

The Rise of Modern American Contract Law

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Chapter 2

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I. INTRODUCTION. American Contract Law is predominately Common Law. The Common Law is a body of legal principles and rules derived from judicial precedents. The Common Law developed in England in tandem with the growth of centralized government, including a centralized legal system. As English society changed from a feudalistic land-based society to a society based on manufacture and trade, the Common Law changed with it. The development of the Common Law was punctuated by occasional Royal edicts and legislative enactments. But most significantly, the Common Law was influenced by the structure of the English court system and the procedural rules it developed to manage litigation. These procedural rules grew into a complicated system called the Common Law Forms of Action. English author Sir Henry Maine remarked: “So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure.” H.S. Maine, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1883).

During the Nineteenth Century, the Common Law shifted away from a procedure-driven system based on Forms of Action to a body of legal principles and rules we now call “substantive law.” And yet the substantive Law of Contracts is deeply rooted in the English Common Law Forms of Action. These roots are discussed in Orsinger, *175 Years of Texas Contract Law* and will not be repeated here. The focus of this Article is the way the principles of England’s substantive Law of Contracts evolved in the American experience.

Looking at the Texas experience, in particular, although the law in Texas prior to 1836 was Spanish law, the Spanish Law of Contracts had no lasting effect after the Texas Revolution. Spanish law was applied by early Texas courts to contracts entered into prior to Texas’ independence,¹ but for contracts made after that date, the Common Law of England was applied. The first Congress of the Republic of Texas did carry forward the Spanish concepts of separate and community property of husband and wife. Under the community property system, the legal identity of a wife did not merge into the identity of the husband, as it did under English Common Law. And each spouse owned one-half of all property acquired during marriage other than by gift or inheritance, or in exchange for other community property. But the husband was the manager of all community property and the wife could not enter into contracts without her husband’s consent. This disability of the wife to contract freely lasted into the 1900s, and was not completely removed until 1967.

The story is repeated in contract lore that modern American Contract Law arose at Harvard Law School in the 1870s and came to general acceptance through the publication of Harvard Law School Professor Samuel Williston’s treatise on *THE LAW OF CONTRACTS* in 1920, and the issuance by the American Law Institute of its *RESTATEMENT OF THE LAW OF CONTRACTS* in 1932, Williston drafted. In 1988, Professor Walter Pratt of the University of South Carolina School of Law wrote that the

“critical origins of the transformation of contract doctrine lie in the period between 1870 and 1920.”² The late Ian R. MacNeel, then Professor of Law at the University of Virginia, wrote that the era of classical contract law was developed in the 19th Century and “brought to its pinnacle by Samuel Williston” in his 1920 treatise on THE LAW OF CONTRACTS and in the RESTATEMENT OF THE LAW OF CONTRACTS (1932), for which Williston was the principal draftsman.³ Professor Jody S. Kraus, at the University of Virginia Law School wrote that the formalistic view of Contract Law was “identified and subsequently enshrined, initially in Williston’s contracts treatise, and later in the highly influential Restatement of Contracts”⁴

While there can be no doubt that Harvard Law School, during the fifty years period between 1870 and 1920, was the incubator of most of the significant writing on the principles of Modern American Contract Law, those writings were in essence a rethinking of the conventional views of published appellate court opinions, both American and English, that themselves derived from earlier English case law that had been analyzed by a succession of English writers dating back to William Blackstone in the 1760s. Those Harvard-educated writers necessarily imprinted their individual perspectives on what they chose to write on, and what they chose to write. But they did not act alone. The latter part of the 1800s saw the rise of English commercial statutes and uniform state laws, and the 1930s saw the rise of Restatements of the Law. The English statutes were written by an esteemed judge or practitioner, but those statutes had to be enacted by the Parliament. The American uniform laws were drafted by lawyers, law professors and judges, but had to be endorsed by the diverse group of political appointees to the National Conference of Commissioners on Uniform State Laws (NCCUSL), and ultimately approved by the legislatures and governors of the states that enacted them into law. The Restatements of the Law were drafted by law professors, but they had to be vetted with other members of the American Law Institute and ultimately accepted by the Institute’s governing body. And the last step in the approval process for a Restatement was purchase and use by lawyers and judges. So while Harvard Law School was a crucial catalyst, the development of Modern Contract Law had many contributors.

An important contributing influence to the development of Modern Contract Law was the laws enacted by various governments, that set out Contract Law principles in statutory form. The Code Civil des Français (French Civil Code), enacted in 1804, included basic principles of Contract Law. The French Civil Code was adopted in 1808 by the U.S. Territory of Orleans (which in 1812 became the state of Louisiana). In 1872, the Indian Contract Act became effective, consisting of a comprehensive body of codified Common Law rules that governed contractings in most of India. In 1882, the British Parliament adopted the English Bills and Exchange Act, a law governing negotiable instruments. In the ensuing decades both Parliament and the legislatures of various American states enacted laws governing different aspects of Contract Law.

The story of modern American Contract Law begins with the English justices and treatise writers who looked beyond the all-encompassing procedural framework of the English Forms of Action to find general principles uniting the court decisions that determined when parties could invoke the power of the state to enforce their bargains. In America, the diversity of decisions issuing from the many states forced intellectuals contemplating American Contract Law to generate more and more particularized rules to cover the myriad situations that arose as economic activity became increasingly complex. Beginning in the 1870s, with the rise of modern law schools, and their full-

time law professors, and the establishment of law journals, the Contract Law theorists began to look for unifying principles, perhaps not even mentioned in the judges' Opinions,⁵ that might harmonize the decisions into a coherent whole. Once the theorists developed a conscious awareness of general principles, those principles were, both in England and America, disseminated in treatises and translated into rules that found expression in legislative enactments and Restatements of the Law. These treatises, enactments, and Restatements, coupled with the vast store of state and Federal court opinions, embody Modern American Contract Law.

II. STAGES OF CONTRACT LAW. In 1975, Harvard Law Professor Duncan Kennedy partially completed a book entitled *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT*, which he submitted in support of his bid for tenure from Harvard Law School. The book was not published until 1998. In his book, Kennedy divided Anglo-American law into three phases: Classical (1850-1900), Social Thought (1900-1968), and Modern Thought (1945-2000). In a later article Professor Kennedy characterized periods as a "mode of thought," where each mode provided its own "conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments."⁶ This Article adopts Professor Kennedy's methods of assessment, but having a different purpose it draws a different conclusion.

A. TWO MODES OF THINKING. It is the Author's view that American Contract Law can best be divided into two eras: Pre-Modern and Modern. The Post-Modern world exists in law school classrooms, law review articles, and monographs on Contract Law and Jurisprudence. But the people who are writing contracts, signing contracts, assigning contracts, relying on contracts, suing on contracts, and adjudicating contracts, all operate in a commercial world and under legal systems that have a conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments, that developed over centuries--sometimes many centuries--and coalesced during the period from about 1870 to about 1920 into Modern Contract law. This modern paradigm was fundamentally altered by the great worldwide economic depression of the 1930s. In response to this systemic failure, governments stepped up their role as protector, intervening in contractual relations to limit somewhat the ability of economic actors to exploit their counterparts, but the fundamentals of the system remain in place. The purpose of this Article is to identify the schemes, modes, and arguments that are modern, and to identify the personalities and circumstances that caused them rise to ascendancy.

B. PRE-MODERN CONTRACT LAW. Pre-Modern American Contract Law evolved from English property law, specifically real property law. In earlier days, sustenance derived from the land, and wealth derived directly or indirectly from owning that land. When the Spanish culture discovered the New World, the wealth they acquired was not vast new fields to plant; it was mineral resources, primarily silver and gold, a form of portable wealth. This discovery drove colonial expansion, but, as luck would have it, the Spanish happened to have control of most of the New World's sources of silver and gold, leaving the other European powers the alternative of trading in lesser commodities like silk, spices, sugar, coffee, tobacco, cotton, and unfortunately, low-cost human labor in the form of slaves. Out of this opportunity arose merchants and shippers, along with the mechanisms they needed, including partnerships, corporations, credit, insurance, and safe seas. Pre-Modern Contract Law was the legal framework that developed, to deal with the new economy, by adapting the law of immovable real property to movable chattels. Because the silver and gold

belonged to the kings and queens, the merchants and shippers had to develop a new form of portable wealth that they themselves had to invent, and that turned out to be paper. The paper was not, however, paper currency. It was contracts--contracts that were promises, promises that could be traded like money. So Contract Law developed along two tracks: promises that brought stability to trading relationships, and promises that facilitated the transfer of wealth. The path to Modern Contract Law was the evolution from ownership of land, to ownership of chattels, to ownership of promises. Unlike land or chattels, where ownership settled into possession, promises were only valuable if the promises were performed. This value was initially based on trust, but where trust was breached, it required the government to enforce the promises. Only a small portion of promises required enforcement, but since every promise could potentially be breached, prudent business men watched the enforcement mechanisms closely and strived to bring their promises within the parameters set by governments to make the promises enforceable. Governments did not make all promises enforceable. And governments imposed many conditions on the enforceability of promises. At first, the constraints on enforceability were vestiges of the old law that had to be circumvented or eliminated. By the late 1800s, the constraints were new constraints invented to protect the weak from the strong, the poor from the rich, the worker from the employer, and the like. But these new governmental influences only affected the underlying mechanisms, they did not fundamentally change them.

C. MODERN CONTRACT LAW. At its core, what differentiates Modern Contract Law from Pre-Modern Contract Law is a shift in the legal system away from ownership rights in property to rights and duties under contracts and ultimately to the enforceability of promises. Modern Contract Law has specific rules on who can create contract rights and duties, how contract rights and duties come into being, how contract rights can be assigned, how contract rights can be enforced, when contract duties are relieved, and who gets what when contract duties are breached and contract rights are impaired. Another aspect of Modern Contract Law is the effort to standardize and universalize contractual rights and duties, so that contracting parties, wherever they may be, know at the time of contracting what each is expected to do, and the consequences of not doing it.

So we turn now to the process and the people through which Modern Contract Law came to maturity. We will be looking for the introduction and development of key aspects of the modern, including: moving from physical possession of chattels to contract rights in chattels as the essence of ownership; looking past the peculiarities of the English Forms of Action to a vision of Contract Law principles; replacing status and relations of the parties as organizing tools with underlying principles and rules that apply to all situations; moving from assuming fully-formed contracts to examining the process of contract formation; introducing the offer-and-acceptance paradigm for creating contracts; abandoning the form of the contract as determinative of the validity of the contract; recognizing quasi-contract as a doctrine separate from Contract Law; developing rules of construction to interpret contracts based on the words used; shifting from a subjective to an objective approach to contract formation and interpretation; the willingness to fill gaps in incompletely-drafted contracts; changing the focus from contracts to enforceable promises; making promises assignable and then negotiable; extending equitable estoppel to promises that caused detrimental reliance; using implied warranties to create contractual duties by operation of law; using legislative power to organize whole areas of contract law; using treatises and Restatements of the Law as reliable indicators of Common Law; dividing remedies for breach of contract into expectancy-based,

reliance-based, and restitution-based; using concepts of causation and foreseeability to limit contract damages; moving the family from isolation into the mainstream of the law, in the process giving married women the right to contract; and lastly moving away from mere labeling to an analysis of the substance of contracts as a way of organizing our thoughts about contracts.

III. ADOPTING THE COMMON LAW IN TEXAS. Initially, Texas was governed by centuries-old Spanish Law. The framers of Texas' first constitution determined that the new Republic would be a Common Law jurisdiction. The 1836 Texas Constitution directed the Texas Congress to adopt the Common Law of England as the Common Law of Texas, "with such modifications as our circumstances, in their judgment, may require." Tex. Const. Art. IV, § 13 (1836). On December 20, 1836, Texas President Sam Houston signed a statute providing that the Common Law of England would apply to juries and evidence in Texas courts.⁷ On January 20, 1840, Congress passed an act saying that "[t]he Common Law of England, so far as it is not inconsistent with the Constitution or acts of Congress now in force, shall, together with such acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by the Congress."⁸ On February 5, 1840, a statute was enacted that "the adoption of the common law shall not be construed to adopt the common law system of pleading, but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer . . ."⁹ In *Cleveland v. Williams*, 29 Tex. 204, 1867 WL 4513, *4 (Tex. 1867) (Coke, J.), the Court held that the Common Law of England in force in Texas did not include England's Statute of Frauds adopted during the reign of Charles II, which had been adopted "in nearly all the states of the Union except Texas." In *Paul v. Ball*, 31 Tex. 10 (1868) (Lindsay, J.), the Court said: "It is a singular fact, that, although this state has adopted the common law by express legislative enactment, yet, unlike most, if not all, of the states which have adopted the common law, we have not, as they have, also adopted all English statutes of a general nature, up to a particular period, not repugnant to or inconsistent with the constitution and laws of the state. Hence our rules of construction and interpretation must be predicated upon the common law, upon our statutes, and upon the general policy embodied in our varied form of government." The Supreme Court reconfirmed this view in *Southern Pac. Co. v. Poster*, 331 S.W.2d 42, 45 (Tex. 1960) (Norvell, J.), when it said: "No English statutes were adopted."

The courts of American states who had, prior to the creation of the Republic of Texas, enacted "reception statutes" adopting the Common Law of England, arrived at the conclusion that the Common Law adopted in their jurisdictions was the Common Law of England adapted to apply to the American experience. So it happened in Texas, where the Supreme Court decisions more frequently cited to Common Law principles articulated in prior decisions by the U.S. Supreme Court and the appellate courts of various American states, as opposed to the decisions of English courts. Couple that with the practicality that the early justices, of the Supreme Court of the Republic of Texas and later of the State of Texas, were all trained as lawyers in American states, and one—Abner S. Lipscomb¹⁰—had served for fifteen years on the Alabama Supreme Court before coming to Texas, and it can be said that the Common Law adopted in Texas was really the constitutional Common Law of America, which was adapted from the Common Law of England.

In *Grigsby v. Reib*, 105 Tex. 597, 600-601, 153 S.W. 1124, 1124-25 (Tex. 1913) (Brown, C.J.), the Supreme Court rejected the English Common Law banning informal marriage. Chief Justice Brown wrote:

[W]e conclude that “the common law of England,” adopted by the Congress of the republic, was that which was declared by the courts of the different states of the United States. This conclusion is supported by the fact that the lawyer members of that Congress, who framed and enacted that statute, had been reared and educated in the United States, and would naturally have in mind the common law with which they were familiar. If we adopt that as our guide and source of authority, the decisions of the courts of those states determine what rule of the common law of England to apply to this case.

In *Clarendon Land, Investment & Agency Co. v. McClelland*, 86 Tex. 179, 23 S.W. 576, 577 (Tex. 1893) (Gaines, J.), the Court observed that “[n]either the courts nor the legislature of this state have ever recognized the rule of the common law of England which requires every man to restrain his cattle either by tethering or by inclosure.” *Accord, Davis v. Davis*, 70 Tex. 123, 125, 7 S.W. 826, 827 (Tex. 1888) (Gaines, J.) (“this rule has not been regarded as applicable to the condition of the lands in this state”). In a later case, the Texas Commission of Appeals characterized the decision of whether a common law doctrine had been incorporated into Texas law by the Act of 1840 in this way:

The Court of Civil Appeals has correctly announced the rule under the English common law. Whether that doctrine is in force in this state under the act of 1840, which makes the common law of England the rule of decision in this state, is a question requiring an examination not only into the common-law rule, but into its basis and its applicability to our system of jurisprudence as applied to lands and interest therein.

Perry v. Smith, 231 S.W. 340, 341 (Tex. Com. App. 1921, judgm’t adopted) (Phillips, C.J.).

Finally, the Common Law of England that was adopted in Texas did not include the English Forms of Action. Chief Justice Hemphill explained, in *Banton v. Wilson*, 4 Tex. 400, 1849 WL 4037 (1849) (Hemphill, C.J.):

All forms of action have been abolished in our system of jurisprudence, or rather they were never introduced. The distinctive actions of assumpsit, debt, trover, trespass, detinue, action on the case, & c., are not now nor were they ever recognized or permitted to mar the beauty of our judicial system. The distinctive forms of action were supposed at common law to be essential to the administration of justice. We know from experience that the supposition is totally unfounded

Today, the operative reception statute is Texas Civil Practice & Remedies Code Section 5.001, which says: “The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state.” In present day, direct and even indirect citations to English Common Law seldom occur, and the primary source of Common Law principles is prior American cases, and particularly, in Texas, prior Texas cases.

IV. LEARNED TREATISES ON EUROPEAN, ENGLISH AND AMERICAN CONTRACT LAW. In 1834, English legal writer Joseph Chitty wrote: “A treatise upon any legal subject is but

a collection of inferences from adjudged cases.”¹¹ One of the ways for people of our time to determine the modes of thought of former times is to review then-contemporary treatises on the law. In the early to mid-1800s, the legal treatises cited by American courts were either written by Englishmen, or were English treatises annotated by American writers with American cases. This fact alone served to perpetuate English Common Law doctrines in American law. The earliest American treatise on Contract Law was written by a Harvard College law professor in 1853. In the 1870s and 1880s, as Harvard and Yale Law Schools started their rise to prominence, and law schools opened across America, an American legal intelligentsia emerged that supplanted the English treatise writers as sources of authority. These American writers began to focus on the rising tide of American case law instead of the infrequent pronouncements of prominent English jurists that had dominated English law.

An aside is necessary. Most of the English treatise-writers concerned themselves almost exclusively with proceedings in the law courts of England, and not courts of equity, courts of admiralty, etc. English Contract Law treatises mostly ignored the enforcement of promises in England’s equity courts, with the exception of the equitable remedy of specific performance. As a result of the emphasis on the history of the law courts in England, we have an incomplete picture of the full scope of English Contract Law.

A. TREATISES ON CONTINENTAL LAW. Two Continental law writers influenced English and American contract-treatise writers: Robert Joseph Pothier (1699-1772) of France and Frederick Carl Von Savigny (1779-1861) of Germany.

1. Pothier. Robert Joseph Pothier was born in Orléans in 1699, where he died in 1772. He studied law at the University of Orléans. He became a professor of French law at that University. Pothier has been credited as the originator of the modern legal treatise.¹² Pothier published seven treatises on various aspects of Contract Law during the period from 1761 to 1767, the first being *TRAITÉ DES OBLIGATIONS* (Paris 1761), a 599-page treatise on general Contract Law principles, followed by special applications of the general principles to areas such as sales, bailment, partnership, gift, etc. An English language translation of Pothier’s *TRAITÉ DES OBLIGATIONS* was published in America in 1802, under the name *A TREATISE ON OBLIGATIONS CONSIDERED IN A MORAL AND LEGAL VIEW*. Another translation into English, by an English barrister, William David Evans, was published in London in 1806 with the title *TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS*.

Pothier’s original 1761 treatise on Contract Law extended to 662 pages. The treatise consisted of “Parts,” and each Part consisted of chapters. In his treatise, Pothier covered the following topics: Part I, “Of the Essence of Obligations and their Effects;” Part II, “Of the different Kinds of Obligations;” Part III, “Of the different Manner in which Obligations are extinguished, and of the *différents Fins de non recevoir*, or Prescriptions against Debts; and Part IV, “Of the Proof of Obligations and their Payment.” There is a large number of chapters covered in these Parts. In his 1806, English translation of Pothier’s treatise on contracts, English barrister William David Evans included lengthy footnotes setting out English cases that agreed or disagreed with Pothier’s statements of the law, and Evans added a Volume II to Pothier’s first volume, consisting of an Appendix of extended essays written by Evans that were referred to in his footnotes to Pothier’s Volume I. As a consequence of Evans’ efforts, his translated volume of Pothier’s treatise, with notes

and appendix, constitutes a comprehensive treatise on the English Common Law of Contracts as of 1806.

Pothier's treatise on sales, *TRAITÉ DU CONTRAT DE VENTE* (1772), ran to 296 pages and contained five parts: 1st part, "of the nature of the contract of sale and of that which constitutes its substance"; 2nd part, "of the engagements of the seller and of the actions which result therefrom; 3rd part, "of the engagements of the buyer; 4th part, "at whose risk the thing sold is during the intermediate time between the contract and the delivery; and the 5th part, "of the execution and dissolution of the contract of sale. The 1839 English translation of Pothier's *TREATISE ON THE CONTRACT OF SALE* (tr. L.S. Cushing 1839), contained two later-added parts: the 6th part, "of promises to sell and to buy; of earnest; and of some particular kinds of sale: and the 7th part, "of acts and contracts resembling the contract of sale."

In his treatise on sales, Pothier set out his view of a contract of sale:

This contract is entirely of natural right; for not only does it owe its origin to that right, but it is governed solely by rules drawn therefrom. It is of the number of those, which are called *consensual* contracts; for it is formed by the mere consent of the contracting parties: It is a *synallagmatic* contract, that is to say, it contains a reciprocal engagement of each of the contracting parties, one towards the other, according to the definition above given: And it is a commutative contract, in which the intention of each of the parties is to receive as much as he gives.

Id. at 3. Pothier went on to give the substance of the contract of sale: "Three things are necessary to the contract of sale; a thing which makes the object of it, a price agreed, and the consent of the contracting parties." *Id.* at 3. Pothier explains that the "thing" need not be physical; "an incorporeal thing, a moral being, a credit, a right, etc., may be the object of this contract." *Id.* at 4. Even a mere expectation can be sold. *Id.* at 4.

Many of Pothier's concepts later found expression in Napoleón's French Civil Code (1804), which profoundly influenced French Contract Law. It has been said that Pothier's most important contribution to classical Contract Law was his idea that contracts were founded upon mutual consent, an idea that impacted the English Law of Contracts.¹³ Pothier defined an agreement in this way: "an agreement is the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made." Pothier, *A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS* 3 (tr. Evans 1806). This differed from the previously-existing rationale for the English Contract Law, which was premised on the idea that someone who has taken a benefit becomes liable to pay value for it. *Id.* at pp. 28-29. Because of Pothier's interest in consent of the parties, he was especially interested in the effect of mistakes (which could negate consent) on contractual duty. In his treatise on contracts, and his treatise on sales, Pothier discussed different kinds of mistakes and their effect on a contract.

