. Although the Anglo-Saxon mystical idea fell into disuse, the idea that spirituality resided in the thing continued to exist. The master of the personality just changed from a human to God. In this way, a God's penny with holy character had a binding force of contract as long as merchants had faith in Christianity.

We have some important documents in the rolls of the St. Ives fair court. The documents say that a buyer gives four pence (Document 3), five shillings (Document 4) or a chattel mortgage (Document 2) as an additional payment besides giving a God's penny. This suggests that the God's penny was not working well as a means to strengthen the binding force of contracts. According to the customary law of merchant guilds, the buyer who concluded a contract by giving a God's penny should be regular in his payment (Document 5). We understand from this customary law that there were some buyers who did not pay the price, and consequently they needed such a rule to secure the business.

According to the customary law of the borough of Waterford, the buyer who concluded and cancelled the contract secured beforehand by giving a God's penny should pay ten shillings in compensation (Document 6). The decrease of the effect of a God's penny had an influence on national law. Edward I, the King of England, promulgated *Carta Mercatoria* in 1303. The law granted foreign merchants a privilege to trade in all the towns in England by imposing a customs duty. Law merchant (*lex mercatoria*), namely merchants' law, came to be considered as a part of the laws of the realm for the first time. The rule concerning sales contracts in the *Carta Mercatoria* tells us as follows:

'Furthermore, that every contract entered into by those merchants with any persons whatsoever, whatever they come from, touching any sort of merchandise shall be firm and stable, so that neither of the merchants can withdraw from or go back on that contract after God's penny

has been given and received between the principal contracting persons. And if perchance dispute arises over such a contract, let proof of or enquiry into the matter be made in accordance with the usages and customs of the fairs and towns where the said contract happens to have been made and entered into.’¹¹

It is provided here that neither can withdraw from the contract when a buyer gives a God’s penny to a seller, and that the dispute on the contract should be settled by the customs of the fairs and towns. In this context merchants had to be well aware of those customs.

The binding force of the contract with a God’s penny was now secured by the law of the realm¹². This means that God’s penny itself was losing its effect. It is possible that the spirituality of Christianity had not the power to influence the merchants in those days. As William Langland wrote in his “*The Vision of Piers the Plowman*” in the second half of the fourteenth century, mammonism was spreading among people including clergymen. The expression of a God’s penny as earnest money also appeared in the customary laws of the boroughs in the fifteenth and seventeenth centuries (Documents 7, 8). When the God’s penny given by a buyer was in fact dedicated to a church in 1506¹³, it was still possible to play its original role in the sixteenth century. And yet the legal situation was probably changing as business increased and gradually the God’s penny disappeared.

4. Conclusion

When earnest money is given and received, it is usually taken to have effect of a cancellation deposit in Japanese civil law. As stated above a cancellation deposit is money or a valuable thing which is given and received between both parties to reserve the right of cancellation. The earnest money is quite effective in transactions. However, we have to take into account the historical facts above-mentioned if we wish to ascertain the fundamental nature of earnest money.

In conclusion, earnest money was originally given and received to secure the legal binding force of the original contract, and God’s penny in late medieval Europe was the legal system made for this purpose. There is no doubt that a religious mentality played an important role in the legal system of God’s penny.

Documentary Appendix

[Document 1] Fair of St. Ives, 1275.

John Goldsmith of Bury complains of Odo of Thorpe and William of Thorpe, for that whereas the said John came on Ash Wednesday last and bought of the said Odo and William through one Simon Blake their attorney and chapman in the said business eleven score sheep skins at the price of 8d. [d. = a penny or pence] per skin, in respect of which skins he had given

11 Harry Rothwell (ed.), *English Historical Documents*, Vol. 3, London, 1975, pp. 515–516.

12 At first the rule of God’s penny applied only to the foreign merchants, and later it was introduced into the common law to apply to domestic merchants as well. Pollock & Maitland, *op. cit.*, Vol. 2, p. 209.

13 Mary Bateson (ed.), *Borough Customs*, Vol. 1, London, 1904 (Publication of Selden Society, Vol.18), p. 218, n. 5.

them a God's penny (*argentum dei*) by way of earnest in hand paid,¹⁴

[Document 2] Fair of St. Ives, 23 May 1291.