Pothier's work was first cited in Texas in *Hall v. Phelps*, Dallam 435, 440 (Tex. Rep. 1841) (Hutchinson, J.), for the proposition that a person who is paid not to do something that the law doesn't allow him to do must return the money paid. He was cited again in *Thompson v. Harrison*,

Dallam 466, 1842 WL 3625 (Tex. Rep. 1842) (Jack, J.), to support the rule that a wager on the outcome of an election violated public policy and was not enforceable. He was cited again in *Hall v. Aldridge*, 1845 WL 5592 (Tex. Rep. 1845) (Hemphill, C.J.), that under Spanish law a judicial surety (in this case someone who had posted an appellate bond) could be sued without first going against the principal. Pothier was again cited, along with Story's treatise, in *McIntyre v. Chappell*, 4 Tex. 187 (Tex. 1849) (Wheeler, J.), for the proposition that a party can establish a legal domicile by a combination of residence and intent. Pothier was also cited in *Cannon v. Hemphill*, 7 Tex. 184 (Tex. 1851) (Hemphill, C.J.), in support of the view that an attack on a judgment must be brought within the time permitted by law or it is barred. Pothier's 1839 treatise on the LAW OF SALES was cited as recently as 1999, in *Tejas Power Corp. v. Amerada Hess Corp.*, No. 14-98-00346-CV, *1 (Tex. App.--Houston [14 Dist.] 1999, no pet.) (unpublished) (Hudson, J.), for support of the rule that a party must do whatever is necessary to comply with a contractual obligation.

Professor Joseph M. Parillo credits Pothier with originating other important concepts that became part of Anglo-American Contract Law, beyond his consent-based view of contractual obligation.¹⁴ One was the offer-and-acceptance paradigm for contract formation, introduced into American Common Law in *Mactier's Administrators v. Frith*, 6 Wend 103 (N.Y. 1830).¹⁵ Another was Pothier's idea that contract damages were limited to what was in the contemplation of the contracting parties, thus ruling out consequential damages that were not foreseeable—an idea usually credited to the English case of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).¹⁶ Pothier's third contribution was imposing limits on penalty clauses, which Pothier suggested should not exceed double the actual damages.¹⁷

2. Savigny. Another influential Continental treatise-writer was the German, Friedrich Carl von Savigny (1779–1861). Savigny was cited only once by the Texas Supreme Court,¹⁸ and that by way of citation to an American treatise containing Savigny's opinion on one point in dispute, Savigny's views were known to English lawyers and judges mainly through the writings of Sir Frederick Pollock, who published an influential treatise on Contract Law in 1876.

B. TREATISES ON ENGLISH LAW. The early treatises on English law, by Ranulf de Glanville (1188), Henry de Bracton (1260), Britton (1291-1292), Littleton (1481), St. German (1523), Rastell (1530), Finch (1580), Cowel (1607), Spelman (1626), Coke (1628-1644), Blount (1670), and various abridgements of the law, relate to medieval law or early Forms of Action that predate the rise of modern Contract Law. Beginning in the 1700s, treatises on English law began to appear. In the 1800s, a virtual explosion of publications occurred, with several hundreds of treatises on commercial law and Contract Law appearing in London between 1801 and 1900.¹⁹

1. Blackstone. The first “modern” treatise on the Common Law of England was William Blackstone's four-volume treatise, *COMMENTARIES ON THE LAWS OF ENGLAND*, published from 1765 to 1769. Blackstone's description of English Contract Law, brief as it was, echoed through subsequent writing on the subject for the next 100 years. Blackstone's writing exemplifies an approach to the law which Harvard Law Professor Duncan Kennedy calls “pre-Classical,” in that it viewed Contract Law from the standpoint of rights in property, not personal rights.

a. Definitions and Categories of Contract. Blackstone defined a contract as “an agreement, upon

sufficient consideration, to do or not to do a particular thing. From which definition there arise three points to be contemplated in all contract; 1. The agreement; 2. The consideration; and 3. The thing to be done or omitted, or the different species of contracts.”²⁰ Blackstone went on to describe a contract as “an agreement, a mutual bargain or convention,” which must involve at least two contracting parties who have sufficient ability to make a contract.²¹

b. What Constitutes an Agreement? As to the first element of a contract, an agreement, Blackstone said that a contract or agreement may be either express or implied.²² An express contract has terms that are “openly uttered and avowed” at the time of contracting.²³ Implied contracts are “such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform.”²⁴ Examples of an implied contract occur when (I) someone hires another to perform a service without expressly-agreed-upon compensation, and the law requires him to pay “as much as his labour deserves,” or (ii) when one takes wares from a vendor without a stated price, so that the law requires the purchaser to pay “their real value.”²⁵ Blackstone also described an implied contractual obligation, when a contracting party fails to perform the agreement, to “pay the other party such damages as he has sustained by such my neglect or refusal.”²⁶

Blackstone differentiated *executed* from *executory* contracts, the former having been fully performed when created (such a simultaneous exchange of horses) and the latter being a contract to perform in the future (such as an agreement to exchange horses next week).²⁷

c. Consideration. As to the second element of a contract, Blackstone described the requirement that a contract be founded “upon sufficient consideration.” This is the “price or motive of the contract, which itself must be legal or else the contract is void.”²⁸ Blackstone divided consideration into four categories: (I) when money or goods are furnished upon an express or implied agreement to pay for them; (ii) an exchange of promises to perform an act or not perform an act; (iii) when a person agrees to perform work for a price, either stated or what the law considers reasonable; and (iv) where a person agrees to pay another to perform work (the counterpart of (iii)). Blackstone reiterated that consideration is “absolutely necessary to the forming of a contract.” Otherwise, the purported contract is a “nudum pactum” or “naked contract,” that is not enforceable. However, “any degree of reciprocity will prevent the pact from being nude.”²⁹ Blackstone identified the requirement of consideration as a safeguard to avoid “the inconvenience that would arise from setting up mere verbal promises,” so that consideration is not required “where such promise is authentically proved by written document.” He gave as examples a voluntary bond or promissory note, which carry with them “an internal evidence of good consideration”—in the case of the bond it is the “solemnity of the instrument” and in the case of the promissory note it is “the subscription of the drawer.”³⁰ To Blackstone, Consideration was the way that “simple” contracts achieved the seriousness that was assured by a seal or recordation or registration with a court.

d. The Subject Matter of the Contract. Blackstone’s third element of a contract was the thing agreed upon to be done or omitted. Blackstone identified four things that can be agreed upon: (I) sale or exchange of personal property; (ii) bailment; (iii) hiring and borrowing (including interest on money loaned); and (iv) debt; all of which he discusses in detail.³¹ Blackstone discussed usury at some length, and attributed a proper rate of interest both to a return on the money loaned and to reward the risk of loss. His discussion of risk led to a discussion of insurance contracts. As to debt,

Blackstone said debt arises from a sale of goods or lending of money. He called the debt a “chase in action,” and a right to a certain sum of money. A “debt of record” is a debt validated by the judgment of a court of record. A “debt by special contract” is where the obligation to pay a sum of money is reflected by deed or instrument under seal. A “debt by simple contract” is not a debt of record, or signified by deed or special instrument, but rests instead upon an oral promise or an unsealed note. Blackstone discussed in some detail two debts on simple contract, bills of exchange (a letter directing payment to a third person) and promissory notes (“a plain and direct engagement in writing, to pay a sum specified” at a specified time to a specified person, or to his order or to the bearer of the note).³²

e. Remedies For Breach of Contract. Blackstone covered remedies for breach of various contractual obligations in Book III, chapter 9 of his COMMENTARIES. His approach was pre-Classical, in that remedies are described in terms of the Forms of Action available for different kinds of claims. Blackstone discussed the “form of the writ of debt” and the “writ of covenant.” See Sections V.A & B of *175 Years of Texas Contract Law*.³³ Blackstone spoke of accord and satisfaction in Book III, chapter 1, where he said that “if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action,” but if the injured party accepts something of value as satisfaction, the later agreement extinguishes the former claim.³⁴

2. Powell. John Joseph Powell wrote AN ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS, published in London in 1790, now credited as being the first pure English Contract Law treatise. In his introduction, Powell wrote:

All reasoning must be founded on first principles. The science of the Law derives its principles either from that artificial system which was incidental to the introduction of feuds, or from the science of morals. And, without a knowledge of these principles, we can no more establish a conclusion in law than we can see with our eyes shut, measure without a standard, or count without arithmetic.³⁵

Powell’s treatise was published in two volumes. Volume I was divided into twelve parts: “On the Primitive State of Property”; “Of the Assent to Contracts or Agreements, and the Power Residing in Different Persons, as Moral Agents, to Bind Themselves and Others; Of the Subjects of Contracts or Agreements; Of the General Nature of Contracts or Agreements; Of Contracts or Agreements, Considered as such in Equity, Arising out of Instruments, & Having a Different Effect at Law; Of the Consideration Necessary to Support A Contract or Agreement; Of the Interpretation of Contracts and Agreements; [and] Of Disannulling, Discharging, Rescinding, Waiving, or Altering Contracts or Agreements.” Volume II contained four parts: “Of the Remedy to Enforce Agreements In Law and Equity; Of the Equitable Jurisdiction in Decreeing Executory Contracts and Agreements; Of the Equitable Jurisdiction in Relieving Against unreasonable Contracts or Agreements; [and] Of the Principles on which Courts of Equity Refuse to Interfere in Cases Of Contracts or Agreements.” Powell wrote that the law enforced contracts because “there is a mutual consent of the minds of the parties concerned in them.”³⁶ Powell said that “it is of the essence of every contract or agreement, that the parties to be bound thereby should consent to whatever is stipulated.”³⁷ Powell therefore considers: “First, What persons are capable of binding themselves by their contracts or agreements.

Secondly, What persons are capable of binding themselves, and also others, by their contracts or agreements. Thirdly, In how many ways an assent to a contract or agreement may be given. And, fourthly; What circumstances invalidate such assent.”³⁸

3. Chitty. Joseph Chitty, Jr. was born at Dagenham, England in 1775. He was admitted to the Middle Temple in 1794, and admitted to the Bar in 1816. Chitty wrote a large number of treatises, including TREATISE ON THE LAW OF BILLS OF EXCHANGE (1799), a TREATISE ON COMMERCIAL LAW (1818), a TREATISE ON THE LAW OF COMMERCE AND MANUFACTURING AND THE CONTRACTS RELATING THERETO (1824), and A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL (1826). Chitty’s treatise on Contract Law was first published in America in 1827. Chitty’s treatise on Contract Law, now in its 31st edition, was cited by the Texas Supreme Court numerous times.

a. Structure of the Treatise. The 1824 edition of Chitty’s treatise on Contract Law was not available for review in drafting this Article. So this analysis is based on the third edition of his Practical Treatise on the Law of Contracts, edited by Thompson Chitty and published in 1841 which gives a comprehensive view of Contract Law at that time. Chapter I of the 1841 edition discusses the form of contracts, and when a writing is required and when stamps must be affixed. Chapter II deals with contracts of incompetent persons, and of various other types of persons (principle and agent, partners, assignees of a bankrupt, executors and administrators, the government, etc.). Chapter III deals with the subject matter of contracts (real estate, personal property, the person, money). Chapter IV deals with illegal contracts. Chapter V deals with the usual “defences” to simple contracts. Chapter VI deals with damages and liquidated damages. Joseph Chitty, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL; AND UPON THE USUAL DEFENSES TO ACTIONS THEREON 1 (3d ed. Thompson Chitty, ed. 1841).

b. Definition and Categories of Contracts. In the 1841 edition, the treatise starts with the meanings of different terms. The term “obligation” is used by Roman jurists and by Pothier, but English law identifies that term with Bonds. *Id.* at 1. The term “contract” is associated with agreements not under seal. *Id.* at 2. The term “agreement” “clearly imports a reciprocity of obligation,” and so is not used with special contracts which are under seal and require no consideration or “mutuality of stipulation.” *Id.* at 2. The treatise says that “[t]he word *promise* is used to denote the engagement of a person, without regard to the consideration for it, or corresponding duty of the other party.” *Id.* at 2. But the meaning of the terms is not as important as “the essential distinctions between the different kinds of contracts.” *Id.* at 2. The treatise divides contracts into three types: 1, of record; 2, specialities, and 3, simple contracts. *Id.* at 2. Contracts of record are “judgments, recognizances, or statutes staple,” which have been promulgated by or under the authority of a court of record. “These obligations bind the land; their existence is in general triable only by an inspection of the record itself, not as a matter of fact; and no consideration is necessary to render them binding, not can they be impeached by the parties themselves, even for a defect apparent on the record, except by writ of error.” *Id.* at 2-3. Contracts under seal, called “specialties,” “are instruments not merely in writing but *sealed* and *delivered over* as deeds, . . . such sealing and delivery being a particular form and ceremony, which alter the nature and operation of the agreement.” *Id.* at 3. A signature is not necessary to make a contract under seal valid. *Id.* at 3. Simple contracts include verbal contracts and written contracts not under seal or “delivered over as

deeds.” *Id.* at 3. Simple contracts have the same “efficacy” as special contracts, whether they are verbal or written. The requirement of a writing under the Statute of Frauds is not an essential part of the engagement, but rather is “necessary *evidence* of the contract or promise.” *Id.* at 4-5. The treatise remarks that the “most striking distinction” between specialties and simple contracts is that for simple contracts, “a consideration is absolutely necessary to give it validity.” *Id.* at 5.

c. Formation of Contract; Offer-and-Acceptance; Mutuality of Obligation. In discussing the formation of contracts, the treatise says that, “[i]n order to constitute a binding contract, there must be a definitive promise by the party charged, accepted by the person claiming the benefit of such promise. There must be a request on one side and an assent on the other.” *Id.* at 9. The treatise discusses Pothier’s definition of contract, then cites *Cooke v. Oxley* and *Adams v. Lindsell* on the issue of when an acceptance of an offer becomes effective. *Id.* at 12-13. See Section VIII.F.1 & 3.c of this Article. As to mutuality of obligation, Chitty’s treatise says: “The agreement . . . must in general be obligatory on both parties, or it will bind neither.” *Id.* at 15.

d. Analysis of Promises. The treatise next discusses promises. In an action for breach of promise to marry, “the jury must be satisfied, that there were mutual promises to marry” This requires the woman to prove that she accepted the man’s marriage proposal. *Id.* at 16. The treatise goes on to talk about consideration for a promise. Promises are either express or implied. The treatise cites Blackstone’s division between express or implied promises. *Id.* at 19. “An express contract is proved by an actual agreement; an implied contract by circumstances, or the general course of dealing between the parties.” But however proved, the consequences flowing from either type of contract are the same. *Id.* at 19. The treatise next discusses promises implied by law, using the example of a case holding that a bank has an implied obligation to pay a check within a reasonable time of presentment. *Id.* at 19-20. The author writes: “To enumerate all the decided cases in which promises have been implied from the acts of a party, would be a tedious and unprofitable task.” *Id.* at 21. Then several examples are given, and there is a discussion of quantum meruit and quantum valebant. *Id.* at 21. The treatise also focuses on finding implied promises arising from usage or custom, provided that the usage or custom is “uniform and universal; and not merely the course of dealing at particular houses. It must be so universal that every one in the trade must be taken to know it” *Id.* at 20. However, promises cannot be implied in contradiction to the express terms of the agreement excluding such usage. *Id.* at 21 & 25. The treatise also says that implied promises can be inferred from the parties’ course of dealing “on former and similar occasions.” *Id.* at 23.

e. Consideration. As to consideration, Chitty’s treatise says that a “valid and sufficient consideration . . . is the very essence of a contract not under seal” *Id.* at 27. The treatise suggests that consideration was a requirement in Roman law, and the treatise correlates consideration to the “cause” of a contract required in civil law—a comparison proved erroneous by later writers. *Id.* at 27-28. The treatise notes that consideration is required to support bills of exchange and promissory notes in an action “between the immediate parties thereto, but not once the bill or note is in the hands of what we today call a “holder in due course,” the requirement of consideration falls away. *Id.* at 28-29. The treatise follows Blackstone in distinguishing “good” from “valuable” consideration, a refinement that is lost from today’s law. *Id.* at 29.³⁹

The treatise divides valuable consideration into four types: First, “*do, ut des*,” where “I give money

or goods on contract that I shall be repaid money or goods for them again.” Examples are “loans of money upon bond, or promise of repayment; and all sales of goods in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth.” Second, *facie ut facias*, “as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together, or to do any positive acts on both sides. Or it may be to forbear on one side, of consideration of something done on the other Or it may be for mutual forbearance on both sides” Third, *facio ut des*, when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value for it.” Fourth, *do ut facies*, “which is the direct counterpart of the preceding.” *Id.* at 30. Consideration may be a benefit to the promisor (or at his direction to a third party) or a detriment to the promisee. *Id.* at 30. Even a slight benefit will suffice. *Id.* at 31. “But if the folly of the contract be extremely gross,” it may prove fraud. *Id.* at 31. The treatise cites a case holding that the adequacy of consideration is a question for the court (not the jury). *Id.* at 31. It matters not that detriment assumed is “of the most trifling description, provided it be not utterly worthless in fact and in law.” *Id.* at 32. Mutual promises to arbitrate a dispute is sufficient consideration, provided that the obligation to arbitrate is mutually binding. *Id.* at 44. *Accord, In re 24R, Inc.*, 324S.W.3d 564 (Tex. 2010) (Per Curiam). A promise exchanged for a promise is consideration, so long as there is “reciprocity of obligation. *Id.* at 46-47. A mere moral obligation will not bind a party. *Id.* at 50.

g. Remedies for Breach of Contract. As to damages, the treatise notes that parties can agree “that the one shall pay to the other a specified sum of money, in the event of a breach of its provisions.” If the clause is a penalty it will not be enforced, but if it is liquidated damages it will be. *Id.* at 863-66. The distinction is a difficult one to draw and examples are given. *Id.* at 863-69. For a claim in *assumpsit* (i.e., for breach of contract), the remedy is damages. If the obligation is to pay a fixed sum, that sum is binding on the jury. *Id.* at 869. When an action in *assumpsit* is for damages resulting from a breach of contract, “the jury may take into their consideration any consequential injury the plaintiff has sustained; if such injury be the fair and natural result of the defendant’s violation of his agreement.” *Id.* at 870. For example, if the purchaser of a horse warranted to be sound was not so, he cannot recover damages for the profit he would have made upon resale of the horse. *Id.* at 870. However, in a suit for breach of a warranty of a chain cable, the plaintiff can recover the value of an anchor lost when the cable broke. *Id.* at 871. The treatise cites a case where a buyer gave notice that he would not accept delivery of wheat that was in transit for delivery; the measure of damages was the difference between the contract price and the price on the day the wheat was tendered for acceptance, not the date that notice was received by the seller. *Id.* at 871. The treatise states: “There are instances in which the defendant may be regarded in the light of a wrongdoer in breaking his contract, and in such case a greater latitude is allowed the jury in assessing the damages. *Id.* at 872. Insurance proceeds are not to be deducted from the plaintiff’s damages. *Id.* at 873.

4. Addison. In 1847, G. G. Addison published his TREATISE ON THE LAW OF CONTRACTS AND PARTIES TO ACTIONS EX CONTRACTO. In his preface written in March of 1847, Addison noted that “some attempt has been made to recommence the teaching of law as a science, in localities where it has long been practiced as an art.”⁴⁰ The treatise amounted to 886 pages, and dedicated 428 of them to general Contract Law principles.⁴¹ According to authors Austen-Baker and Zhou: “much of modern contract theory *is there* – offer, mirror-image acceptance, consideration, privity and so-

forth – but it is presented in a fashion that is alien to contemporary lawyers.”⁴²

5. Benjamin. Judah P. Benjamin had a remarkable history. He was born in Saint Croix (now the U.S. Virgin Islands) in 1811, as a British subject. His family migrated to North Carolina and then settled in South Carolina. Benjamin attended Yale University, but dropped out and went to New Orleans where he clerked for a law firm and then became licensed as a Louisiana lawyer, steeped in French law. Benjamin married a Creole woman, bought slaves and owned a sugar plantation, then sold out and entered politics, eventually becoming one of Louisiana’s U.S. Senators. In 1854, U.S. President Franklin Pierce offered Benjamin a seat on the U.S. Supreme Court. Had he accepted, Benjamin would have been the first person of Jewish descent on that court. Benjamin was expelled from the U.S. Senate when Louisiana seceded from the Union in 1861. Although Benjamin had once challenged Jefferson Davis to a duel, they mended their differences and, as President of the Confederate States of America, Davis appointed Benjamin to serve as Attorney General, then Secretary of War, and finally Secretary of State for the Confederacy. At the end of the Civil War, Benjamin barely evaded arrest by Union troops, and fled eventually to Liverpool, England, where he found and took \$20,000 being held on deposit in his name⁴³ on behalf of the now-defunct Confederacy. Benjamin became a barrister and newspaper writer. In 1868, Benjamin published his *TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY*, which achieved recognition in England and America, and which was cited in Opinions issued by the Supreme Court of the State of Texas.

In the Preface to the first edition of Benjamin’s treatise on *THE LAW OF SALE OF PERSONAL PROPERTY*, Benjamin indicated that his work followed on the treatise of Justice Blackburn on Sale, which was limited to the effect of the contract, and the legal rights of property and possession in goods. Benjamin said that his treatise “is an attempt to develop the principles applicable to all branches of the subject, while following Blackburn on Sale as a model for guidance in the treatment of such topics as are embraced in that work.” Benjamin said he included references to American decisions and to authorities on civil law.

In Section 1 of his treatise, Benjamin tackled formation of the contract, which he said requires the concurrence of the following elements: (i) parties competent to contract; (ii) mutual assent; (iii) a thing transferred from seller to buyer; and (iv) a price in money⁴⁴ paid or promised. Benjamin, *SALES OF PERSONAL PROPERTY* §1, p. 1. If transfer of ownership was immediate, the transaction was “a bargain and sale of goods”; if the transfer was to occur in the future, the transaction was “an executory agreement.” *Id.* § 3, p. 3. The 1888 American edition of Benjamin’s treatise contained a footnote saying: “The reader is referred to a very valuable article on this question in 5 Am. Law Rev. 450, understood to be from the pen of Oliver Wendell (now Mr. Justice) Holmes, Jr., of the Supreme Judicial Court of Massachusetts.” *Id.* p. 6.

6. Leake. Stephen Martin Leake (1826-1893) was a barrister-at-law of the Middle Temple in London. Leake published *THE ELEMENTS OF THE LAW OF CONTRACTS* (1867), which was republished with subsequent editors through a 17th edition in 1921. Leake described his treatise in the Preface, saying that he attempted to set out the “elementary rules and principles of the law of contracts, exclusively of the detailed applications of that law to specific matters.” Leake distinguished his work from “all those treatises on the law of contracts which treat exclusively or primarily, and either collectively or separately, of the applications of the law to the various specific

matters of contract; such as the treatises on the law of vendors and purchasers of land, the sale of goods, landlord and tenant, carriers, insurance, bills of exchange and the like” Leake continued: “the writer of the present treatise is not aware of any English work undertaken with the exclusive object of treating of the law of contracts in its general and abstract form, apart from its specific applications.”

In the preface to his third edition, Leake said that the original version of his treatise was prepared for the study of law, but that the book “has been more used in the practice of the profession than in the study of law,” so in the third edition he has substantially reduced the size of the book.⁴⁵

a. Structure of the Treatise. Leake’s treatise is a comprehensive review of the major issues that had arisen in English Contract Law up to the time, and the answers that had been given by some of the courts, expressed in terms of underlying rules of law rather than in terms of the traditional English Forms of Action, or in terms of special rules for special fact patterns. The English Forms of Action were phased out in stages by Parliamentary acts from 1832 to 1873 (particularly with the Common Law Procedure Act of 1852), so Leake was writing after the effective demise of that earlier procedural paradigm but when the new approach to litigation was still young. Prior to Leake, most writers on Contract Law had differentiated the way courts handled cases according to the type of transaction, or the status of a party, or the relationship between the parties. Leake set out rules and principles he felt cut across all fact situations. As was customary for the time, Leake asserted the black letter law in his text, with footnotes to court opinions supporting his statements of law. Leake’s treatise appears to have been the earliest of the modern (post-Blackstone) treatises on English Contract Law, that were structured along the lines of underlying principles and rules of law rather than fact patterns. Leake covered the necessity of mutual consent, rules governing offer-and-acceptance, the requirement of consideration, vitiation of a contract by fraud or mistake, and the incapacity to contract on the part of minors, incompetents, and (in various circumstances) married women. Leake’s rules and principles echo Blackstone and yet they are very familiar to us today, showing that strong ties exist between the law before and the law after the time in which he wrote.

b. Definition of Contracts; Categories of Contracts. Leake divided contracts into three kinds: simple contracts, contracts under seal, and contracts of record. “Simple contracts” come in two forms: those arising from nothing more than an agreement between parties, and those that arise by operation of law, or “implied contracts.” Leake, *THE ELEMENTS OF THE LAW OF CONTRACTS* (1867), p. 7. Leake wrote that, to create a contract, “the matter agreed upon must import that the one party shall be bound to the other in some act or performance, which the latter shall have a legal right to enforce.” *Id.* at 9. Leake differentiated between executed and executory contracts.

c. Contract Formation. Leake committed to the “objective theory” of contract formation, which evaluated whether or not an agreement had been reached based on how a reasonable person would view the acts and words of the parties. Leake wrote:

Agreement consists in two persons being of the same mind concerning the matter agreed upon. The state of mind or intention of a person, being impalpable to the senses, can be ascertained only by means of outward expressions, as words and acts. Accordingly, the law judges of the state of mind or intention of a person by outward expressions only, and thus excludes all

questions concerning intentions unexpressed. It imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words and actions; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to agree in regard to some matter, that intention is established in law as a fact, whatever may be the real but unexpressed state of his mind on the matter. *Id.* at 8.

Leake noted that it follows that an agreement can spring only from intentions that are communicated between the contracting parties. Where a person's words and conduct conflict, the words are given greater weight, but Leake notes that conduct can prevail over words in some cases. *Id.* at 8. Leake mentions a promisor and a promisee. *Id.* at 9. The promisor is the party who signifies an intent to do something, which is accepted by the other party, who is the promisee. *Id.* at 9. Leake notes that a promise that amounts to no more than an option will not create a contract. *Id.* at 9. Leake speaks to express warranties, saying "commendatory expressions concerning the quality of goods made upon a negotiation for sale without intending to warrant the quality, do not create a warranty." *Id.* at 9-10.

d. Consideration. Leake discusses the requirement of consideration:

It is further necessary in the English law that an agreement, in order to create a legal contract, should include in the matter agreed upon, besides a promise, what is called a *consideration* for the promise. The consideration may be described generally as some matter agreed upon as a return or equivalent for the promise made, showing that the promise is not made gratuitously. *Id.* at 10.

Leake explained the requirement of consideration in these terms:

The object of requiring a consideration for a promise, as a condition of creating a legal contract by agreement, seems to be to secure a test that the parties have the intention of making a binding engagement, and are not using promissory expressions without a serious intention of engaging themselves to a contract. The fact of bargaining and giving an equivalent for the promise serves to show that the parties act with deliberation, and in the expectation that the transaction shall be binding. *Id.* at 10.

Leake points out that not all gratuitous promises are unenforceable. Contracts under seal are enforceable without consideration. *Id.* at 10.

e. Express Agreements Versus Agreements Implied in Fact or in Law. Leake distinguished between express and implied agreements based on the way that the agreement is proved. Express agreements are "proved by express words, written or spoken, stating an actual agreement; an implied agreement is proved by circumstantial evidence showing that the parties intended to contract." *Id.* at 12. Leake wrote that one contract can be partially express and partially implied, as determined by the manner of proving different parts of the agreement. *Id.* at 12. Leake also pointed out another type of "implied contract," being one that the law imputes without any agreement existing in fact. He distinguished between his concept of an agreement implied in fact versus an agreement implied by law when none existed in fact. *Id.* at 12.

f. Offer and Acceptance. Leake wrote that “[a]n agreement must necessarily be made in the form, or what is equivalent to the form, of an offer of the matter or terms of the agreement on one side, and an assent to or acceptance of those terms on the other side” *Id.* at 12. Leake recounts an auction, where successive bids are offered, and finally the highest bid is accepted “by the fall of the hammer.” *Id.* at 12-13. Leake wrote that offer and acceptance can occur through exchanged correspondence; it’s just that, compared to a formal agreement, an agreement construed from correspondence is “generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.” *Id.* at 13. Where the acceptance varies from the offer, there is no agreement. (the “mirror image” rule) *Id.* at 14. Leake discussed “the mailbox rule.” See VIII.F.3.c & d of this Article.

g. Mistake, Fraud, and Incapacity. Leake discussed rescission of a contract based on mistake, fraud, or incapacity: mistake, at 168-81; fraud at 181-206; duress, at 206-209; insanity, at 247-49; intoxication, at 249-250.

7. Pollock. Sir Frederick Pollock was born in London on December 10, 1845. Pollock was educated at Trinity College, Cambridge, and admitted to the bar in 1871. Pollock published *THE PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY*⁴⁶ in 1876, which emphasized underlying principles as opposed to specific applications of the law in particular types of cases. Pollock began teaching at Oxford University as a professor of Jurisprudence in 1883. In 1895, Pollock co-authored with Frederic W. Maitland *A HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*. In 1895, Pollock was appointed as editor of the *Law Reports*, overseeing the production of law reports on judicial opinions, a position he held for forty years. Pollock also edited the *Law Quarterly Review*, an academic journal that covered the Common Law across the world. For several decades Pollock exchanged correspondence with American jurist Oliver Wendell Holmes, Jr.⁴⁷

The first American edition of Pollock’s second edition of his contracts treatise was published in 1881, with Gustavus H. Wald as editor.⁴⁸ Wald did not alter the text, but added American cases to the footnotes. In 1885, the second American edition was released, again edited by Wald. The third American edition appeared in 1906, containing American cases gathered by Wald, prior to his death, and by Harvard Law School Professor Samuel Williston. The footnotes also contain much analysis contributed by Williston, and Williston added a chapter on discharge of contracts, and added to Pollock’s chapters on third party beneficiaries and repudiation of contracts.

In his preface to the first edition of his 1876 treatise, Pollock identifies the work as a treatise on “the general principles which determine the validity and effect of contracts in their inception.” Frederick Pollock, *PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY* ix (1876). Pollock noted that writers of books on contract law focused on contracts litigated in English courts of law, and relegate discussion of contracts litigated in equity courts to books on equity jurisprudence which typically did not cover the topic well. *Id.* at ix.

Therefore Pollock had covered the power of married women to bind their separate estates; rules of partnership; assignment of contracts; mistake; misrepresent, as distinguished from fraud; undue influence; and specific performance. *Id.* at x.

In the Preface, Pollock makes special note of the Indian Contract Act, which says deserves more attention from English writers than it has received. *Id.* at xi-xii. Pollock states: “It is a most instructive example of what can be done to consolidate and simplify English case-law, and shows better than any discussion can do what are the real advantages of codification, the real difficulties to be overcome, and the most likely means of overcoming them.” *Id.* at xii. Pollock says that he did not collect American cases, but did include some U.S. Supreme decisions of note.

Pollock's book of 600+ pages was divided into twelve chapters: Ch. I, Agreement, Proposal, and Acceptance; Ch. II, Capacity of Parties (natural persons, artificial persons); Ch. III, Form of Contract; Ch. IV, Consideration; Ch. V, Persons Affected by Contracts (with appendices on contracts made by agents; assignments of choses in action); Ch. VI, Unlawful Agreements (with appendices on statutes forbidding certain contracts, provisions of the Indian Contracts Act on unlawful agreements); Ch. VII, Impossible Agreements; Ch. VIII, Mistake; Ch. IX, Misrepresentation and Fraud; Ch. X, the Right of Rescission; Ch. XI, Duress and Undue Influence (appendix on Indian Contract Act on Fraud); Ch. XII, Agreements of Imperfect Obligations.

Pollock's treatise on contracts was cited in a Texas appellate opinion in *Bigham v. Bigham*, 57 Tex. 238 (Tex. 1882), (Stayton, Assoc. J.), for the proposition that in evaluating a claim to avoid a contract based on misrepresentation, it is necessary to distinguish between a misrepresentation of an existing fact, and a promise to do, or not to do, something in the future, which will not support a claim of mistake. Pollock was again cited in *Williams v. Rogan*, 59 Tex. 438, 1883 WL 9194 (Tex. 1883) (Stayton, Assoc. J.), for his listing of the “stages and essentials of a contract,” which he took from the Indian Contract Act of 1872.

8. Anson. Sir William Reynell Anson was born November 14, 1843. He was educated at Eton and Balliol College, Oxford, and was called to the bar in 1869. In 1879, Anson published his *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT*. Victor Tunkel wrote that “it largely shaped the modern law itself.”⁴⁹ Richard Austen-Baker and Qi Zhou say that, with Anson's Treatise, “the classical general theory of contract . . . finally reached what may fairly be described as a degree of maturity.”⁵⁰ Anson lists as reference books two treatises by Savigny, as well as Pollock's *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* (1878), Benjamin on *SALES* (2nd ed. 1873), Leake's *ELEMENTARY DIGEST OF THE LAW OF CONTRACT* (1878), and C. C. Langdell's *SELECTION OF CASES ON THE LAW OF CONTRACT* (1871).⁵¹ The first American edition of Anson's treatise was edited by J. C. Knowlton, Assistant Professor of Law at Michigan University, in 1877.⁵² A second American edition was edited by Cornell University School of Law Professors Ernest W. Huffcut and Edwin H. Woodruff, in 1895.⁵³ Anson wrote that the term “agreement” has a wider meaning than the term “contract,” a concept that was expressed in the Uniform Commercial Code Section § 1.201(b) (3) & (12). He defined the elements of contract to include “proposal and acceptance,” “form or consideration”⁵⁴ necessary to make the agreement binding, capacity to contract, “Genuineness of the consent expressed in Proposal and Acceptance,” and legality of the objects of the contract.⁵⁵ Anson noted that an acceptance must be communicated to be effective.⁵⁶

C. IMPORTANT WRITINGS ON AMERICAN CONTRACT LAW. American treatise-writers made their mark in the writings on Contract Law.

1. Kent. James Kent lived from 1763 to 1847. He was born in Putnam County, New York. Kent is reported to have said that “he had but one book, Blackstone’s Commentaries, but that one book he mastered.” He was the first Professor of Law at Columbia College in New York City, beginning in 1793. Kent was appointed to the New York Supreme Court in 1798. In 1814, Kent was appointed chancellor of the New York Court of Chancery.⁵⁷ Kent insisted upon having a written opinion in every case that came before the full court.⁵⁸ Kent retired from the bench in 1823, and again accepted a post as professor of law at Columbia College in New York City. Kent published a four-volume treatise, COMMENTARIES ON AMERICAN LAW, between 1826 and 1830, that grew out of his lecture notes for Columbia College.⁵⁹ Kent was cited many times by the Texas Supreme Court.

Volume II of Kent’s COMMENTARIES (1827) discusses the law concerning the rights of persons and the law concerning personal property. In the latter category, Lecture XXXIX, entitled “Of the Contract of Sale,” discusses “those great fundamental principles which govern the doctrine of contracts.” *Id.* at 363-436. Kent takes up in sequence the types of contract, then consideration, then the subject matter of the contract, then implied warranties in the sale of goods, then the duty of mutual disclosure of material facts, then the passing of title to personalty by delivery, then the statute of frauds, then the effect of fraud on the sale of goods, then auctions, and finally the vendor’s right to stoppage in transitu.

Kent’s definition of contract is taken from Blackstone: “An executory contract, is an agreement of upon sufficient consideration, to do or not to do a particular thing.” *Id.* at 363. Following Blackstone further, contracts are either special (i.e, under seal) or parol (not under seal), or they are contracts of record (entered into before a court of record). *Id.* Kent cites Smith on Contracts for the idea contracts of record. *Id.* Kent says: “The agreement conveys an interest either in *possession* or in *action*; the former if the agreement has been performed, the latter if it is executory.” *Id.* “Contracts are also divided into *express* and *implied*; the former when the parties contract in express words or by writing, and the latter are those contracts which the law presumes by reason of some value or service rendered.” *Id.* [Emphasis in the original.] Kent thus carries forward Blackstone’s use of the term “implied contract” to describe what later became “quasi-contract.” “Every valid contract is made between parties having sufficient understanding and age and freedom of will . . .” *Id.* Sanity is presumed and the burden to prove “imbecility” is on the party claiming it. *Id.* Complete intoxication is a defense. *Id.* The contract is void (not voidable) if procured by “violence or restraint.” *Id.*

Kent next addressed conflict of law rules. “A contract, valid where made, is valid everywhere. The law of the place of contract controls its nature, construction, and validity.” *Id.* at 153. However, the mode and time of suing is governed by the law of the forum. *Id.* But no court is bound to enforce the law of another state that violates public policy, etc. *Id.* Kent notes an exception where the contract is executed in one state with the intention that it be performed in another; in that instance, the law of the other state will apply. For this exception, Kent cites his own treatise on conflict of laws plus a number of cases in support.

Kent lists the normal rules regarding consideration:

A valid contract must have a sufficient consideration. There must be something given in

exchange, or something which is the inducement to the contract, and it must be lawful and of competent value. A contract without a consideration is a nudum pactum, a naked contract, and not binding in law. A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage or suspension or forbearance of a right will be sufficient to sustain a promise.

Id. at 154. Mutual promises are consideration provided that they are “concurrent in point of time.” *Id.* But if promise to pay is exchanged for a promise to deliver, a party can sue only if he has performed his promise. *Id.* Consideration provided in the past must have been at the instance of the other party, and must have been prompted by a moral obligation owed to the other party. *Id.* at 154-55. An existing duty to do something is consideration for a promise to do it. *Id.* at 155. The consideration must be valuable and lawful. *Id.*

“A sale is a contract for the transfer of property from one person to another, for a valuable consideration.” It requires the thing sold, the price, and the consent of the parties. *Id.* Kent goes on to specify more details about sales transactions. Then Kent mentions something of great importance:

Mutual consent is requisite to the creation of the contract, and it becomes binding when a proposition is made on one side and accepted on the other; but if the parties err as to subject matter or essential facts it is no contract.

Id. at 157. Kent thus adopts the offer-acceptance paradigm, and in a general way adopts mistake as affecting contractual obligations

Kent discusses implied warranties in the sale of personal property. If the seller is not in possession, the principle of *caveat emptor* applies. *Id.* But a seller in possession who sells for a fair price warrants title. *Id.* Where goods delivered are not what was specified, the buyer must notify the seller and rescind the contract, or he will be bound to accept the goods. *Id.*

Kent addresses fraud in this way: “If there be an intentional concealment of material facts in the making of a contract, in cases in which both parties have not an equal access to the means of information, it will be such an unfairness as will vitiate and avoid the contract.” *Id.* Kent further says: “As a general rule each party is bound to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not equally within the range of his observation.” *Id.* A seller cannot conceal defects, but it not required to point them out if they are equally observable to both parties. *Id.* at 158. A disinterested person making a false statement about the goods is liable if the purchaser relies upon it. *Id.*

Where the seller’s obligations under the agreement have been fulfilled, title and risk of loss shifts to the buyer. *Id.* If the sale is on credit, the same rule applies even if the buyer’s title would be defeated if he becomes insolvent before taking actual possession of the goods. *Id.* More details of sale are set out. *Id.*

The Statute of Frauds applies to sales contracts, except in instances of partial payment or partial

consideration performed. *Id.* at 161-62.

Where a purchaser buys knowing of a judgment against the seller, the sale is void. *Id.*

An auctioneer has a lien on the goods sold to secure his fee. *Id.* An auctioneer who knows the seller does not own the goods sells at his own risk. *Id.* If the auctioneer does not disclose the seller at the auction, he assumes the risk concerning the goods. *Id.* “A bidding at an auction may be retracted before the hammer is down: a bid is merely an offer, not binding until accepted.” *Id.* For this last proposition, Kent cites *Payne v. Cave*.

Kent next describes the rights of a vendor to stop delivery while goods are in transit. *Id.* at 162-63.

Kent’s last category is the interpretation of contracts. The passage is worth citing:

The rules of construction of contracts are the same in courts of law and of equity. The mutual intention of the parties to the instrument is the great and sometimes difficult object of inquiry. Words are to be taken in their popular and ordinary meaning. If the intention be doubtful, it is to be sought by reference to the context and to the nature of the contract and usage of the place. Parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a written contract. Parol evidence is received, however, to defeat the contract by showing fraud or illegality. Parol evidence is admissible to explain a latent ambiguity, or one which does not appear on the face of the contract.

Id. at 163.

2. Story. Joseph Story (1779-1845) was a U.S. Supreme Court Justice, Harvard Law Professor, and author of numerous treatises on American law. Story’s treatises were often cited in American contract cases, including Texas contract cases. Story was born in Marblehead, Massachusetts, in 1779, the son of a medical doctor who had fought the British troops at Concord, Lexington, and Bunker Hill.⁶⁰ Joseph Story entered Harvard College in 1795, at age 15.⁶¹ He graduated second in his class⁶² in 1789.⁶³ He read law in Marblehead under Samuel Sewall, then a congressman and later Chief Justice of Massachusetts. He later read law under Samuel Putnam in Salem.⁶⁴ He was admitted to the Massachusetts Bar in 1801.⁶⁵ Story rapidly built his reputation as a lawyer, and served in both State and Federal legislatures. He edited Chitty’s treatise on *BILLS AND NOTES* in 1809.⁶⁶ He was one of the lawyers representing John Peck in the celebrated Contract Clause case of *Fletcher v. Peck*, 10 U.S. 87 (1810), in which the U.S. Supreme Court held that the U.S. Constitution’s Contract Clause prohibited states from abrogating previously-granted land titles.⁶⁷ See Section XIII.A.5.a of *175 Years of Texas Contract Law*. In 1811, Story was President James Madison’s fourth choice to fill an opening on the U.S. Supreme Court.⁶⁸ Story accepted the appointment, was confirmed by the Senate, and at the young age of 32 became a U.S. Supreme Court Justice. Story was the first Dane Professor of Law at Harvard College, where he taught from 1828 until he died in 1845.⁶⁹ Beginning in 1832, Story wrote nine Commentaries on the law, on bailments, constitutional law, conflict of laws, equity, pleadings, agency, partnership, bills of exchange, and promissory notes.⁷⁰ Story never wrote a treatise on the general law of contracts. However, his son William W. Story did and William Story’s treatises was often cited by Texas courts on contract issues. Joseph Story died in 1845,

having served 33-1/2 years on the U. S. Supreme Court.

3. Parsons. Theophilus Parsons, Jr. was born in Newtownport, Massachusetts in 1792. His father was a celebrated jurist, Chief Justice of Massachusetts. The younger Parsons grew up in Boston, was privately schooled, and entered Harvard University in 1811, at age 14. The elder Parsons was a Fellow of Harvard College whose best friend was President of the college. The younger Parsons lived with the President during his entire time as a student. After graduating from Harvard College, Parsons went to work with Boston attorney William H. Prescott. Parsons was admitted to the bar in 1817. Parsons went to Europe for a year, then returned to Boston where he practiced law for five years, after which he moved to Taunton, where he practiced law and was elected to the Massachusetts legislature.

In 1848, Theophilus Parsons, Jr. succeeded Simon Greenleaf as the Dane Professor of Law at Harvard University.⁷¹ In 1853, Professor Parsons published a two-volume treatise on Contract Law, called *THE LAW OF CONTRACTS*, the first American Treatise devoted solely to Contract Law. Parsons dedicated the treatise to his old mentor, William H. Prescott. Parsons wrote in his Preface⁷² that his Contract Law treatise differed from previous treatises since it did not just list cases and their holdings like earlier writers had done. Instead, Professor Parsons expounded his view of the principles of Contract Law, and supported these views by notes discussing individual cases. Parsons did not write the supporting notes. Instead, Parsons employed Harvard law students to read and digest the underlying cases, and they submitted their summaries to the student librarian, Christopher Columbus Langdell (1826-1906), who wrote the explanatory notes and whom Parsons duly acknowledged in his treatise. The Harvard students read, and Langdell synthesized, some 6,000 cases, primarily from England but some from Massachusetts, New York, and a few other U.S. states. Parsons stated some general principles of contract law, and then categorized contract cases according to the types of persons or relationships involved. From 1853 to 1904, Parsons' Contract Law treatise went through a number of editions and "was the standard American textbook used by lawyers and courts for two generations."⁷³ Parsons taught at Harvard College until the 1869-70 school year, when he retired. Parsons died in 1882. Professor Parsons' *TREATISE ON THE LAW OF CONTRACTS* was cited numerous times by Texas courts.

a. The Structure of the Treatise. Parson's treatise initially consisted of two volumes. Volume I dealt with "the law of contracts considered in reference to the obligation assumed by the parties."

Volume I consisted of a Preliminary Chapter and more chapters. Preliminary Chapter covered the extent and scope of contracts, the definition of contracts, and the classification of contracts. Book I dealt with: parties to a contract, including classification of parties, joint parties, agents; factors and brokers, servants, attorneys, trustees, executors and administrators, guardians, corporations, joint-stock companies, partnerships, new parties by novation, indorsement, infants, contracts of married women, bankrupts and insolvents, persons of insufficient mind to contract, aliens, slaves, and outlaws, persons attainted, and persons excommunicated. Book II dealt with: consideration and assent of parties. Book III dealt with the subject-matter of contracts, including: purchase and sale of real property, hiring of real property, sale of personal property, warranty, stoppage in transitu, hiring of chattels, guaranty or suretyship, hiring of persons, contracts for service generally, and bailment.