Hugh of Carlisle complains of William of Halling, for that whereas he [Hugh] bought from him a pair of tongs for 12s. [s. = shilling (s)] in the vill of St. Ives on Monday last, giving him for the same a God's penny and a drink, of which 12s. he was to pay him a half at the fair of Boston on the feast of St. James in the nineteenth year of he reign of King Edward and the other half at the next fair of Winchester, and he was to give him security therefore, the said William unjustly detains the said tongs contrary to their covenant; and thereof he [Hugh] produces suit¹⁵.

[Document 3] Fair of St. Ives, 6 May 1295.

Walter Chamberlain of London complains of John, prior of Swavesey, for that he unjustly detains from him and does not pay him 5s. of silver, and unjustly because whereas on Wednesday before the feast of St. George the Martyr in the nineteenth year of the reign of King Edward a certain Geoffrey, prior of Swavesey, his, John's, predecessor, bought from him, Walter, in the fair of St. Ives two pieces of frieze-cloth for 5s. 4d., toward which he [Geoffrey] gave him a God's penny and 4d. as earnest money, and whereas he ought to have paid the remaining money to the said Walter on the following Ascension day, he paid him nothing, to his damage 20s. etc¹⁶.

[Document 4] Fair of St. Ives, 17 May 1317.

John of Haddenham was attached to answer John Treasurer in a plea of debt. And whereof he complains that whereas on Tuesday after the feast of St. Margaret the Virgin in the eighth year of the reign of the present king the said John bought from the said John of Haddenham sixteen stone of wool for 77s. 4d. at the fair of Stourbridge, and to confirm the said contract gave him a penny as a God's penny and 5s. as earnest money (*unum denarium in argentum dei et quinque solidos in arram*), and he [John of Haddenham] was to render and deliver this wool to him at the house of the said John [of Haddenham] in the vill of Haddenham on the following Sunday; yet on that day he did not care to deliver any wool to him, but has detained it and still detains it, wherefore he says that he is injured and has damage to the value of 40s.; and thereof he produces suit¹⁷.

[Document 5] *Statuta gilde (apud Berwicum)*, 1249.

Constitutio de arris datis mercatori. If any one buy herring or other aforesaid goods and should give a God's penny or other silver in earnest, he shall pay the merchant from whom he bought the said goods according to the bargain made, without breach of contract or breach of the earnest¹⁸.

14 Frederic W. Maitland (ed.), *Select Pleas in Manorial and Other Seignorial courts*, Vol. 1, London, 1889 (Publication of Selden Society, Vol. 2.), pp. 151–152.

15 Charles Gross (ed.), *Select Cases concerning the Law Merchant*, Vol. 1, London, 1908 (Publication of Selden Society, Vol. 23), p. 47.

16 Gross (ed.), *Select Cases concerning the Law Merchant (op. cit.)*, pp. 68–69.

17 Gross (ed.), *Select Cases concerning the Law Merchant (op. cit.)*, p. 103.

18 Bateson (ed.), *Borough Customs (op. cit.)*, p. 217.

[Document 6] Borough of Waterford, 1300 (approximately).

De denariis dei. Furthermore, whoever gives God’s silver and repents, be he who he may, shall pay 10s¹⁹.

[Document 7] Borough of Romney, 1498.

Ande if the plantiff tell that the seyde covenant is affermed by a peny, or ell by a ferding, that men call God silver, and the defendand make knowlache and will hold the covenaunt, have the plantiff for hys peny 20s., and if it be of the ferdyng be the quantite²⁰.

[Document 8] Borough of Cork, 1614.

Forasmuch as, upon the canting of divers bargains at court, sundry persons of this city that gave their earnest or God’s penny for accomplishment hereof and, contrary to their promises, upon quiddities relinquished and withdraw themselves from making payment, to the prejudicing of the court and corporation: to the end that hereafter such earnest or God’s penny may be of full force, it is agreedthat every person of the citizens that give in court an earnest or God’s penny for performance of any bargain, shall perform it, so as the mayor etc. give full benefit unto the party giving his God’s penny²¹.

19 Bateson (ed.), *Borough Customs (op. cit.)*, p. 218.

20 Bateson (ed.), *Borough Customs (op. cit.)*, p. 219.

21 Bateson (ed.), *Borough Customs (op. cit.)*, p. 219.