Volume II dealt with the operation of law upon contracts, including: the construction and interpretation of contracts, the law of the place, defences, and finally estoppels.

b. Definition of Contracts; Categories of Contracts. In his Preliminary Chapter, Parsons described the extent and scope of the Law of Contracts. One could say that here Parsons expressed his philosophy of society, and the goals of Contract Law and the means by which it attempts to achieve justice. Parsons wrote:

The Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of all human society.

In Section II, Parsons defined a contract as “an agreement between two or more parties, for the doing or not doing of some specified thing.” In support, Parsons cited *Sturges v. Crowninshield*, 17 U.S. 4 Wheat. 122 (1819), and 4 Blackstone’s Comm. 446. Parsons noted that his definition does not mention “the Consideration” as an element. Parsons explained that he does not recognize “the Consideration” as, of itself, an essential part of a contract. But because “it is made so by some important and very influential rules,” he treated it as “one of the elements of a legal contract.” *Id.* at 7.

In Section III, classification of contracts, Parsons said that the “most general division of contracts” is “contracts by specialty and simple contracts.” *Id.* at 7. Contracts by specialty are reduced to writing and attached by seal, or are “contracts of record.” Parsons stated that his Treatise focuses primarily, but not exclusively, on simple contracts.

According to Parsons, a contract that is neither under seal nor a contract of record is called a simple contract. Whether a simple contract is written or spoken, the contract is a parol contract. The Statute of Frauds requires that certain contracts be proved by a writing, but otherwise simple contracts are the same, whether oral or in writing.

c. Express and Implied Contracts. Parsons divided contracts into express contracts and implied contracts. In express contracts, the terms stated by the parties in writing or verbally. Implied contracts must have their terms gathered wholly or in part from acts of the parties. So the distinction between express and implied contracts is based on how the parties expressed their agreement, and how those terms are proved. Parsons noted some confusion from Blackstone’s use of the term “implied contracts,” to mean obligations imposed by law, regardless of the intentions of the parties. Parsons said that these must be distinguished from contracts implied from the acts of the parties. Because the only similarity between express contracts and contracts imposed by law is the fact that the remedies are similar, Parsons preferred to call contracts imposed by law “quasi-contracts,” rather than implied contracts. Parson identifies the essential elements of a contract to be: (i) parties, (ii) consideration, (iii) assent of the parties, and (iv) the subject matter of the contract.

d. Consideration. Parsons said that “a promise for which there is no consideration cannot be enforced at law.”⁷⁴ Parsons discredited the claim that the requirement of consideration was inherited from Roman law. He noted that contracts under seal are enforceable without consideration, it is said

because the seal implies a consideration. However, Parsons saw the act of sealing a contract to be a deliberate and solemn act, implying “caution and fullness of assent.”⁷⁵ The distinction of a sealed contract “rests now, perhaps, more on the difficulty of disturbing a rule established by long use and of very extended operation.” While some cases hold that consideration expressed in a written agreement cannot be contradicted with other evidence, other cases hold that the promisor can always prove other and additional consideration not expressed in the contract. Parsons said that consideration can be a benefit to the promisor or detriment to the promisee.

4. Langdell. Christopher Columbus Langdell was born to a farm family in New Boston, New Hampshire, in 1826. He grew up in humble circumstances. With financial assistance from his sister and a scholarship, Langdell entered Phillips Exeter Academy in 1845, then in 1848 he entered the sophomore class of Harvard College. Langdell dropped out of college in his third semester due to lack of funds. Langdell worked in a New Hampshire law office, then entered Harvard Law School, where he worked as a student librarian and assisted Professor Parsons in composing the latter’s 1853 treatise on *THE LAW OF CONTRACTS*. While in school, Langdell became friends with another student at Harvard, William Eliot. In 1854, Langdell was awarded an honorary B.A. degree from Harvard College, effective 1851. Beginning in 1854, Langdell practiced law with success in New York City, where he was valued for providing extensive written briefs for other lawyers.⁷⁶ On January 6, 1870, Langdell was selected by his old friend William Eliot, now President of Harvard University, to replace Professor Theophilus Parsons, Jr. as Dane Professor of Law at Harvard Law School. On September 27, 1870, Langdell became the first Dean of Harvard Law School. He held that position until 1895, when he retired as Dean. In 1900, Langdell became Dane Professor of Law Emeritus until he died in 1906.⁷⁷

President Eliot’s selection of Langdell was a surprise to the Harvard Law School faculty and alumni, as Langdell had few ties to Harvard during his sixteen years of practicing law in New York City. However, hiring Langdell was one of many steps taken by President Eliot that--to use Oliver Wendell Holmes, Jr.’s words--“turned the whole University over like a flapjack.”⁷⁸ Dean Langdell described Harvard Law School before his arrival:

In respect to instruction there was no division of the school into classes, but, with a single exception, all the instruction given was intended for the whole school. There never had been any attempt by means of legislation to raise the standard of education at the school, or to discriminate between the capable and the incapable, the diligent and the idle. It had always been deemed a prime object to attract students to the school, and with that view, as little as possible was required of them. Students were admitted without any evidence of academic acquirements, and they were sent out from it, with a degree, without any evidence of legal acquirements. The degree of bachelor of laws was conferred solely upon evidence that the student had been nominally a member of the school for a certain length of time, and had paid tuition fees--the longest time being one and a-half years.⁷⁹

President Eliot worked with Dean Langdell to radically reform the operation of the law school. Before Langdell, entrance to Harvard Law School was based on family ties or social connections.⁸⁰ Langdell implemented merits-based criteria for the selection of law students. He required an undergraduate degree as a condition to admission to Harvard Law School, or that an applicant

without a college degree pass an admission test that demonstrated the applicant's ability to translate Latin (Virgil, Caesar, or Cicero) or French, plus familiarity with Blackstone's COMMENTARIES.⁸¹ Langdell instituted a three-year, sequenced curriculum of study, and progression required students to pass a written examination based on complex hypothetical problems.⁸² Langdell upgraded the law school library from a repository of text books to a facility for legal research of published appellate opinions. And he formed a national alumni association.⁸³ Langdell who valued intellect more than experience, also introduced a policy of hiring recent law school honor graduates to teach at the law school.⁸⁴ One such hire was James Barr Ames, who succeeded Langdell as Dean of Harvard Law School.

Although America had experimented periodically with a few private law schools, and several colleges had established undergraduate professorships in law, Harvard University founded the first law school in America in 1817, followed by Yale in the early 1840s. Baylor University in Texas offered a 2-year law curriculum from 1857 to 1872. With a small number of law schools, there were few law school graduates in America through the mid-1800s. Most lawyers gained their knowledge of law and law practice by apprenticing to a practicing lawyer. Others learned the law through self-study and learned how to practice law on their own after getting a law license. In the law classroom, learning was based on reading a textbook and listening to the professor lecture, and skill in advocacy was developed by role play in weekly moot court presentations. In the spring of 1870, when Langdell took over Theophilus Parsons' Dane Professorship of Law, he implemented a new teaching paradigm (since labeled "the Socratic method"), that moved away from professorial lectures based on treatises and moved toward students' studying selected appellate court opinions outside of class, then discussing them in class in dialogue with the law professor. Professor Langdell called upon his students to recite in class the facts and holdings of the cases, and had class members discuss the principles underlying the court's decision.⁸⁵ To facilitate this case study approach, Langdell prepared a case book of contract cases (the first case book ever), which he compiled in a few months ending in October 1870.⁸⁶ Langdell's case book was a novelty. Prior to Langdell, American authors of legal treatises on--for example--Contract Law used the "manual method," which organized discussions of the law based on particular factual components of situations, such as contracts with innkeepers, as distinguished from contracts with "drunkards, spend thrifts, seamen, aliens, slaves, infants, married women, outlaws," each of which was differentiated from the others.⁸⁷ Langdell envisioned an ordered intellectual framework for the law, similar to those promulgated by natural philosophers like Johannes Kepler (the laws of planetary motion) and Isaac Newton (the laws of motion and gravitational force; the laws of optics), or the biologist Charles Darwin (incremental evolution based on the process of natural selection). Langdell's preface to the first edition of his case book reflects his intent:

Law, considered as a science, consists of certain principles and doctrines ... [T]he number of fundamental legal doctrines is much less than is commonly supposed ... It seems to me, therefore, to be possible to take a branch of the law such as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.⁸⁸

Langdell's case book begins with a case and ends with a case, with no commentary in between to

guide the student. Langdell's approach to teaching forced law students to use inductive reasoning and analogical reasoning to discern the legal principles underlying the cases he had selected for them to read. The students were assisted in this process through teacher-student dialogue in class, and student-to-student discussion outside of class. Although the case book method was disliked by most of Langdell's early students, and was initially controversial both inside and outside of Harvard Law School, the case book method eventually supplanted the lecture-based teaching paradigm, and is universally reflected in present-day first year law classes that proceed based on case books and teacher-student dialogue. Langdell initially offered his students no direction other than his personal guidance in the classroom. However, ten years into the process Langdell produced an outline of Contract Law principles to help his students discern the principles Langdell felt underlay the appellate decisions included in his casebook. This outline was published as part of the second edition of his case book, and was published separately in 1880 under the name SUMMARY OF THE LAW OF CONTRACTS.⁸⁹ Samuel Williston, a student and later a Harvard Law School professor during Langdell's tenure, wrote in his memoirs that Langdell's failing eyesight forced him to revert to lecturing in the classroom, and Williston credits the Law School's next dean, James Barr Ames, as developing the case method of study into the case method of teaching.⁹⁰ Although it is seldom mentioned, it should be remembered that Langdell taught subjects other than Contract Law, and the greater bulk of his case books and summary writing was in other areas of the law. The 250-page SUMMARY OF THE LAW OF CONTRACTS was intended by Langdell to be used as an aid for teaching law students but, because it contained insights considered important by other writers, this Summary came to be viewed as an exposition of Langdell's theory of Contract Law. Langdell could have fleshed out his Summary, augmented with more case citations those included in his case book, and produced a grand treatise on Contract Law, but this was not his purpose. His desire was to create an environment where students could study cases and discuss underlying principles with learned professors, and this approach planted seeds that led to a rich harvest.

Although Langdell's written work on Contract Law consisted only of gathering and republishing selected cases, preparing a study outline of the principles underlying those cases, and writing several law review articles, his idea that unifying legal principles explained court decisions has become the epitome of the approach to law called "formalism." Although formalism has been in ill repute in academia for more than a century, formalism has always been and probably will continue to be an unavoidable component of the law applied by the courts where the outcome is determined by constitutions, statutes, and prior case law. Many of the appellate decisions in contract cases, to the present day, still reflect a formalistic approach to Contract Law doctrine. The American Law Institute's Restatements of the Law are examples of formalism, and nothing could be more formalistic than the codification of Contract Law principles in uniform laws like the Uniform Commercial Code.

Oliver Wendell Holmes, Jr. and later writers criticized or even vilified Langdell. Holmes called Langdell "the greatest living legal theologian,"⁹¹ while Duke Law School Professor Grant Gilmore called Langdell "an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius."⁹² A more careful analysis of first hand materials suggests that Langdell has been unfairly maligned. See various articles on Langdell written by Bruce A. Kimball.

a. Langdell's First Case Book. Langdell's original case book was titled *SELECTION OF CASES IN THE LAW OF CONTRACT* (1871). The case book was a practical solution to a practical problem: the law library at Harvard Law School was a single room with a limited number of case reports, which could not be read simultaneously by a group of students.⁹³ The case book allowed each student to have his own copy of the cases to be studied and discussed. Langdell assembled it for his first contracts class. The second edition was published in 1879, with a summary of underlying principles included in an appendix. The case book contained the full text of appellate court opinions, without comment. The case book was divided into three chapters, "Mutual Consent," "Consideration," and "Conditional Contracts."

b. Langdell's Summary of the Law of Contracts. The second edition of Langdell's case book, published in 1879, included an appendix that set out a summary of the Contract Law principles raised by the cases in the case book. This summary was like a modern-day hornbook or "Gilbert's Outline" of the law, reflecting that Langdell's students, like students of our generation, notwithstanding the benefits to be derived from Socratic dialogue in class, sometimes needs someone to just simply tell them what the law is. According to Langdell, demand for the SUMMARY without the related cases caused the publishers to want to offer the SUMMARY as a separate volume, which they did under the title *A SUMMARY OF THE LAW OF CONTRACTS* (2d ed. 1880). This demand reflects the fact that not only law students, but sometimes also lawyers and judges, want somebody to just tell them what the law is. Langdell's SUMMARY summarized only the principles exemplified by the cases in Langdell's case book, not the Law of Contracts generally.⁹⁴ In the preface to the second edition, Langdell observed that the work was on certain subjects more detailed than any treatise, yet not comprehensive in that only subjects raised in the cases in the case book were covered.⁹⁵ He described the book as "only a fragment."⁹⁶

(1) Structure of the SUMMARY. In the preface, Langdell described his comments as "a concise statement and exposition of the doctrines involved," but that description hardly captures the sense, from reading the book, of overpowering logic. The exactitude with which Langdell wrote, and the forcefulness of his reasoning (he even worked through an Aristotelian-style syllogism in one example), belie Grant Gilmore's slur that Langdell was an essentially stupid man. In fact, Oliver Wendell Holmes, Jr. praised the appendix to the casebook that was the forerunner of the SUMMARY when it was first published.

Langdell explained that few authorities are cited in the SUMMARY, "it being no part of the writer's object to make a collection of authorities upon the subjects discussed."⁹⁷ The SUMMARY was divided into sixteen titles, arranged in alphabetical order: Acceptance of Offer, Bidding at Auction, Concurrent Conditions, Conditions, Conditions Precedent, Conditions Subsequent, Consideration, Debt, Demand, Dependent and Independent Covenants and Promises, Mutual Consent, Notice, Performance of Conditions, Revocation of Offer, and finally Unilateral and Bilateral Contracts.

(2) Offer and Acceptance. In his discussion of acceptance of an offer, Langdell says that in "popular apprehension" "a promise is the act of the promisor alone," but in fact an act of the promisee is required. Langdell, SUMMARY ¶ 1 at 1. The promisor makes only an offer; it is the acceptance by the promisee that converts the offer into a promise. *Id.* ¶ 1 at 1. In support, Langdell cites two European writers, Grotius and Poithier, and also cites a contrary view contained in case

included in his case book. *Id.* ¶ 1 at 1. Langdell says that an offer must be communicated to be effective, but that an acceptance “requires, it seems, a mental act only, and need not be communicated to the offeror to be effective.” *Id.* ¶ 2 at 1. Langdell supports this assertion by citing a case on acceptance completing a gift. *Id.* ¶ 2 at 1. But before an acceptance can convert an offer to a promise, the promisee must give or perform the consideration. *Id.* ¶ 2 at 2. Thus, while acceptance and providing consideration are distinct, the absence of either is “fatal to the promise.” *Id.* ¶ 2 at 2. Acceptance does not imply the performance of consideration but providing consideration does imply acceptance, so it may be said that the offer is accepted by giving or performing the consideration. *Id.* ¶ 2 at 2. Langdell goes on to say that since “the performance of the consideration is what converts an offer into a binding promise, it follows that the promise is made in legal intentment at the moment when the performance of the consideration is completed,” and that the offer can be revoked any time prior to completion of performance of the consideration, thus depriving the offeree “of any compensation for what he has done.” *Id.* ¶ 4 at 3. Langdell cited a case in his case book, which in turn cited a contrary case, but Langdell says “it must be deemed erroneous.” *Id.* ¶ 4 at 3, n.3. Langdell pointed out that while this rule, that providing consideration must be complete before the promise is binding on the promisor, imposes a hardship on the promisee, the lack of a binding promise can cause a hardship to the promisor, as well, if the promisee abandons performance before the task is complete. *Id.* To avoid this, the parties can create a binding contract “by means of mutual promises,” “and if they neglect this precaution, any hardship that they may suffer should be laid at their own doors.” *Id.* As to the view that the offer is accepted “the moment the performance of the consideration begins,” Langdell says that “[s]uch a view....would be fanciful and unsound.” *Id.* It would also be unjust, because the offeree is protected while the offeror is not. *Id.* at 4-5.

(3) Unilateral vs. Bilateral Contracts. Langdell says that “in a unilateral contract the offer becomes a contract in consequence of what the offeree *does*, in a bilateral contract in consequence of what he *says*.” SUMMARY ¶ 12, at 13. Langdell says that an offer becomes binding when the offeree provides consideration. *Id.* at 3. In a bilateral contract, the consideration is a counter-promise by the offeree. The counter-promise is not binding until it is received by the original offeror. *Id.* at 12-13. It is for this reason that Langdell rejected the “mailbox rule.” *Id.* at 15, 18-20. This also gives rise to the idea that neither party is bound until both parties are bound, which occurs at the same moment of time. *Id.* at 13.

5. Holmes. Oliver Wendell Holmes, Jr. was born in Boston in 1841. His father was a physician who taught medicine at Harvard College and became nationally known for his essays, novels and poetry. Holmes attended Harvard College from which he graduated in 1861. The Civil War having started, Holmes volunteered for the Massachusetts militia. He fought for a year-and-a-half in the Twentieth Massachusetts Volunteer Infantry, and was wounded three times, once at the Battle of Ball’s Bluff, then at the terrible Battle of Antietam, and finally during the Union attack on Mayre’s Heights in the Battle of Fredericksburg.⁹⁸ Holmes entered Harvard Law School in 1864, passed an oral bar exam, and was admitted to the Massachusetts Bar in 1866. Holmes practiced law in Boston for fourteen years. In 1870, Holmes was appointed co-editor of the American Law Review, at the time one of America’s only publications of scholarly legal articles.⁹⁹ From 1873 to 1882, Holmes practiced law in Boston.¹⁰⁰ In 1881, at age 39, Holmes published a book, THE COMMON LAW, based on articles he had written for the American Law Review and a series of lectures he had given at the

Lowell Institute, augmented by subsequent study. Soon afterward Holmes took a job teaching at Harvard Law School, but resigned in 1883, after one semester of teaching, to accept an appointment to the Supreme Court of Massachusetts. Holmes edited the twelfth edition of Kent's COMMENTARIES.¹⁰¹ On December 2, 1902, President Theodore Roosevelt nominated Holmes to the U.S. Supreme Court. Holmes was confirmed by the U.S. Senate two days later. Holmes' meticulous study of the historical development of the Common Law, coupled with his lucid analysis of legal principles, and his gift for coining memorable phrases, and his output of sometimes memorable appellate opinions during a 33-year career as a jurist, have contributed to his becoming America's most celebrated jurist and legal theorist.

For many decades, Holmes exchanged correspondence with the English legal theorist Sir Frederick Pollock. Holmes wrote in one letter to Pollock that "[y]ou always have regarded my notion of contract as a pardonable eccentricity."¹⁰² Holmes's views on Contract Law were originally expressed in three essays carried forward in his book, THE COMMON LAW, and later in law review articles and various court opinions. Despite the fact that he never wrote a treatise on Contract Law, Holmes's views on Contract Law were extremely influential and they continue to be studied in articles and books to this day.

Holmes is remembered for a number of ideas, including the idea that the Common Law was not a brooding omnipresence in the sky, but instead reflected the practical necessities of the times. Holmes sought to avoid natural law and even morality as the basis for law, as reflected in his statement in a letter to his friend Pollock that his (Holmes's) definition of law was "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."¹⁰³ Holmes wrote that the desire to achieve sensible outcomes was in tension with continued adherence to inherited legal principles.¹⁰⁴ Holmes believed that liability in tort should be measured by an objective "reasonable man" standard, and so too for contract formation and contract interpretation,¹⁰⁵ which he wrote should be determined objectively, not based on the actual thinking of the parties.¹⁰⁶ Holmes also wrote that a contract involves a promise by one party and consideration provided by the other, each a reciprocal inducement of the other.¹⁰⁷ Holmes also suggested that a contractual obligation should be viewed as an option for the promisor to either perform or pay damages.¹⁰⁸ Holmes thus moved away from moral judgments and toward a standard of behavior to be derived from what the community would expect and accept, something he called "the felt necessities of the time." Holmes dissented in *Lochner v. New York*, 198 U.S. 45 (1905), which invalidated a New York statute setting a maximum 40-hour work week and 10-hour work day for bakery employees, on the ground that the statute interfered with the liberty of employers and employees to contract as they wish regarding employment, protected by the Fourteenth Amendment. Holmes' short but memorable Dissenting Opinion said that it is not the Supreme Court's job to evaluate the wisdom of legislation. Adverting to his favored "reasonable man" standard, Holmes wrote: "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id.* at 75. Many people have analyzed the philosophical perspective of Holmes's writings, some sourcing his approach in positivism¹⁰⁹ and others in pragmatism.¹¹⁰ Holmes's perspective was rooted in his study of history, but history stripped of its association with religion, morality, and permanent truths. Holmes saw that legal doctrines arose as

a product of their circumstances, then evolved over time, eventually became outmoded, and needed to be changed or replaced. His approach to the Common Law was to assert that no principle was absolute, and that legal precedents should be adapted or ignored when necessary. His analytical tool when evaluating the Common Law was the “reasonable man” construct, which he applied to torts and contracts, and which changed as prevailing sentiments changed. When it came to judicial review of the constitutionality of legislation, as evidenced in his dissent in *Lochner*, Holmes would let the legislatures do what they wanted subject only to restraint based on established, fundamental principles (which he did not source to the U.S. Constitution). Holmes did not readily credit ideas he took from others, making it difficult to identify the influences on his thinking. Holmes expressed his disagreement with Langdell’s belief that certain immutable principles underlay the law, and while young Holmes was complimentary about Langdell’s teaching innovations and new insights on Contract Law principles, Holmes also disparaged Langdell as a theorist, saying that Langdell was “the world’s greatest living legal theologian.” Holmes wrote:

It is something to show that the consistency of a system requires a particular result, but it is not all. The life of law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

In the 1920s and 1930s Holmes became the patron saint of Legal Realists. See Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 345 (1984). Later perceptions of Holmes shifted from the view that he was a modernist to the view that he was a conservative. Unarguably, however, Holmes was an independent thinker whose example encouraged others to question the continuing validity of legal doctrine in changed circumstances.

In their correspondence, Holmes and Pollock sometimes discussed Contract Law. Holmes described his view of a contract as “a conditional liability to pay damages, avoidable by performance.”¹¹¹ This reflected Holmes’ desire to remove all sense of morality from a breach of contract. Pollock wrote to Holmes about these views:

If the promise in a contract were held to be in the alternative - perform or pay damages - then (1) there could be no decrees for specific performance; (2) there would be no reason for allowing any implied exception of frustration or the like; (3) (and chiefly) it would not answer reasonable expectations of promisees. Those are my reasons: I don’t see where moral phraseology comes in. No doubt it might be the law in some other planet.¹¹²

Holmes wrote several notable court opinions on Contract Law principles. In *Goode v. Riley*, 153 Mass. 585, 586, 28 N.E. 228 (1891), one party contended that a deed included too much land as a result of mutual mistake. Taking the opportunity to expound on his objective standard of contract interpretation, Justice Holmes (a Bostonian by ancestry and birth) wrote: “[Y]ou cannot prove a mere private convention between the two parties and give language a different meaning from its common one It would offer too great risks if evidence were admissible to show that when they said 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the Old South Church.” *Id.* at 586, 227. But the case was not a contract interpretation case, and parol

evidence was held admissible to show that the legal description in the deed was inaccurate due to mutual mistake.

In the case of *Violette v. Rice*, 173 Mass. 82, 84, 53 N.E. 144, 144 (1899) (Holmes, J.), Justice Holmes wrote:

“[T]o give evidence requiring words to receive an abnormal meaning is to contradict. It is settled that the normal meaning of language in a written instrument no more can be changed by construction than it can be contradicted directly by an avowedly inconsistent agreement, on the strength of the talk of the parties at the time when the instrument was signed. . . . When evidence of circumstances or local or class usage is admitted, it tends to show the ordinary meaning of the language in the mouth of a normal speaker, situated as the party using the language was situated; “but to admit evidence to show the sense in which words were used by particular individuals is contrary to sound principle. . . . If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything.” [Citations omitted.]

Holmes wrote an Opinion in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903), on the determination of recoverable damages for breach of contract. See Section XIII.D.1.c of this Article. In *Towne v. Eisner*, 425 U.S. 418 (1918), Holmes wrote on the proper approach to contract interpretation. See Section VIII.J.5 of this Article.

6. Pound. Roscoe Pound was born in Lincoln, Nebraska, in 1870. He was prepared for college by his mother, herself a college graduate, and attended the University of Nebraska, where he studied botany and graduated in 1888. After a year at Harvard Law School, and without a law degree, he passed the bar examination, and was admitted to the Nebraska bar in 1890. Pound received a Ph.D. in Botany in 1889. He practiced law from 1890 to 1903. He taught at the University of Nebraska from 1903 to 1907. He became professor of law in Northwestern University in 1907, then he took a teaching position in the law school at the University of Chicago. In 1910 he became the Story professor of law at Harvard Law School and in 1913 the Carter professor of jurisprudence. Pound was the Dean of Harvard Law School from 1916 to 1936. Like Holmes, and later Lon Fuller, Pound thought not just about the content of the law—he thought about the role of law in society. Pound came to national prominence as a result of a speech he gave to the American Bar Association in 1906 attacking lawyers who unquestioningly applied outmoded legal principles to solve problems. Pound’s article on *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908), attacked the view that the law consisted of a coherent body of rules that could be applied mechanically to arrive at the right result. Pound advocated that the methods of social sciences be applied to the study of law, to develop an accurate description of how the law was created and applied. Pound’s writings gave impetus to the Realist school of legal thought that developed in the 1920s but he came into opposition with the Realists in the 1930s. Dean Pound’s dislike of formalism did not make him a Legal Realist. He was a legal philosopher with practical as well as jurisprudential concerns, more identified with including in legal analysis insights from psychology and sociology, more interested in the study of the “legal process” than the study of the law.¹¹³ Pound resigned as Dean of Harvard Law School in 1937, and became a Harvard University Professor. He died in 1964.

Pound wrote an article on *Liberty of Contract*, 18 YALE L. J. 1 (1909). It was written during the Progressive Era, when state legislatures were passing laws to rectify the worst abuses of the laboring class by business organizations, and these statutes were being nullified by state and Federal appellate courts on the ground that they unconstitutionally interfered with the worker's "liberty to contract" as they wished with employers, a right protected by the Fourteenth Amendment and so-called Substantive Due Process.¹¹⁴ Pound's criticism of the repressive nature of the court decisions of that era was forceful, even indignant. This debate was eventually put to rest when the U.S. Supreme Court changed its course in *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937), where Justice Owen Roberts sided with the Courts four liberals to uphold Washington's minimum wage law. Then President Franklin D. Roosevelt pushed through Congress the Fair Labor Standards Act of 1938 inalterably changing the labor law landscape. By the end of his life, Pound had received 200 honorary degrees, and was widely viewed as the preeminent legal thinker of his time.

7. Elliott. Byron Kosciusko Elliott, born 1835 in Ohio, moved to Indianapolis, Indiana in 1850. He was admitted to the Indiana Bar in 1858.¹¹⁵ He served as a volunteer in the Indiana militia during the Civil War.¹¹⁶ After the war he served as city attorney for Indianapolis. He eventually served as a justice on the Indiana Supreme Court from 1881 until he was defeated for re-election in 1893.¹¹⁷ After leaving the bench, Justice Elliott went into a law partnership with his son, William F. Elliott, representing a large Indiana railroad. Justice Elliott and his son authored a number of legal treatises, including texts on municipal law and railroad law. Byron Kosciusko Elliott died in 1913.¹¹⁸ That same year his son, William F. Elliott, published a six volume treatise, COMMENTARIES ON THE LAW OF CONTRACTS, "assisted by the publisher's editorial staff." Elliott's treatise on the Law of Contracts was first cited by a Texas court in *Hancock v. Haile*, 171 S.W. 1053, 1055 (Tex. Civ. App.—Fort Worth 1914, no writ), for the proposition that an insane person or minor, who contracts for necessities that are actually provided, is not bound to pay the contract amount, but is bound to pay the reasonable value of the necessities provided.¹¹⁹ Elliott's treatise was also cited in *E.H. Perry & Co. v. Langbehn*, 113 Tex. 72, 79, 252 S.W. 472, 472 (1923) (Cureton, C.J.), for the proposition that the bill of lading represents a contract between the shipper and the shipping company. Elliott's treatise was not ground-breaking, but it was comprehensive and reflects the state of the law at the time it was written.

8. Williston. Samuel Williston (1861-1963) was a law student at Harvard Law School from 1885 to 1888, where he studied Contract Law (not under Dean Langdell) and served as an editor of the initial volume of the Harvard Law Review. From 1888 to 1889, Williston clerked for U.S. Supreme Court Justice Horace Gray.¹²⁰ He joined the Harvard Law School faculty in 1890, and taught there until 1938.¹²¹ Williston served as acting dean of Harvard Law School from 1909-1910.¹²² Williston edited the eighth edition of Parson's THE LAW OF CONTRACTS (1893),¹²³ and the third American edition of Pollock's treatise on THE PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY (1906). From 1938 to 1956, Williston was a consultant for the Boston law firm of Hale & Dorr.¹²⁴ Williston co-authored with Langdell a case book of contract cases.¹²⁵ Williston's own case book, A SELECTION OF CASES ON THE LAW OF CONTRACTS, was published in 1903.¹²⁶ Williston served as the main author of the Uniform Sales Act and the Uniform Warehouse Receipts Act, both promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1906. He also authored the NCCUSL's Bills of Lading Act (1909) and Stock Transfer Act (1909). Williston authored a one-volume treatise on sales law in 1909,¹²⁷ which expanded to two volumes in 1924, and

to four volumes in 1948. In 1915, Williston published a one volume treatise on NEGOTIABLE INSTRUMENTS, for the American Institute of Banking. In 1918, he published a one volume treatise on COMMERCIAL AND BANKING LAW, also for the American Institute of Banking. In 1920, Williston published a 4-volume treatise on THE LAW OF CONTRACTS which grew in size and became and remains preeminent in American Contract Law. The first four volumes were revised in 1936 and the fifth in 1937. Williston drafted the NCCUSL's Uniform Interparty Agreement Act (1925), the Written Obligations Act (1925), and the Joint Obligations Act (1925).¹²⁸ Williston served as the Reporter for the American Law Institute's RESTATEMENT (FIRST) OF THE LAW OF CONTRACTS (1932). See Section XII.D of *170 Years of Texas Contract Law* (2015 ed.).¹²⁹ Williston also authored the NCCUSL's Vendor and Purchaser Risk Act (1935). Williston, who apparently struggled with severe bouts of depression,¹³⁰ lived to the age of 101.¹³¹ Williston embraced formalism in his teachings and writings, and much of the formalism evident in Contract Law today can be traced to Williston's TREATISE ON CONTRACTS (1920) and his influence on the RESTATEMENT OF THE LAW OF CONTRACTS (1932).

It is worth noting that, in his 1920 treatise, Williston frequently cited Langdell's views, sometimes agreeing and sometimes disagreeing with Langdell's position, either way reflecting that Langdell's forty-year-old SUMMARY was much on his mind.

In his writings, Williston elevated predictability to a primary goal of Contract Law. He wrote: "A system of law cannot be regarded as successful unless rights and duties can, in a great majority of instances, be foretold without litigation."¹³² Like Holmes, Williston adopted the "objective" view of contracts, which guided his approach to the formation and the interpretation of contracts.

Williston's eighth edition of Parsons' treatise on THE LAW OF CONTRACTS (1893) was cited by Texas courts. The first Texas appellate court citation to Williston's 1920 treatise on Contract Law was *Osborn v. Texas Pac. Coal & Oil Co.*, 229 S.W. 359, 362 (Tex. Civ. App.—Fort Worth 1921, no writ). The Court cited to 3 Williston on Contracts, § 1525, in support of the rule that the need to prove injury as a prerequisite to recovering damages for fraud does not apply to a claim to rescind a contract or deed for fraud in the inducement.

The most recent Texas Supreme Court case to cite to Williston's Treatise on Contract Law is *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012) (Lehrmann, J.), in which Justice Lehrmann cited the treatise for the rule that an illusory promise cannot form the basis of a contractual obligation.

9. Cardozo. Benjamin Cardozo was born 1870, in New York City. Cardozo served on the New York Court of Appeals and eventually the U.S. Supreme Court. Cardozo wrote THE NATURE OF THE JUDICIAL PROCESS, published in 1921, containing reflections on law and the legal process. Cardozo did not write a book, or part of a Restatement or uniform law, or even an important law review article on Contract Law. He did, however, write Opinions in several important tort and contract cases, that are still out in case books and are still written about in law review articles.¹³³ *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916), ended privity of contract as a source of duty for defective products that cause injury, ruling that manufacturers of products could be held liable in tort for injuries to consumers. In *DeCicco v. Schweizer*, 117 N.E. 807 (1917), Cardozo approached the issue

of third party beneficiary law in a contract for marriage case. Cardozo's Opinion in *Wood v. Lucy, Lady Duff-Grodon*, 118 N.E. 214 (N.Y. 1917), asserted that an *implied* promise to do something constituted consideration sufficient to support a contract. In *Jacob & Youngs v. Kent*, 230 N.Y. 239 (1921), Cardozo established that substantial performance of a contract negates the other party's right to terminate, leaving money damages as the sole remedy for the incomplete performance. In *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), a Caballero bean weighing dispute, Cardozo recognized duties imposed by law but growing out of contract. In *Allegheny College v. Nat'l Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927), Cardozo held the estate of a benefactor liable for a donative promise (i.e., a pledge) based on consideration in the form of creation of a scholarship. However, Cardozo also discussed reliance by the donee, as grounds to enforce the promise, but the decision did not rest on detrimental reliance.

10. Corbin. Arthur Linton Corbin was born on a family farm in Linn County, Kansas,¹³⁴ in 1874. Corbin's mother taught high school, and his sister obtained a Ph.D. from Yale University, then returned to Kansas to teach. Corbin graduated from high school in Lawrence, Kansas, and graduated from the University of Kansas, Phi Beta Kappa, in 1894. Corbin taught high school in Kansas at \$50 per month,¹³⁵ then entered Yale Law School 1897. He obtained an L.L.B. from Yale 1899, graduating magna cum laude.¹³⁶ As a law student Corbin taught as a substitute teacher in New Haven public schools, played varsity baseball, did some typewriting for pay,¹³⁷ and received two academic prizes.¹³⁸ After graduating from law school, Corbin moved to Colorado, took the bar exam in Denver, and practiced law and served as assistant prosecutor for four years in the "mining camp" of Cripple Creek, Colorado. Corbin then accepted a job as an instructor in contracts and mining and irrigation law at Yale Law School, where he taught from 1903 to 1943. Corbin became a full professor in 1909. As a Yale law student, Corbin was disenchanted with professors who lectured on black letter law with little discussion of the facts and circumstances of the different cases.¹³⁹ Corbin followed the case book method pioneered by C. C. Langdell at Harvard Law School, using Clark's case book on contracts, which was based on Sir William Anson's treatise on Contracts.¹⁴⁰ In 1919, and again in 1924, and 1930, Corbin wrote the American notes that were added to Anson's PRINCIPLES OF THE LAW OF CONTRACT.¹⁴¹ In 1921, Corbin published his own case book, CASES ON THE LAW OF CONTRACTS: SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS.¹⁴² Although Corbin adopted Langdell's case book method, Corbin did not subscribe to Langdell's view that law was a science founded on fixed principles. Corbin acknowledged that he studied John Stuart Mill's book, INDUCTIVE LOGIC,¹⁴³ and he took to heart Mill's view that inductive reasoning did not establish its conclusions with certainty. In reviewing thousands of appellate decisions in contract cases, Corbin became convinced of two "truths": that contract decisions are not uniform and instead vary with the facts and surrounding circumstances; and that Contract Law principles change as society changes. As a consequence, Corbin considered the principles of Contract Law, which all acknowledge that he mastered, to be no more than working hypotheses. Corbin's thinking is reflected in twelve letters he wrote at different periods of his life, unearthed by Professor Perillo.¹⁴⁴ Corbin wrote: "[There] will always be two large fields of legal uncertainty--the field of the obsolete and dying, and the field of the new born and growing." "I have read all the contract cases for the last 12 years; and I know that 'certainty' does not exist and the illusion perpetrates injustice."

During the 1930's, while Corbin was teaching at Yale Law School, Yale was the hot bed of the Realist School of legal theory. They claimed Corbin as a devotee, but he did not claim them. Corbin

did not see himself as a member of any school, other than Yale Law School.¹⁴⁵ He had his own perspective, developed no doubt on the foundation of his practical, non-legal experience as a child and student and teacher of the Midwest. Corbin has been widely credited with the inclusion of Section 90 of the RESTATEMENT OF THE LAW OF CONTRACTS (1932), on promissory estoppel, but Corbin's correspondence reflects that Williston crafted the section on his own. Although "differences arose, in both theory and expression," between Corbin and Williston, Corbin nonetheless considered Williston to be his teacher on Contract Law, and Corbin collaborated closely with Williston in preparing the RESTATEMENT OF THE LAW OF CONTRACTS (1932), for which Corbin had the primary responsibility for drafting the chapters on remedies.¹⁴⁶ Corbin greatly respected Samuel Williston.¹⁴⁷ Corbin had a close relationship with Legal Realist Karl Llewellyn, who called him "Dad."¹⁴⁸ Corbin's personal papers appeared to have been destroyed in a fire in 1959, so much of the "back story" of the way his thoughts developed has been lost. We do have some correspondence from the personal papers of others, and Corbin left a record of law review articles, a case book, and a prominent treatise, that reveal the depth of his thinking on various points of Contract Law. Corbin remained active in writing about the law of contracts up to the time his eyesight failed. Corbin died in 1967 at age 93.

Although Corbin published a case book in 1921, Corbin is most noted for his treatise, *CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW* (1950),¹⁴⁹ which Professor Grant Gilmore called "the greatest lawbook ever written."¹⁵⁰ It was first published in eight volumes, and later expanded to fifteen. Corbin's treatise has endured, garnering more than 10,000 citations nationwide on Westlaw, and being cited recently in Texas Supreme Court Justice Paul Green's Opinion in *Tawes v. Barnes*, 340 S.W.3d 419, 430 (Tex. 2011) (Green, J.). Professor Corbin was highly regarded by his students and by his contemporaries, and Corbin contributed significantly to Yale Law School's rise to prominence.

A sense of Corbin's view of the law can be taken from this passage that he wrote:

[T]he law does not consist of a series of unchangeable rules or principles engraved upon an indestructible brass plate or, like the code of Hammurabi, upon a stone column. Every system of justice and of right is of human development, and the necessary corollary is that no known system is eternal. In the long history of the law can be observed the birth and death of legal principles. They move first with the uncertain steps of childhood, then enjoy a season of confident maturity, and finally pass tottering to the grave. . . . The law is merely a part of our changing civilization. The history of law is the history of . . . society. Legal principles represent the prevailing mores of the time, and with the mores they must necessarily be born, survive for the appointed season, and perish.

Arthur L. Corbin, *ANSON ON CONTRACTS* v-vi (3d Am. ed. 1919). Corbin drew inspiration from the writing and opinions of Benjamin Cardozo.¹⁵¹

Corbin had strongly-stated views. Corbin championed the view that consideration was not always required to create an enforceable contract, and that reliance often served as a substitute. In his article *Offer and Acceptance and Some of the Resulting Legal Remedies*, 26 YALE L. J. 204 (1917), Corbin argued that the state's enforcement of contracts involved a choice of how, when, and for whom the

weight of the state would be brought to bear.¹⁵² Corbin disliked the Parol Evidence Rule, and wrote two weighty law review article on its deficiencies: Corbin, *The Parol Evidence Rule*, 53 YALE L. J. 603 (1944), and Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. Q. 161 (1965).

Professor Corbin made a comprehensive statement of his view on the fundamental nature of contracts and the creation of contractual obligations, in his law review article, Corbin, *Offer and Acceptance and Some of the Resulting Legal Remedies*, 26 YALE L. J. 169 (1917) [“Corbin, *Offer and Acceptance*”]. The article offers easy access to Corbin’s ideas on contract fundamentals. It is interesting to look at the authorities Corbin cites in this article. His opening citation is to Yale Law School Professor W. N. Hohfeld’s article on *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Corbin, *Offer and Acceptance*, at p. 169 n. 1. Later on, Corbin again cites Hohfeld, “to whom the writer acknowledges great indebtedness.” *Id.* at p. 181, n. 17. Among treatise writers, Corbin cites Parsons, Langdell’s case book, Pollock (3d edition, Wald), Langdell’s SUMMARY OF THE LAW OF CONTRACTS, Anson (2d Am. ed., Huffcut), judicial opinions by Holmes, as well as Contract Law treatises by New York University School of law Professor Clarence D. Ashley, New York lawyer Joel Prentiss Bishop, and Philadelphia lawyer Francis Wharton. Corbin also cites two writings on equity: James Barr Ames’ CASES ON EQUITY, and a Columbia Law Review article authored by fellow Yale Law School professor Walter Wheeler Cook. Corbin cites the German Civil Code seven times, the Japanese Civil Code four times, the Swiss Code twice, and the Georgia Civil Code once.

Corbin states his view that the way to determine the legal rules of society is “only by induction from judgments and decrees and pronouncements of the past.” Corbin, *Offer and Acceptance*, at 170. He notes that “no legal relation is deemed contractual in the absence of certain voluntary acts on the part of two contracting parties.” *Id.* Corbin finds offer and acceptance as a “convenient” way to analyze such acts. *Id.* at 171. Corbin distinguishes barter from contract. In barter, there is an immediate exchange of items that “creates new physical relations” and “new legal relations.” *Id.* at 171. The new relations arise from voluntary acts, but they are relations to property and not *in personam* relations. For Corbin, these must be an *in personam* relation in order for it to be a contractual relation. *Id.* at 172. If person A sells apples to person B exchange for B’s promise to pay money to A later, a new physical relation exists between B and the apples, but A’s relation to the promised money is not a physical relation. A has a claim against B that he has against no one else; B has a duty that rests upon no other person. Because this personal claim/duty arose by mutual consent, the duty is contractual. *Id.* at 172-73. Where the personal duty runs from one party to the other, with no corresponding duty running back, the contract is “unilateral.” Where the duties run both ways, the contract is “bilateral.” *Id.* at 173. Corbin says that the statement that mutuality of obligation is required is “a loose and inaccurate statement” that has no application to unilateral contracts. *Id.* at 173. With a unilateral contract, one party has a right and the other a duty, and not vice-versa. *Id.* at 175. Corbin notes a second time that “[t]he distinction between unilateral and bilateral is not even yet very thoroughly grasped by the multitude of lawyers, a fact which leads them to repeat again and again the erroneous statement that one cannot be bound unless the other is bound.” *Id.* at 177. Corbin distinguishes express, implied and tacit contracts. *Id.* at 178. See Section VII.A.2 below. Corbin distinguishes void and voidable contracts. *Id.* at 179. Where the parties engage in acts of offer and acceptance but do not create an enforceable contract, the contract is void. The offer creates

no legal power to accept on the part of the offeree. *Id.* at 180. With a voidable contract, the offer and acceptance bring a contract into existence, but one party has the power to disaffirm or avoid the contract. Or, looked at differently, the contemplated contractual relations do not yet exist, but one party has an irrevocable power to create them. *Id.* at 180. Corbin lays out an extensive discussion of offers, and of acceptances. He concludes with a discussion of mutual assent. *Id.* at 204. He notes that “the acts of offer and acceptance must be expressions of assent.” *Id.* at 204. However, in keeping with the objective approach to contract formation, Corbin says that the parties are bound by their statements and acts and the law determines the legal effect of them. Corbin says: “Parties are bound by the reasonable meaning of what they said and not what they thought.” *Id.* at 205. Then Corbin invokes the “reasonably prudent man” standard and sets out rules for interpreting offers and acceptances. If A makes an offer to B who “reasonably understands” the offer to have one meaning and accepts the offer, then A is bound to B’s understanding. If A’s offer has only one reasonable meaning, then that meaning prevails, even if B had a misunderstanding of the offer. Because of this, Corbin replaces the idea of carrying out the intentions of the parties with the idea that the purpose of the law “is to secure the fulfilment of the promisee’s reasonable expectations as induced by the promisor’s act.” *Id.* at 205. If there is a misunderstanding and neither party was negligent, Corbin says that “there is no contract,” citing *Raffles v. Wichelhaus*, (1864) 2 H. & C. 906. Corbin, *Offer and Acceptance* at 205-06. The same occurs if both parties are equally negligent. *Id.* at 205. Corbin points out that the law is not confined to the words used in the abstract. The determination of whether and what contract was created must be seen “in the light of subsequent circumstances.” *Id.* at 206. In the last analysis, however, “the decision will depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions often being inarticulate and subconscious.” *Id.* at 206.

11. Llewellyn. Karl Llewellyn was born in Seattle, Washington, in 1893. Llewellyn entered Yale College in 1911 and remained there until 1914 when he attended the Sorbonne. In 1915 he returned to the United States and attended Yale Law School, from which he graduated in 1918.¹⁵³ In 1925 Llewellyn became a professor at Columbia Law School. Llewellyn argued that judges should become familiar with the facts of a case, so they could acquire a “situation sense” that would lead to the right result.¹⁵⁴ Llewellyn published a case book on contract law that broke with Langdell’s black letter law approach by discussing economic considerations, business practices, and other factors influencing the expectations and behaviors of commercial buyers.¹⁵⁵ Llewellyn served as Reporter for the Uniform Commercial Code (“U.C.C.”), a project that was started in 1940 and came to fruition in 1952. See Section XII.E of *175 Years of Texas Contract Law*. Llewellyn was the principal draftsman of Article 2, on sales, which contained provisions relating to the formation, interpretation, and enforcement of contracts. Professor Llewellyn influenced the U.C.C. to be more in accord with prevailing business practices, and to focus more on general standards and less on mechanical rules. Instead of merely enacting the existing body of Contract Law, the U.C.C. in many instances deviated from the Common Law of Contract that had developed for the sale of goods. Llewellyn drafted the Uniform Trust Receipts Act in 1957.

Professor Llewellyn was a leading light in the Legal Realist school of thought,¹⁵⁶ and the original 1952 version, and even the 1962 version, of the Uniform Commercial Code reflected Llewellyn’s Legal Realist view of the law. In his 1962 book entitled *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE*, Professor Llewellyn suggested that American law has moved between two poles, one

being a flexible approach to interpreting and applying the law and the other being a formalistic, rule-bound approach.¹⁵⁷ In the 1830s and 1840s, judges followed the flexible approach, but from 1885 to 1910 a formulaic approach prevailed, only to shift back to the flexible approach beginning in the 1920s and 1930s, leading to the Uniform Commercial Code of the 1950s and 1960s, which was flexible in its terms.¹⁵⁸ Llewellyn was an adherent of the flexible approach to law, and this characterized his approach to drafting the Uniform Commercial Code. See Section XII.E of *170 Years of Texas Contract Law*.

12. Fuller. Lon Luvois Fuller was born in Hereford, Texas in 1902.¹⁵⁹ In 1906, his family moved to California. Fuller attended the University of California at Berkeley in 1919-1920, then transferred to Stanford University from which he graduated in 1924 with a degree in economics. Fuller obtained a law degree from Stanford Law School in 1926. His first job was teaching at the University of Oregon. In 1928, Fuller moved to the University of Illinois, where he taught until 1931. He then moved to Duke University where he taught until 1939. From 1939 to 1940, Fuller was a visiting professor at Harvard Law School, where he officed next door to Professor Samuel Williston.¹⁶⁰ Fuller accepted a professorship at Harvard in 1940. During World War II, from 1942-1945, Fuller taught only two days a week and practiced law the rest of the time.¹⁶¹ In 1945, Fuller returned to teaching, but also served for the next twenty years as a labor arbitrator.¹⁶² From 1940 to 1972, Fuller was a professor at Harvard Law School. In 1947, Fuller published his own case book, BASIC CONTRACT LAW, which contained the innovation of starting with cases on remedies and not cases on contract formation.¹⁶³ In 1948, Fuller took Dean Roscoe Pound's Chair in General Jurisprudence at Harvard University. Fuller died in 1978.

Professor Fuller's article, co-authored with his student research assistant William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936), written when Fuller was 35 years old, appears 49th on Fred R. Shapiro's June 2012 list of the most-cited law review articles of all time.¹⁶⁴ The article was enormously influential in contract theory. In the article, Professor Fuller posited that there were three interests that should be protected in contract law: the expectation interest, the restitution interest, and the reliance interest. See Section XXVII.A of *175 Years of Texas Contract Law*. Fuller's other significant article on Contract Law was Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

13. Gilmore. Grant Gilmore was born in Ohio in 1910. He graduated from Yale undergraduate in 1931, and obtained a Ph.D. in French Literature from Yale in 1936, and taught French at Yale. Gilmore obtained his law degree from Yale Law School in 1942. Gilmore was a student of Corbin, and Gilmore later wrote that he "benefitted greatly from his wise counsel."¹⁶⁵ Gilmore taught at Yale Law School, then the University of Chicago School of Law, then Ohio State Law School, then Vermont Law School, then back to Yale. Gilmore was the Reporter for Article 9 of the Uniform Commercial Code (1954). In 1974, Gilmore published THE DEATH OF CONTRACT, a book of lectures he had delivered in 1970 at Ohio State University Law School, with explanations, qualifications, and documentation added. The book sold nearly 50,000 copies through twenty-two printings. In the lectures, Gilmore laid out his view that American Contract Law was not a product of the slow development of the Common Law, but instead sprang from the mind of C. C. Langdell when he created his first case book, and was carried forward by Oliver Wendell Holmes, Jr. and Samuel Williston.¹⁶⁶ Gilmore suggested that the cases chosen to be included in case books caused the

underlying theories to seem warranted, but that was the result of selecting cases that supported the author's view and omitting those that did not (i.e., sampling bias). Gilmore noted that Contract Law absorbed preexisting areas of specialty, like sales and instruments. Gilmore saw a trend away from the objective approach typified by the RESTATEMENT OF THE LAW CONTRACTS (1932) to a more generous approach to liability reflected in the RESTATEMENT (SECOND) OF CONTRACTS (1981). Gilmore suggested that Contract Law was in a trend away from Holmes's bargain theory toward a reliance theory, and would eventually be reabsorbed into tort law, from whence it came (hence the "death" of contract). Gilmore published law review articles from 1949 to 1979, in which he stated his views on Contract Law and Admiralty.¹⁶⁷ Gilmore's 1965 two-volume treatise on Security Interests in Property Law won Harvard Law School's Ames Prize for the most distinguished work of legal scholarship over a five-year period. Gilmore's analysis was always trenchant, and he was not afraid to share unkind comments about other legal writers.¹⁶⁸ Gilmore died in 1982 at his home in Norwich, Vermont.

14. Farnsworth. E. Allen Farnsworth was born in Providence, Rhode Island, in 1928. Farnsworth obtained a B.S. in Applied Mathematics from the University of Michigan in 1948, an M.A. in Physics from Yale University in 1949, and a J.D. from Columbia University in 1952. Farnsworth taught at Columbia University School of Law for 50 years from 1954 to 2005. Farnsworth served as the Reporter for the RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS, published by the American Law Institute in 1981. Farnsworth published a number of law review articles on Contract Law. Farnsworth died in New Jersey at age 76.

15. Posner. Richard Posner was born in New York City in 1939. He graduated summa cum laude from Yale University in 1959. He attended Harvard Law School, where he was president of the Harvard Law Review and graduated first in his class, magna cum laude, in 1963.¹⁶⁹ Posner clerked for Supreme Court Justice William J. Brennan Jr. Posner worked for the Federal Trade Commission and the U.S. Solicitor General, and worked for ten years as a researcher at the National Bureau of Economic Research. Posner joined the Seventh Circuit Court of Appeals in 1981 and began teaching at the University of Chicago School of Law that same year. Posner has advocated an economic perspective on the law, particularly Contract Law, and suggests as a goal that court decisions be made in such a way not to vindicate a moral commitment to keeping a promise but rather to maximize overall value or reduce overall cost (a modern form of pragmatism). This perspective is evident in Justice Posner's Opinion in *Zapata Hermanus Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002), where he says that "a breach of contract is not considered wrongful activity in the sense that a tort or crime is wrongful. When we delve for reasons, we encounter Holmes's argument that practically speaking the duty created by a contract is just to perform or pay damages" Posner cited to Holmes's book on the COMMON LAW (1881) and Holmes's 1897 Harvard Law Review article *The Path of the Law*.¹⁷⁰ Posner, like Kent, Story, and Holmes, has been able to present his perspective on Contract Law both in publications and, when the opportunity was presented, through the opinions he wrote on behalf of a prominent appellate court. But Posner has not had the advantage of writing a treatise or Restatement or uniform law of contracts that would have fostered the replication of his contract theories in court decisions throughout the land. However, the final chapter is not yet written, and Posner has succeeded in seeing his noteworthy contract law decisions come to outnumber those of Holmes and Cardozo in contract case books used in American law schools.¹⁷¹

V. STATUTORY ENACTMENTS RELATING TO CONTRACT LAW. In English law, and later American law, there has been a tension between entrusting the development of the law to the appellate courts versus legislatures promulgating the law in the form of statutes and codes. This is evident in the history of Contract Law and Commercial Law in particular.

A. CIVIL CODES. Comprehensive Civil Codes adopted on the European Continent include: 1756, the Bavarian Civil Code; 1794, the Prussian Civil Code; 1804, France's French Civil Code; Austrian Civil Code; 1811, Austrian Code; 1865, Italian Civil Code; 1883, Swiss Code of Obligations; Spanish Civil Code; 1900, German Civil Code ("BGB"); 1907, Swiss Civil Code. Jeremy Bentham, an English lawyer, philosopher, and reformist, was the first person of note in England to suggest codifying the entirety of the Common Law. In a letter he wrote to American President James Madison in 1811, Bentham offered to write a civil code for the United States, to relieve us from the "yoke" of the "wordless, . . . boundless, and shapeless shape of *common*, alias *unwritten law*," an offer the President declined several years later, after the conclusion of the War of 1812.¹⁷²

1. French Civil Code. On August 12, 1803, First Consul of France Napoleón Bonaparte established a commission of four persons to draft a comprehensive civil code for France and its territories. The completed civil code was promulgated on March 21, 1804. American Jurist and legal writer Joseph Story said, of the French Civil Code:

The modern code of France, embracing, as it does, the entire elements of her jurisprudence in the rights, duties, relations, and obligations of civil life; the exposition of the rules of contracts of every sort, including commercial contracts; the descent, distribution, and regulation of property; the definition and punishment of crimes; the ordinary and extraordinary police of the country, and the enumeration of the whole detail of civil and criminal practice and process; -- is perhaps the most finished and methodical treatise of the law, that the world ever saw.¹⁷³

The Contract Law principles of the French Civil Code found expression in the Civil Code of Louisiana, published in 1808.

2. Louisiana. Louisiana adopted a Civil Code in 1808. This Civil Code contained sections dealing with Contract Law principles and rules, and the Law of Sales, taken in entirety from the French Civil Code of 1804.

a. Preliminaries. Article 1 of the Louisiana Civil Code defines a contract as "an agreement by which one or more persons oblige themselves to one or more persons, to give, to do, or not to do a certain thing." Louisiana's Civil Code permits contracts to make a gift, which under the Common Law were not enforceable. Article 8 says that four conditions are essential to a contract: (i) "the consent of the party who obligates himself;" (ii) "the capacity to contract;" (iii) "a determinate object forming the matter of an engagement;" and (iv) "a lawful purpose in the obligation."

b. Consent. Articles 9 through 22 relate to consent. Consent is not valid if "given through error, or extorted by violence or surprised by fraud." Article 9. Error can nullify an agreement "only when it falls on the very substance of the thing that is the object of it." Article 10. To nullify a contract,

the violence must be “that which naturally tends to make an impression on a person possessing sound judgment, and to inspire him with the fear of exposing his person, or fortune to a considerable and immediate evil.” Article 12. The Civil Code thus applies an objective standard of “a person of sound judgment,” rather than a subjective inquiry into whether the individual person involved actually suffered fear. Violence would nullify consent if it was exercised on the contracting party, or on the wife or husband, or descendants or ascendants. Article 13. Violence would not nullify a contract where the contract was expressly or tacitly approved after the violence had ceased, or where the violence was raised as an issue after “the time of restitution,” as fixed by law, had expired. Article 15. Fraud would nullify a contract only where the party would not have entered into the contract but for the fraud. Article 16. Fraud is not presumed, but must be proved. *Id.* Consent induced by error, violence, or fraud made the contract voidable, not void. Article 17.

c. **Capacity.** Sections 23 through 25 cover the “capability” of parties to contract.

3. Massachusetts. Massachusetts was the first Common Law American state to initiate a project to codify the entirety of the civil law. In 1836, the governor established a commission consisting of Joseph Story and four others to consider the drafting of a civil code. In 1837, the commission reported back that the law on commercial contracts “had attained . . . scientific precision” and that “the general principles which define and regulate them . . . are now capable of being put in a regular order, and announced in determinate propositions in the text of a code.”¹⁷⁴ The ultimate conclusion was that “[t]he Commissioners do not indulge the rash expectation, that any code of the known existing common law will dry up all the common sources of litigation. New cases must arise, which no code can provide for, or even ascertain.”¹⁷⁵ The commission did recommend codifying the criminal law and the law of evidence and “those areas of commercial law already settled according to principles by the courts, particularly ‘commercial contracts’” No general civil code was proposed.

4. New York. A codification of civil law was attempted in New York, where the state constitution of 1846 called for a code commission to reduce to a systematic code “the whole body of the law of this state.”¹⁷⁶ In 1848, New York had replaced the old English Forms of Action with a modern code of civil procedure, a project spearheaded by prominent New York attorney David Dudley Field. In 1857, Field was appointed to the commission for drafting codes.¹⁷⁷ Preliminary drafts of codes were published for a government code (1859), a civil code (1862), and a penal code (1864).¹⁷⁸ After a period of comment from lawyers and judges, final versions were released in 1860, 1865, and 1865, respectively.¹⁷⁹ The code movement languished in New York, but the draft New York Civil Code was adopted in the Dakota Territory (1866) and California (1872).¹⁸⁰ After lobbying by Field, New York adopted the Commission’s penal code, and portions of its government code, but never adopted the draft civil code, which was rejected for the final time in 1888.¹⁸¹ The Montana Territory adopted California’s version of the civil code in 1895, and it remains in force today, spread throughout the Montana statutes.

The 1862 Draft of a Civil Code for the State of New York, prepared by the Commissioners of the Code, which was circulated to judges and other for examination, contained a segment, called “Division Third,” relating to contractual obligations. The Division Third was made up of two “Parts,” Part I relating to “Obligations in General” and Part II relating to “Obligations arising from

particular transactions.” The Parts are subdivided into Chapters, which are made up of “Articles,” which amount to individual sections.

Part I, Title I, discusses the nature of an obligation. Part I, Title II discusses contracts. Part I, Title III discusses obligations imposed by law. Part I, Title IV, discusses extinction of obligation. Part II, on obligations arising from particular transactions, covers many topics: Title I, Sale; Title II, Exchange; Title III, Deposit; Title IV, Loan; Title V, Loan of Money; Title VI, Hire; Title VII, Employment and service; Title VIII, Carriage; Title IX, Trusts; Title X, Agency; Title XI, Partnerships; Title XII, Insurance; Title XIII, Commercial paper; Title XIV, Indemnity; Title XV, Suretyship; Title XVI, Pledge; Title XVII, Mortgage; and Title XVIII, Liens.

Part I deals with obligations in general. Part I, Title I, deals with the “nature of an obligation.” “An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.” Section 532. An obligation arises either from (1) the contract of the parties, or (2) the operation of law. Section 533.

Part I, Title II deals with contracts generally. Article I sets out the definition of a contract. “A contract is an agreement to do or not to do a certain thing.” Section 534. Four things are essential to a contract: parties capable of contracting, their consent, a lawful object, and a “sufficient cause or consideration.” Section 535. Section 535 cites to the Code of Louisiana, § 1772, 1758 & 1759; and to the French Civil Code, § 1108.

Article II deals with “parties.” All persons are capable of contracting, except for infants, persons of unsound mind, and persons deprived of civil rights. Art 536. The parties “must not only exist, but it must be possible to identify them, or there is no contract.” Section 537.

Article III deals with the “object of a contract.” The “object” of a contract “is the thing which it is agreed to do or not do.” Section 538. The object of a contract must be lawful, possible, and ascertainable. Section 539. A contract is not lawful if it is (1) contrary to an express provision of law, or (2) is not expressly prohibited but is contrary to the policy of the law; or (3) is “[o]therwise contrary to good morals.” Section 540. A Contract that attempts to exempt a person from responsibility for fraud, wilful injury, or violation of law, is against public policy and is void. Section 541. The draft Code says that “everything is deemed possible, except that which is physically impossible.” Section 542. Impossibility is not to be determined by the means or ability of a party, but instead “by the nature of things.” Section 543. Something is “ascertainable” if it is capable of being ascertained by the time performance is due under the contract. Section 544.

Article IV deals with “consent.” “A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are or ought to be known by the person accepting.” Section 545. Consent must be free, mutual and communicated to the other party. Section 546. Consent that is not free or is voidable at the option of the “party prejudiced.” Section 547. “Apparent consent” is not real or free if obtained through duress, menace, fraud, undue influence, mistake or accident. Section 548. Consent is obtained in one of these ways if consent would not have been given absent such cause. Section 549. Duress and “menace” are defined. Section 550, & 551. “Fraud is either actual or constructive.” Section 552. “Actual fraud” is defined

as: (1) “any artifice by which one obtains an unconscientious advantage over another”; or (2) “any unconscientious use of a power or advantage obtained through a personal confidence voluntarily accepted.” Section 553. The draft Code supports Section 553(1) with citations to treatises on Equity written by Story, Jeremy, Pothier, and to several appellate opinions. The draft Code supports Section 553(2) with citations to three cases and Story’s treatise on Equity. Constructive fraud is described as consisting of “any breach of a duty which, without an actually fraudulent intent, gains an advantage to the person in fault,” by “misleading another to his prejudice,” and in such acts or omissions as the law declares to be fraudulent. Section 554. Undue influence is described. Section 556. “Mistake may be either of fact or law.” Section 557. A mistake of law will render a contract void only when the misunderstanding is shared by all parties who supposed that they understood the law, or when one party is mistaken as to the law and the other parties know about that misconception and fail to rectify it. Section 559. A mistake of foreign law is a mistake of fact. Section 560. A mistake made through “willful ignorance” or by neglecting a legal duty, does not impair a contract. Section 561. The draft Code importantly says: “Consent is not mutual, unless the parties all agree upon the same thing in the same sense.” Section 562. However, the rules of interpretation set out later in the draft Code may lead to the court deeming the parties to agree even when they did not. Section 562. Consent is communicated “with effect” only by an act or omission intended to communicate consent. Section 563. If a proposal sets out a required manner of accepting, the proposer is not bound unless the acceptance is communicated in that way; but where no manner is specified, “any reasonable and usual mode may be adopted.” Article V discussed “consideration.”

5. Georgia. Georgia adopted a general civil code in 1862. The civil code was written as a codification of the civil law in Georgia, both statutory and Common Law. The Code begins by outlining the fundamentals of three branches of government, etc. The Code deals with contractual obligations in a number of places, in different contexts, such as debtor/creditor, principal/surety, and mortgages. There are no provisions relating to the circumstances of contracting in general, and no abstract propositions of Contract Law. The Georgia Civil Code thus represents the “old” way of looking at contracts, as having unique rules applying to particular areas, with no generalized principles underlying all contracts.

6. California. California adopted a civil code in 1872, that was a variation of the draft New York Civil Code of 1865. The Legislature deleted the provision saying that the Civil Code supplanted the Common Law, and as a result California courts continue to take a Common Law approach to solving legal problems. The Civil Code has been amended many times, and remains in effect today.

7. The German Civil Code (“BGB”). The German Civil Code of 1900 (“BGB”) was promulgated by German Ruler Kaiser Wilhelm on August 18, 1896, to become effective on January 1, 1900. This Civil Code unified the civil laws of the various components of the German Reich. The Civil Code amazingly has remained in effect since that time, through World War I, the Weimar Republic, Nazi Germany, World War II, Soviet occupation, and the reunification of East and West Germany. A history of the creation of the German Civil Code is given in 12 THE LAW QUARTERLY REVIEW 17- 35 (1896), edited by Sir Frederick Pollock. The Second Book of the BGB is entitled “The Law of Obligations,” and is subdivided into seven sections: Section 1, Scope of obligations; Section 2, Obligations ex contracts; Section 3, Extinction of obligations; Section 4, Transfer of claims; Section 5, Assumption of debt; Section 6, Plurality of debtors and creditors; and Section 7,

Particular kinds of obligations.

B. ENGLISH STATUTES ON CONTRACTS AND SALES. Legislative enactments relating to contracts generally, and to the sale of goods, have existed in the European world for two centuries. Apart from the general civil codes, mentioned above, that contained Sections relating to Contract Law, the following codes regarding sales and Contract Law principles were adopted: 1807, French Commercial Code; 1861, German Commercial Code (redone in 1900); 1862, Austrian Commercial Code; 1881, Swiss Obligations Law; 1882, Italian Commercial Code (combined with the Civil Code in 1942); and 1885, Spanish Commercial Code. In the Common Law world, Great Britain preceded America in codifying aspects of commercial law.

1. The Indian Contract Act of 1872. The Indian Contract Act of 1872 was a uniform law of contracts adopted by the Imperial Legislative Council, the legislative body of British India, to apply to all but a few locations in India. The Act was originally drafted by the Third Indian Law Commission in 1866, but the draft was rejected by the Indian legislature, so the Commission resigned and the Act was redrafted by the Indian legislative department. The Act consisted of 11 chapters, broken into 266 sections. The chapters dealt with the following subjects: Chapter I, the communication, acceptance, and revocation of proposals; Chapter II, contracts, violable contracts, and void agreements; Chapter III, contingent contracts; Chapter IV, performance of contracts and contracts which must be performed; Chapter V, certain relations resembling those created by contracts; Chapter VI, consequences of breach of contract; Chapter VII, sale of goods; Chapter VIII, indemnity and guarantee; Chapter IX, bailment; Chapter X, agency; Chapter 11, partnerships. Chapter VII on the sale of goods was replaced by the Sale of Goods and Movables Act of 1930; Chapter XI on partnerships was replaced by the Indian Partnership Act of 1932.

The Indian Contract Act of 1872 is a recapitulation of the English Common Law of Contract as it then existed. Frederick Pollock was heavily influenced by the Act in writing the portion of his 1876 treatise relating to basic principles of contract law. A portion of the Indian Contract Act of 1872 was introduced into Texas jurisprudence when the Texas Supreme Court, in *Williams v. Rogan*, 59 Tex. 438, 1883 WL 9194 (Tex. 1883), quoted Pollock's treatise which in turn quoted the Act's listing of the "stages and essentials of a contract." The Act is for this reason a convenient way to evaluate the English Law of Contracts as it existed at the time.

a. The Preamble. The Act's Preamble (Proposal; Acceptance; Agreement; Consideration; Contract) sets out fundamental terms and definitions used in the contracts section of the Act. Agreements are made when one person makes a *proposal* to do or not do something, with the intent of obtaining the assent of another person, and the other person accepts the proposal. Section 2(a). Upon acceptance, the proposal becomes a *promise*. Section 2(b). The person making the proposal that has been accepted is called the "promisor"; the person accepting is called the "promisee." Section 2(c). When the promisee, at the desire of the promisor, does or refrains from doing something, or promises to do or refrain from doing something, the promisee's act or forbearance or promise is consideration for the original promise. Section 2(d). Where the promise (i.e., accepted proposal) has consideration, it becomes an *agreement*. Section 2(e). Where the consideration for the promisor's promise is the promisee's promise, the two promises are called reciprocal promises. Section 2(f). An agreement that is not enforceable by law is called "void." Section 2(g). An

agreement enforceable by law is a *contract*. Section 2(h). Where an agreement is enforceable at law (i.e., is a contract) by one party, but not the other, the agreement is a voidable contract. Section (I). A contract that ceases to be enforceable becomes void at that time. Section 2(j).

To recapitulate, the Indian Contract Act recognized that contracts can be formed in stages. The Act divided the process into four categories--(I) an offer, (ii) acceptance of the offer, which makes a promise, (iii) the promisee providing consideration for his acceptance, which makes the promise an agreement; and (iv) the agreement, if legally enforceable, is called a contract; if not legally enforceable, the agreement is called a void agreement. The usefulness of distinguishing between an agreement and a contract is not explained, but that same distinction is used in the RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § ____ (1981).

b. Chapter I. Chapter I (“Of the communication, acceptance and revocation of proposals”) provides that a proposal, acceptance, and a revocation of either, to be effective must be communicated, either by word or act. Section 3. The communication of a proposal is complete when it comes to the knowledge of the person to whom it was made. Section 4. An acceptance becomes binding on the proposer when the acceptance is put “in a course of transmission which is beyond the power of the proposee’s control.” Section 4. It becomes binding on the acceptor only when it comes to the knowledge of the proposer. Section 4. Similarly, a revocation is binding on the person communicating it when it is put into a course of transmission that is beyond the revoking party’s control. Section 4. The revocation is effective against the person to whom it is made only when it comes to his knowledge. Section 4. A proposal can be revoked any time before acceptance is complete, but not afterwards. Section 5. And acceptance can be revoked any time before its communication is complete, but not afterwards. Section 5. A proposal can be revoked in four ways: (I) by communicating the revocation to the other party; (ii) by the lapse of time for acceptance specified in the proposal, or if no time is specified then after a reasonable time, provided it has not been accepted; (iii) by failure of the acceptor to fulfill a condition precedent for acceptance; or (iv) by death or insanity of the proposer, provided the acceptor learns of this fact before acceptance. Section 6. An acceptance converts a proposal into a promise only if the acceptance is absolute and unqualified, and is expressed in “some usual and accepted manner,” except that, where the proposer specifies the manner of acceptance and the acceptance is not made in that manner, the proposer may within a reasonable time insist on the specified manner of acceptance. If the proposer does not so insist, then the acceptance is effective. If the accepting party receives such a notice and fails to comply, the acceptance is not effective. Section 7. An acceptance is effective if the accepting party performs the conditions of the proposal, or provides consideration (including a reciprocal promise). Section 8. A proposal or acceptance is “express” if made in words. A proposal or acceptance communicated in any other way, is “implied.” Section 9.

c. Chapter II. Chapter II (“Of contracts, voidable contracts and void agreements”) provided that an agreement made by the free consent of competent parties is a contract, provided that there is lawful consideration and a lawful object. Section 10. The Act does not revoke any other requirement in the law that a contract must be in writing. Section 10. Any person is competent to contract if he is the age of majority according to “the law to which he is subject,” of sound mind, and not disqualified by the law to which he is subject. Section 11. Sound mind means that, at the time of making a contract, the person is capable of understanding it and of forming a rational judgment as

to its effect on his interest. A person who is usually of unsound mind can contract during periods of mental soundness, but not when he is of unsound mind. Section 12. The term “consent” is described in this way; “Two or more persons are said to consent when they agree upon the same thing in the same sense.” Section 13. Consent is “said to be free” when it is not caused by coercion, undue influence, fraud, misrepresentation, or mistake. The term cause is what we now call “but for” causation, meaning that consent would not have been given but for the improper factor. Section 14. Those terms (i.e., coercion, undue influence, fraud and misrepresentation) are defined in the Act. Sections 14 - 18. A contract induced in such a manner is voidable at the election of the party who is subject to such factors. Section 19. If a contract is induced by fraud or misrepresentation, the party may insist that he is put in the position he would have been absent the fraud or misrepresentation. Section 19. However, a contract is not voidable for fraud or misrepresentation where the party’s consent was induced by fraud or misrepresentation, and the party “had the means of discovering the truth with ordinary diligence.” Section 19. Where the contract was induced by undue influence, it may be set aside absolutely, or “upon such terms and conditions as to the Court may seem just.” Section 19. Mistake is governed by several sections of the Act. An erroneous opinion as to value is not a mistake as to fact. Section 20. A mistake of law will not matter except that a mistake as to a law not in force in India has the same effect as a mistake of fact. Section 21. A unilateral mistake of fact (a misconception by only one part) will not make a contract voidable. Section 22.

An agreement reached without consideration is “void” unless: (i) it is in writing and registered in accordance of law is made “on account of natural love and affection between relatives”; or (ii) it is a promise to compensate for a prior voluntary act or a prior act which the actor was compelled by law to do; or (iii) it is a promise to pay for the legally-enforceable debt of another ignoring a time limitation bar. In any of those instances, the contract is enforceable. Section 25. The Act provides:

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.

Section 25, Explanation 2. Agreements in restraint of marriage (Section 26) and in restraint of trade (Section 27) are void. Restraint of trade means a restriction to restrain one from exercising a lawful profession, trade or business of any kind. Section 27. The bar does not apply to a contract incident to a sale of the goodwill of a business. In that situation, the seller can agree to refrain from competition within “specified local limits,” so long as the buyer carries on a like business. The limits must appear reasonable to the court, “regard being had to the nature of the business.” Section 27, Exception 1. An agreement to restrain bringing legal proceedings to enforce rights under a contract within any legal period of limitations is void to the extent of such prohibitions. Section 28. Agreements to arbitrate future disputes are exempted from this rule. Section 28, Exception 1. Agreements to arbitrate disputes that have already arisen are not void if they are in writing. Agreements whose meaning is not certain or capable of being made certain are void. Section 29. Agreements by way of wager are void. Section 30.

d. Chapter III. Chapter III covered contingent contracts. A “contingent contract” is defined as a contract to do or not do something if some event, collateral to the main contract, does or does not

occur. section 31. Contingent contracts involving the happening of an uncertain future event are not enforceable until the event does or does not happen. If the event becomes impossible, the contract becomes void. Section 32. Contingent contracts involving an uncertain future event *not* happening can be enforced when the event becomes impossible, but not before. Section 33. If the contract is based on the way a person will act by an unspecified time, the contract is enforceable when the person does anything that renders it impossible to do the act within any definite time, “or otherwise than under further contingencies.” Section 34. A contingent contract based on an uncertain future event occurring within a fixed time become void then the event does not occur by the specified time, or become impossible. Section 35. A contingent contract based on an uncertain future event *not* happening may be enforced when the event has not occurred before the time expires, or when the event becomes impossible. Section 35. If the contingency is impossible, then the contract is void, whether or not the parties knew this at the time of contracting. Section 36.

e. Chapter IV. Chapter 4 (of the performance of contracts; Contracts which must be performed) governs the duty to perform and the consequences from not performing. A contracting party must perform, or offer to perform, his promise unless excused by the Act or other law. Section 37. If a contracting party dies before performance, the decedent’s representative is bound unless a contrary intention appears from the contract. Section 37. Where a contracting party offers to perform under the contract, and the offer is not accepted, the offeror is excused from non-performance, but is still entitled to performance by the other party. Section 38. Such an offer to perform (i) must be unconditional, and must be made under such circumstances that that the other contracting party can evaluate the legitimacy of the offer to perform and, if the promised performance is to deliver items, the other party must have a reasonable opportunity to see whether the items are what was contracted for. For this purpose, an offer to perform to one promisee is an offer to all. Section 38. If one party to a contract refuses to perform or disables himself from performing his promise in its entirety, the other party can cancel the contract unless he has by word or conduct signified acquiescence. Section 39. Where it was the intention of the parties that performance would be by the promisor himself, the promise must be performed by that promisor. In other cases, the promise may be performed by any competent person. Section 40. Where a promisee accepts performance by a third person, he cannot enforce the promise against the promisor. Section 41. Where a contractual obligation is joint, unless a contrary intent appears, all persons, and after death their representatives, must fulfill the promise. Section 42. A joint promise may be enforced against any one promisor. Each such promisor may seek contribution from other promisors, unless the contrary appears from the contract. In the event of default, all joint promisors must bear the liability in equal shares. Section 43. A release of one joint promisor from liability does not release other promisors. Section 44. Where there are two or more promisees, the duty runs to all promisees and, after death, to their estates. Section 45.

The Act next covered the time for performance under a contract. Where performance is to be upon request, and no time is specified, performance must be made within a reasonable time. The question of what is a reasonable time “is, in each particular case, a question of fact.” Section 46. Performance on a particular day, but not upon request, may be performed at any hour of the usual business day, at the place where the promise “ought to be performed.” Section 47. Where performance is to be performed on a particular day, upon request, the promisee must request performance “at a proper place” during usual business hours. Proper time and place is a fact question. Section 48. Where the promise is to be performed without a request by the promisee, and no place for performance is fixed,

the promiser must ask the promisee to designate the place, and the promisor must comply. Section 49. A promise may be performed in any manner, or at any time or place, specified by the promisee. Section 50. In the event of reciprocal promises to be simultaneously performed, neither promiser need perform unless the promisee is ready and willing to perform his reciprocal promise. Section 51. The order of performance of reciprocal promises that is specified in the contract controls, but where no order is specified, the order of performance shall be what “the nature of the transaction requires.” Section 52. Where one party to a contract with reciprocal promises makes the other party unable to perform, the contract is voidable at the option of the party presented, and he is entitled to compensation for “any loss he may sustain” as a result of such action. Section 53. With reciprocal promises, if performance by one party is a condition to performance by the other party, and that party fails to perform, that party who failed to perform the predicate promise cannot enforce the other party’s promise, and must compensate the other party “for any loss which such other party may sustain by the non-performance of the contract.” Section 54. Where a party promises to do or not do a thing by a specified time, then the portion of the contract not performed by the deadline becomes voidable at the option of the promisee, but only if the intention of the parties was that “time should be of essence of the contract.” Where time was not of the essence, the promisee is entitled to compensation for any loss occasioned by the failure to timely perform. In the event that non-timely performance is accepted, the promisee cannot claim compensation unless, at the time of acceptance, the promisee gives notice of the intent to claim compensation. Section 55.

The Act next dealt with contracts that cannot be performed due to impossibility or illegality. An agreement to do an impossible act is void. Where, after contracting, the promised act becomes impossible, or becomes illegal by some event which the promisor could not prevent, then the contract becomes void at that time. Where one party promises to do something he knows, or with reasonable diligence might have known, is impossible or illegal, and the promisee does not know it to be impossible or illegal, the promisor must compensate the promisee for any loss he sustains from non-performance. Section 56. Where parties make reciprocal promises to do something legal followed by something illegal, the legal portion is a contract, the the illegal part is a void agreement. Section 57. With alternative promises, one branch of which is legal and the other illegal, only the illegal branch can be enforced. Section 58.

The Act next addressed payment of debts. Where a debtor, owing several distinct debts to a creditor, makes a payment while specifying which debt is to be paid, the debts must be applied as designated. The specification may be inferred from the circumstances. Section 59. Where the debtor does not designate, the creditor may specify which debts are paid, even debts that are time-barred. Section 60. Where neither party makes specifies which debt is to be paid, the payment is applied to the oldest debt first, regardless of any time bar on enforcement. If the debts are “of equal standing,” they are paid proportionately. Section 61.

The Act next addressed novation, rescission, and alteration of contract. If the parties agree to substitute a new contract for an old one, or to rescind a contract, that contract cannot be enforced. Section 62. A promisee can dispense with, or remit, performance of a promise made to him, or may alter the time for performance, or accept anything in lieu of performance. Section 63. When a party who has the right to rescind a voidable contract, the promisor is relieved from a duty to perform the contract. If the rescinding party has received something of value, he must restore it to the party from

whom it was received. Section 64. When an agreement is “discovered” to be void, or a contract becomes void, any person receiving a benefit under the contract is restore it, or make compensation for it, to the person from whom the benefit is received. Section 65. The act of rescinding a contract may be communicated or revoked under the rules of proposal and acceptance stated earlier in the Act. Section 66. If a promisee neglects or refuses to afford reasonable facilities for performance of the promise, the promisor is excused for not performing it. Section 67.

f. Chapter V. Chapter V dealt with an assortment of issues that can arise. If a person provides to an incapacitated person necessities “suited to his condition in life, anyone legally bound for support of that person is liable to give reimbursement.” Section 68. A person “interested in the payment of money” which another is legally bound to pay, who pays the obligation is entitled to be reimbursed by the person whose obligation he pays. Section 69. Where a person “lawfully does anything for another person, or delivers anything to him” while not intending a gift, and the recipient enjoys the benefit, the recipient is bound to “make compensation” to the person for what is done or delivered. Section 70. A person who finds good belonging to another person, and takes them into custody, has the responsibility of a bailee. Section 71. A person to whom money is paid or anything delivered, by mistake or under coercion, must repay or return the money or things. Section 72.

g. Chapter VI. Chapter VI (Of the consequences of breach of contract) discussed recovery for breach of contract. When a contract has been “broken,” the party who suffered the breach can recover from the breaching party “compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach.” Such compensation is not to be given for “any remote and indirect loss or damage sustained by reason of the breach.” The same rule of recovery applies to “an obligation resembling those created by contract.” In determining recovery for breach of contract, “the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.” Section 73. Where the contract specifies compensation for breach of contract, or a penalty clause, the party claiming breach is entitled to receive reasonable compensation not exceeding the stipulated amount or penalty. An explanation is given that an increased rate of interest from the date of default can be stipulated. However, where the contract is a bail bond or bond required by law for performance of a public duty or act, the breaching party must pay the amount of the bond. Section 74. A party who rightfully rescinds a contract is entitled to recover “for any damage” he has sustained from non-fulfillment of the contract. Section 75.

h. Chapters Not Reviewed. Chapter VII (Sale of goods) is not detailed in this Article. It was replaced by the Indian Sale of Goods Act of 1830. Chapter VIII (Of indemnity and guarantee). Chapter IX (Of bailment), and Chapter X (Agency, Appointment and Authority of Agents), and Chapter XI (Of partnership) are not detailed in this Article.

In broad overview, the Indian Contract Act of 1872 reflects Contract Law principles that are substantially the same as what is recognized in America today, including Texas. The Act uses an offer/acceptance approach to contract formation, which post-dates Blackstone and exemplifies the approach to contract creation in modern American Contract Law.

2. The English Bills and Exchange Act of 1882. The English Bills and Exchange Act was a codification of the Common Law of bills of exchange. The Act was patterned after Judge Mackenzie Chalmers digest of the law relating to bills of exchange published in 1878.¹⁸² In preparing his digest, Judge Chalmers read some 2,500 cases dating back to 1603.¹⁸³ In the absence of English case law, Chalmers used American cases or the usages among bankers and merchants.¹⁸⁴ The British Institute of Bankers and the Associated Chambers of Commerce commissioned Judge Chalmers to prepare a legislative enactment based on his digest of cases.¹⁸⁵ Judge Chalmers wrote that he intended “to reproduce, as exactly as possible, the existing law, whether it seemed good, bad, or indifferent in its effects.”¹⁸⁶ As he later explained, Chalmers followed advice he had received from Lord Herschell that “a codifying Bill in the first instance simply reproduce existing law, however defective,” . . . since a “Bill which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy.”¹⁸⁷ The proposed enactment was edited lightly by the House of Commons and by the House of Lords, and was passed by both houses of Parliament without opposition.¹⁸⁸ The law was in essence an enactment of Judge Chalmers’ digest, and the words of the enactment were almost word-for-word taken from the digest.¹⁸⁹ The enactment was adopted by all self-governing colonies of the British Empire.¹⁹⁰ This success was followed up by Sire Frederick Pollock, who fashioned a partnership Bill that became The Partnership Act of 1890.¹⁹¹

3. The English Sale of Goods Act of 1893. The English Sale of Goods Act became effective on July 1, 1895.

Part I of the Act covered formation of the contract of sale. Section 2(1) of the Act provided:

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

The Act distinguished between an absolute and a conditional contract of sale. Section 2(2). The Act distinguished a contract of sale, by which goods are actually transferred from a seller to a buyer, from an agreement to sell, by which the transfer of goods is to take place at a future time. Section 2(3). An agreement to sell becomes a sale when the time lapses or conditions are fulfilled so that the transfer has come due. Section 2(4). The Act globally incorporated the general law regarding capacity to contract, but added a proviso that if necessities are sold or delivered to a minor, incompetent person, etc. he must pay the reasonable price therefore. Section 3. Under “formalities,” the Act provided that a contract of sale may be written, oral, or some of each. Section 4. If the contract of sale is 20 dollars or more, it is enforceable only if (i) the buyer accepts part of the goods and receives same, (ii) the buyer “gives something in earnest to bind the contract” or in partial payment, or (iii) there is a note or memorandum in writing of the contract, signed by the party to be bound. Section 5(1). The Act defined “acceptance of goods” as any act relating to the goods that recognizes a pre-existing contract of sale. Section 5(3). The Act allowed contracts of sale to apply to goods not in existence (“future goods”). Section 6(1). A contract of sale can be contingent. Section 6(2). The price can be fixed in the contract of sale, or may be fixed in a manner agreed upon, or determined by the course of dealing between the parties. Section 9(1). If the price cannot be determined in this manner, the contract does not fail. Instead, the buyer must pay a reasonable price,

which is a question of fact. Section 9(2). However, if the price is to be set by a third party, who cannot or does not make the valuation, the contract is void, unless partial delivery has occurred, in which a reasonable price must be paid for the portion delivered. Section 10(1). Part I of the Act went on to discuss conditions and warranties (Section 11-15) and sale by sample (Section 16).

Part II of the Act discussed the effect of the contract, including transfer of property between seller and buyer (Section 17-21) and transfer of title (Section 22-26). Part III of the Act discussed performance of the contract, including duties of buyer and seller, rules as to delivery, acceptance, and rejection (Section 27-37). Part IV of the Act covered the right of an unpaid seller against the goods (Sections 38-48).

Part V of the Act covered remedies for breach of contract (Sections 49-54). Where “property in the goods” has transferred from seller to buyer, but the buyer does not pay, the seller can recover the sales price. Section 49(1). Where the price is to be paid, irrespective of delivery, and the buyer does not pay when due, the seller can recover the price even if the goods are not yet delivered. Section 49(2). The Act does not impair a seller from Scotland recovering interest on the money due. Section 49(3). The recovery for the seller’s non-acceptance of the goods is “the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract.” Section 50(2). If there is a market for the goods, the recovery for non-acceptance is for the difference between the sales price and the market price at the time of non-acceptance. Section 50(3). The damages for the seller’s failure to deliver is “the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.” Section 51(2). If there is a market for the goods, the recovery for non-delivery is for the difference between the sales price and the market price at the time of non-delivery. Section 51(3). Upon breach of a contract to deliver “specific ascertained goods” the court may, “if it thinks fit,” order specific performance instead of paying damages. Section 52. Where a breach of warranty occurs, and the buyer is not entitled to reject the goods, the buyer can recover for diminished value or can sue for damages for breach of warranty. Section 53(1). The measure of damages for breach of warranty is the “estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.” Section 53(2). Where the warranty is as to quality, the damages are prima facie the difference between the value of the good as delivered compared to value of the goods as represented. Section 53(3). Where the buyer offsets against sales price for breach of warranty, the buyer may recover for “further damage” he has suffered. Section 53(4). The damages section of the Act concludes: “Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.” Section 54.

Part VI of the Act contained supplementary provisions. Section 55 said that any right or obligation that would otherwise arise by operation of law can be negated or varied by express agreement, course of dealing between the parties, or usage that binds both parties. Section 56 said that “reasonable time” used in the Act is a fact question. Section 57 says that any right, duty or liability declared by the Act can be enforced by a law suit, unless the Act provides otherwise. Section 58 governed auctions. Section 58(1) said that each lot is prima facie deemed to be the subject of a separate contract of sale. Section 58(2) said that the sale is complete when the hammer falls, and any bid can be withdrawn prior to that time. The Act did *not* say whether the seller can withdraw the

item from sale after the bidding starts but before the hammer falls. Section 58(3) prohibited a seller from bidding on his own items unless advance notice is given, and if this rule is violated, the sale may be treated as fraudulent by the buyer. Section 58(4) said that an auction sale can be subject to a reserved price, upon prior notice. Section 59 provides that, in Scotland, a buyer who accepts goods he could have rejected and sues for damages, can be required to pay the purchase price into the registry of the court pending outcome of the case. Section 60 pertained to the effect of the Act on prior laws. Section 61 provided: that the rules in bankruptcy relating to contracts of sale continue to apply; that the Common Law, including the Law Merchant, continues in effect except as changed by the Act, particularly the law of principal and agent; the effect of fraud, misrepresentation, duress, coercion, mistake “or other invalidating cause”; that the Act does not pertain to bills of sale; that the Act does not apply to mortgages, pledges, or other security. Section 62 contains definitions. One definition of note is that “[a] thing is deemed to be done ‘in good faith’ within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.” Section 62(2).

The English Sale of Goods Act (1893) was modified by Parliament in 1979.

4. Codifying English Contract Law. Sir Frederick Pollock urged codification of English Contract Law generally, in 1885 in *THE LAW QUARTERLY REVIEW*:

The law of contracts, in particular, is in most of its departments admirably rational and equitable, though it exists in a form in which no one can understand it without the labour of years, which bears upon it in every direction traces of the gradual expansion of view and extension of old formulas to meet new facts which are so interesting to the historical student, and so troublesome, not only to the legal practitioner, but also to his clients. I believe that it would be quite as possible to codify the law relating to contracts as to codify the criminal law, and I think that the advantages of such a code would be felt by every man of business in the country. In order to do so, however, it would be necessary in the first place to digest the existing law into one compact body, and it would be a great convenience, in carrying out such an undertaking, if certain parts of the law which are at once most intricate and open to all sorts of objections could be repealed.

No such general codification of English Contract Law ever appeared. However, the treatises on Contract Law published by Pollock and Anson have performed that same function on an informal basis.

C. AMERICAN STATUTES ON SALES AND CONTRACTS. The situation in America was different from that in Europe and England, due to the federalist nature of our government. Although uniform regulation of interstate commerce was one of the primary aims of the 1787 Philadelphia convention that drafted the U.S. Constitution, and although laws regulating commerce were among the earliest instances where the U.S. Supreme Court recognized preemption of state laws by federal enactments,¹⁹² Federal codification of Contract Law principles never gained traction in the United States. Instead, the codification movement settled on the creation and enactment of uniform state laws.

1. NCCUSL. The enactment of the British Bills and Exchange Act of 1892 excited immediate

interest in the United States. The American Bankers Association, at its meeting in 1892, resolved to pursue similar legislation in America.¹⁹³ A bill was introduced into the United States House of Representatives in 1884, but was not pursued amidst questions about its constitutionality.¹⁹⁴ In 1882, a committee of the American Bar Association recommended uniform state laws on the acknowledgment of deeds and to prevent fraudulent divorces. In 1889, at the instigation of a delegate from Tennessee, the ABA created a committee on uniform state laws. In 1890, the New York legislature enacted a law providing for commissioners to “examine the subject of marriage and divorce, insolvency, the form of notarial certificates and other subjects,” to “invite other States of the Union to send representatives to a convention to draft uniform laws”¹⁹⁵ In 1892, the first meeting of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) met in Saratoga, New York, attended by representatives of seven states.¹⁹⁶ For several years the efforts were to expand the number of participating states, but in 1896 the NCCUSL promulgated the Uniform Negotiable Instruments Act (UNIA), which the conference chairman described as “substantially the English Act of 1882 on Negotiable Instruments.”¹⁹⁷ Encouraged by the favorable reception among the states of the UNIA, the conference asked Harvard Law Professor Samuel Williston to draft a uniform sales law, which he did, modeled after the English Sale of Goods Act. The Conference committee receiving the draft act made numerous changes, including adding sections regarding the transfer of “property in the goods” by documents of title.¹⁹⁸ The act was adopted by only a few states.¹⁹⁹ In 1904, the American Warehousemen’s Association put money at the disposal of the NCCUSL to draft a uniform act on warehouse receipts. Professor Williston drafted the act, it was promulgated, and was enacted in a number of states.²⁰⁰ In 1909, Williston drafted and the NCCUSL issued the Uniform Stock Transfer Act and the Uniform Bills of Lading Act. Initially, Williston did not make bills of lading fully negotiable, like bills of exchange and promissory notes. But the NCCUSL’s Committee on Commercial Law changed the language, so that “even a thief” could pass ownership of a bill of exchange to a good faith purchaser for value.²⁰¹ This drew the ire of Columbia Law School Professor Francis Burdick, who criticized the NCCUSL for promulgating a law that did not seek uniformity by embodying existing laws sustained by the weight of judicial authority, but instead based on the Commissioners’ ideals. Burdick said: “There is a fascination, undoubtedly, in restating the law in accordance with one’s own notion of what the law ought to be. Nor is the fascination greatly diminished, though one convinces himself that his ideals accord with business usages, or even with what those usages are tending to become. Whether the Commissioners ought to yield to this fascination is a point upon which the present writer has grave doubts.”²⁰² This narrative of the NCCUSL is carried along in the sections of the Article discussing individual uniform laws promulgated by the NCCUSL, with one aside. In the 1970s, the NCCUSL attempted to unify real estate law across America, and the effort was a complete failure.

Structurally, the NCCUSL is a non-profit unincorporated association, consisting of 350 unpaid commissioners, all of whom are lawyers, appointed by state governors. All told, the NCCUSL has issued over 300 uniform laws. The NCCUSL now calls itself the Uniform Law Commission. Notable commissioners are Louis Brandeis, Karl Llewellyn, Roscoe Pound, Wiley Rutledge, David Souter, Caspar Weinberger, John Wigmore, Samuel Williston, and Woodrow Wilson.

2. Advantages and Disadvantages of Codification. Underlying all uniform acts in America is an unstated preference for achieving uniformity through concerted state action as opposed to achieving uniformity through the power of the United States Congress to preempt state laws. Since

the U.S. Constitution's Interstate Commerce Clause has been the basis for so much preemptive Federal legislation, it is both remarkable and fortunate that American Contract Law, a core element of interstate commerce to this day, is largely still a creature of state Common Law and state statutes, and not Federal law. Remarkable in the sense that in the Twentieth Century the forces for uniformity tended to achieve uniformity by using Federal preemption to take law-making power away from the states. Fortunate in the sense that a Congressional law of contracts would be a target of lobbyists and special interests that would create anomalies and preferences like we have in the Internal Revenue Code, whereas uniform state laws are more the product of thought and not politics, and thus are more balanced and coherent. It should be remembered, however, that the Commissioners to the NCCUSL are political appointees, and that the ultimate decision to adopt a uniform law rests with elected state legislatures. The fact that the uniform acts have been thoroughly vetted during the drafting process, that the drafters are seeking balance in order to facilitate nationwide adoption, and the ethic that, to remain uniform, the laws must not be amended locally, serves to dampen the partisan inclination to embed competitive advantage in the law at the local level.

One deficiency of uniform laws, according to Yale Law School Professor Grant Gilmore, is that a "drafting conference" proceeds by testing proposed language against "the widest variety of hypothetical situations which those present can imagine." In the preparation of the Uniform Commercial Code, this resulted in the addition of text and comments and examples to deal with the problems presented—a process that overcomplicated the uniform act. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L. J. 1341, 1347 (1948). With regard to the Uniform Commercial Code itself, Professor Gilmore described the official comments as "sometimes learned, sometimes brilliant, and not infrequently run[ning] to the length of law review article." *Id.* at 1355. Additionally, according to Professor Gilmore, uniform laws arose from dissatisfaction with the old law's failure to adapt to new needs, but the uniform laws tended to be out-of-date by the time they were finalized and, on a going-forward basis, they served to freeze the law at the very time the law needed flexibility in order to adapt to the ongoing change occurring in commercial practices. *Id.* at 1347. As discussed below, the NCCUSL has maintained the relevance of the U.C.C. by continual revision and additions to the Code.

3. The Uniform Negotiable Instrument Act (1896). At the annual conference of the National Conference of Commissioners on Uniform State Laws (NCCUSL), held in Detroit, Michigan, in 1895, the assemblage passes a resolution for the Committee on Commercial Law to draft an enactment on commercial paper based on the English Bill of Exchange Act.²⁰³ The project was assigned to a subcommittee consisting of: Lyman D. Brewster, a prominent Connecticut lawyer who served for 6 years as a trial court judge, and president of the NCCUSL; Henry C. Willcox, a New York lawyer, and Frank Berger, a New Jersey lawyer. The subcommittee engaged New York lawyer, John J. Crawford, to draft the proposed statute.²⁰⁴ Crawford structured the American statute differently from its English counterpart, which had emphasized bills of exchange and only secondarily promissory notes. Crawford started his act with general principles that applied to all negotiable instruments, and then wrote separate articles on different types of negotiable instruments.²⁰⁵ Crawford's working draft was annotated with references to cases, treatises, and state statutes, and was accompanied by a section-by-section comparison of the American statute to the English one.²⁰⁶ This working draft was sent to each member of the NCCUSL, to American lawyers and law professors, and English lawyers and judges, for criticism.²⁰⁷ The working draft was reviewed

by the NCCUSL Commissioners at the conference in Saratoga Springs, New York in August of 1896, and certain amendments were adopted that would change existing law.²⁰⁸ This revised draft was approved and sent to the states for consideration. The Act was adopted in Connecticut (1892), Colorado (1897), New York (1897), Florida (1897), Massachusetts (1899), District of Columbia (1899), Oregon (1899), North Dakota (1899), Washington (1899), North Carolina (1899), Maryland (1899), Virginia (1899), Tennessee (1899), Wisconsin (1899), Rhode Island (1899), Utah (1899), Pennsylvania (1901), Arizona (1901), New Jersey (1902), Ohio (1903), Montana (1903), Idaho (1903), Iowa (1903), Kentucky (1904), Louisiana (1904). Texas was the second-to-last state to adopt the Uniform Negotiable Instruments Act, which it did in 1919.

In 14 HARVARD LAW REVIEW 241 (1901), Harvard Law School Dean James Barr Ames published some criticisms of the proposed Act. Judge Brewster responded in an article published in 10 YALE LAW JOURNAL 84. While Judge Brewster's article addressed Dean Ames' article, point-by-point, Brewster was unable to resist including in his piece ad hominem attacks against Dean Ames disguised among mock compliments, particularly derogating Dean Ames for his lack of practical experience. The Commissioners evaluated Dean Ames' comments, and made no changes in the uniform law. The state of Illinois, in adopting its version of the Act, accepted all of Dean Ames' proposed changes.

In 1897, the author of the UNIA, John J. Crawford, published an annotated book on the version of the UNIA adopted in New York. A second edition was published in 1902. In his book, Crawford pointed out the changes that the uniform act made to each state's prior law.

The Texas Legislature adopted the UNIA in 1919, and it became Title 98 of the Texas Statutes. By adopting this act, the Texas Legislature brought Texas into alignment with the other states that enacted the uniform act, as well as with the negotiable instrument law of Great Britain and her colonies. Most of the Act deals with issues unique to negotiable instruments, but some do impact the present discussion. Section 24 of the Act provides that "[e]very negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Section 25 provides that "[v]alue is any consideration sufficient to support a simple contract." The Act thus incorporates the Common Law of Contracts regarding the sufficiency of consideration to support a contract. Section 25 also provides that "[a]n antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." Section 28 provides that "[a]bsence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto" Section 191 of the Act provides that "'Acceptance' means an acceptance completed by delivery or notification." Section 193 of the Act provides: "In determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

A 1916 report on the uniformity of decisions by courts under the NIA complained about a lack of unity and attributed it to the courts' ignorance of the law merchant, and the tendency to fall back on Common Law principles when in doubt about the law merchant.²⁰⁹

4. The Uniform Sales Act (1906). The Uniform Sales Act, drafted by Harvard Law School Professor Samuel Williston, was a project of the NCCUSL. The Uniform Sales Act was largely modeled on the English Sale of Goods Act of 1893, with variations to reflect American case law. The Uniform Sales Act applied to the sale of goods. Section 1. The Uniform Sales Act was conceptually based on title (called “the property in the goods”). That is, many of the parties’ rights and duties were determined by when title transferred from the seller to the buyer, and consequently by who owned title to the goods at the critical juncture (such the moment when the goods were destroyed). The Uniform Sales Act did not free the law of sales from its roots in property law.²¹⁰ Nonetheless, it did standardize practices around a norm, and between 1906 and 1947, the Uniform Sales Act was adopted in 34 states, not including Texas. The failure of the Uniform Sales Act to achieve nationwide acceptance, its over-dependence on the property concept of title,²¹¹ and its obsolescence due to the passage of time, resulted in its replacement by Article 2 of the Uniform Commercial Code. While the Uniform Sales Act was the precursor to Article 2 of the U.C.C., the principles used in drafting Article 2 of the U.C.C. were very different, as explained below. See Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L. J. 1341 (1948) (written after an early working draft of Title 2 of the Uniform Commercial Code had been disseminated).

5. The Uniform Commercial Code (1952 & 1962). The preeminent law in America on commercial transactions is the Uniform Commercial Code, which has been enacted in all American jurisdictions.

a. The Idea of Creating a Uniform Code. Prior to the U.C.C., the NCCUSL had issued seven commercial statutes²¹² that had been adopted by various states.²¹³ These acts were prepared one-by-one, by different writers at different times, and thus were not always consistent.²¹⁴ Nor was coverage of the many facets of commercial law complete. Also, court decisions under the uniform acts were not all in agreement on the meaning and application of the acts. And by the 1940s, some of the uniform acts were outdated,²¹⁵ and did not reflect contemporary commercial practices.²¹⁶ A uniform code for commercial practices in America was first suggested by the president of the NCCUSL in 1940.²¹⁷ His suggestion was a new code that would revise existing acts and expand coverage into other areas of commercial law.²¹⁸ In 1942, the American Law Institute agreed to join in with the NCCUSL to prepare a Uniform Commercial Code.²¹⁹

b. The Creation of the Code. The drafting of the U.C.C. began in 1945, under the supervision of an Editorial Board chaired by a Justice from the Third Circuit U.S. Court of Appeals.²²⁰ Professor Karl N. Llewellyn of Columbia Law School was Chief Reporter, and Llewellyn’s wife Professor Soia Mentschikoff of Harvard Law School was Associate Chief Reporter.²²¹ Philadelphia lawyer William A. Schnader is credited with the idea of the U.C.C. and lobbied along with Karl Llewellyn for the U.C.C. Schnader is known as the “Father of the Uniform Commercial Code.”²²² Final editorial responsibility rested with Professor Robert Braucher of the University of Wisconsin Law School.²²³ Professor Braucher was chair of the subcommittee that handled Article 2 governing sales.²²⁴ The only Texans named as contributors were Harvard Law-educated Baker and Botts lawyer Dillon Anderson, and U.S. Fifth Circuit Justice Joseph C. Hutcheson, Jr.²²⁵ The NCCUSL and ALI approved a definitive text in 1951, which that same year was endorsed by the House of Delegates of the American Bar Association.²²⁶ The text with edits was completed in 1952, whereupon the U.C.C. was released to the public. The U.C.C. was introduced in eight state legislatures, but

Pennsylvania was the only state to adopt the 1952 version of the Code,²²⁷ which it did in 1953.²²⁸ Further adoption of the 1952 version of the U.C.C. was derailed in New York, which sent the proposed Code to a commission for review.²²⁹ Criticism of the 1952 version of the U.C.C. came from many quarters.²³⁰ The Editorial Board for the Uniform Commercial Code accommodated the criticisms engendered by their initial effort, and issued new text in 1958.²³¹ The revision process finally culminated in the release of a revised U.C.C. in 1962.²³²

The 1962 version of the U.C.C. was adopted by the Texas Legislature effective July 1, 1966,²³³ and is now set out in the Texas Business and Commerce Code.

c. Legal Realism's Affect on the U.C.C. While the drafting of the U.C.C. involved many persons, Professor Karl N. Llewellyn was the principal intellectual force that shaped the U.C.C.²³⁴ Llewellyn was a Legal Realist, and his approach to the problem of drafting a uniform law for commercial transactions is reflective of that philosophy. To begin with, Llewellyn envisioned a code, not an act. Implicit in the idea of a code was an enactment of law that is selective, comprehensive, and unified²³⁵: selective in that only leading rules are included,²³⁶ comprehensive in that all the leading rules are included; unified in that all provisions of the code are consistent with each other. However, uniformity requires more than just uniform statutory language. It also requires uniformity in interpretation by courts applying those statutes to individual cases. Stated differently, a uniform law should have reliability, meaning consistency in application, where different courts applying the law to the same set of facts will arrive at the same result.²³⁷

In Llewellyn's view, the standard Common Law approach to business transactions was undesirable because it focused exclusively, or at least excessively, on preconceived legal doctrine and abstract ideas.²³⁸ Llewellyn believed that lawyers and businessmen had fundamentally different ideas about the creation and enforcement of contracts.²³⁹ The existing law envisioned contracts as calling for a single, fixed performance exactly as described in the contract.²⁴⁰ Businessmen, Llewellyn believed, viewed contracts as flexible, and as having a range of satisfactory performances.²⁴¹ In Llewellyn's view, requiring that the outcome of commercial disputes be determined by fixed rules, perhaps centuries old, instead of current commercial practices, made the existing commercial law irrelevant and useless.

Llewellyn also rejected the Uniform Sales Act's idea that title to the goods should determine the parties' rights and duties. He thought that the use of the single concept of title was too blunt an instrument to achieve the goals of a modern law of business transactions.²⁴² Instead, the law needed to focus on particular kinds of transactions, and develop rules that were suited to that kind of transaction.²⁴³

In constructing the U.C.C., Llewellyn attempted to create a statute that would give judges the flexibility to arrive at a just result without having to distort the law or mischaracterize the facts.²⁴⁴ Llewellyn did this in four ways: (i) by adopting open-ended standards instead of bright-line²⁴⁵ rules; (ii) by avoiding formalities as a way of determining contractual rights and duties; (iii) by encouraging courts to engage in "purposive interpretation" of the U.C.C. instead of a textualist approach; and (iv) by making the U.C.C. non-exclusive by allowing the Common Law of Contracts to continue to operate as the background for the U.C.C.²⁴⁶

As to standards, Article 2 on sales uses the reasonableness standard in connection with good faith, the requirement of a writing, firm offer, contract formation, battle of the forms,²⁴⁷ contract interpretation, modification of terms, and in many other instances.²⁴⁸ This use of standards was an effort to allow the business community to develop commercial norms, and to change them over time, and to have the parties' legal rights and duties judged by these evolving norms.²⁴⁹

The U.C.C.'s avoidance of formalities is exemplified by the rejection of the traditional requirement of offer-and-acceptance in the creation of a contract in Section 2-204(1), which says: "A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."²⁵⁰ The U.C.C. also created exceptions to the statute of frauds (U.C.C. § 2-201(2)-(3)), the parol evidence rule (U.C.C. § 2-202(a)-(b)), and it made seals inoperative (U.C.C. § 2-203).²⁵¹ The de-emphasis on formalities also was manifested in Article 9, which combined the previously-distinct liens, collateral, and pledges into one category called "security interests," which were then treated in a uniform way.²⁵²

The concept of "purposive interpretation" was an extension of the pure rules-and-standards approach to writing statutory text. While the text did contain rules and standards, U.C.C. Section 1.102(1) says that "[t]his Act should be construed in accordance with its underlying purposes and policies." Section 1.102(2) provides:

(2) Underlying purposes and policies of this Act are

- (a) to simplify, clarify and modernize the law governing commercial transactions;
- (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- (c) to make uniform the law among the various jurisdictions.

To assist in this purposive interpretation, the drafters included "official comments" for every section of the U.C.C.²⁵³ In a few instances, the purpose of a provision was embedded in the statutory language itself, as in Section 4-107, which allows banks to close before the end of the business day "[f]or the purpose of allowing time to process items, prove balances, and make the necessary entries"²⁵⁴ By this approach, judges were invited to apply the U.C.C. in a way that best accomplished its purposes, rather than in a formalistic manner. Llewellyn felt that cases falling on the borderline between categories were inevitable, as were cases that were not contemplated by the Code's drafters,²⁵⁵ and that the best way to resolve these problem cases was to inform the judges of the goals to be achieved so that they could adapt the rules and standards to achieve the result that would have been intended had the case been contemplated when the statute was drafted.

As to non-exclusivity, the U.C.C. was intended to establish certain points only, and to let Contract Law continue to operate as to the rest. U.C.C. § 1-103 provides:

§ 1-103. Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent,

estoppel, fraud, misrepresentation, duress, coercion, mistake, Bankruptcy, or other validating or invalidating cause shall supplement its provisions.

This provision has been called “the most important single provision in the Code.”²⁵⁶ Professor Grant Gilmore, the Reporter for Article 9, said that the U.C.C. “assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, which it displaces to least possible extent, and without which it could not survive.”²⁵⁷ Assistant Professor Gregory E. Maggs pointed out that Article 2, which governs sales of merchandise, says very little about basic contract doctrines, does not define consideration, does not address mistake, and does not address conditions. Article 3 says when holders of negotiable instruments take them subject to defenses, but the defenses are not defined, and issues of infancy, lack of consideration, and mistake are left to the Common Law.

In substance, then, the U.C.C. generally, and Article 2 in particular, can be seen as effort to get the best of both worlds: securing the benefit of a uniform law that standardizes commercial practices, while allowing courts the flexibility to achieve justice in the individual cases.

A separate observation is necessary with regard to remedies for breach of contract under the U.C.C. Throughout the Code the remedies are designed to make the injured party “whole.” However, Section 1-106(1) provides:

§ 1-106. Remedies to Be Liberally Administered.

(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

By awarding damages based on the benefit of the bargain while ruling out consequential damages, the U.C.C. afforded as much compensation as it could while still avoiding the uncertainties of proving causation of consequential damages and measuring lost profits, tasks that would be difficult to assess before entering into a contract, and tasks that would expand the damage phase of a contract suit far beyond the face of the contract. Since the promisor under the UCC does not automatically undertake the risk of consequential damages, that risk does need to be included in the contract price—unless the parties expressly contract for that risk to be assumed by the promisor. In this way, the contract price includes only the economic value of the contractual benefit given, and insuring against consequential damages remains with the promisee unless it is bargained for separately, or is covered by an agreement with a third party. The U.C.C.’s approach to assessing damages is also distinguished from an approach that would set damages with an eye toward its effect on the behavior of others, in the way that exemplary damages do in tort law. The drafters of the U.C.C. were sensitive to the effect the scope of damages might have on the availability and the cost of transactions.

d. Texas’ Adoption of the U.C.C. The version of the U.C.C. adopted into Texas law in 1966 was the 1962 version of the Code. In adopting the Code, the Texas Legislature made certain elections

offered in the uniform act, and in some instances deviated from the uniform act. These elections and deviations are detailed in University of Texas School of Law Professor Millard H. Ruud's *The Texas Legislative History of the Uniform Commercial Code*, 55 TEX. L. REV. 597 (1966). The only deviation in Article II, relating to sales, is the deletion of proposed Section 2.318, which would have extended the seller's warranties to guests in the buyer's home and members of his family or household. An implied warranty for food and beverages, extending to manufacturers, had already been introduced into Texas law in the case of *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 620, 164 S.W.2d 828 (1942) (Alexander, C.J.). See Section XX.B.2.h of Orsinger, *175 Years of Texas Contract Law*. So the Supreme Court had already engaged in expanding the commercial law of warranty. The Board of Directors of the State Bar of Texas recommended against adopting Section 2.318, out of concern that the section might imperil the adoption of the U.C.C. A comment included in Business and Commerce Code Section 2-318 clarified that the Legislature intended to leave the scope of seller's warranties to Common Law development. The remainder of the elections and deviations do not touch directly on the basic Contract Law and are not covered in this discussion.

e. Uniform Commercial Code Amendments. The 1962 version of the U.C.C. has undergone a significant number of alterations since it was initially released. Article 9 was revised in 1972. Article 8 was revised in 1977 and again in 1984. The 1984 revisions to Article 8, on investment securities, have been adopted in all jurisdictions except Puerto Rico.²⁵⁸ The 1989 revisions to Article 4, on funds transfers, have been adopted in all states.²⁵⁹ Article 2A, on leases, was promulgated in 1987 and amended in 1990. Article 2A has been adopted in all jurisdictions except Louisiana and Puerto Rico.²⁶⁰ In 1989, Article 4A, pertaining to funds transfers, was promulgated, and has been adopted in all states.²⁶¹ In 1989, Article 6, on bulk sales, was amended, and the amendments have been adopted in all states but Georgia.²⁶² The 1990 amendments to Article 3, on negotiable instruments, have been adopted in all states but New York.²⁶³ The 1995 revisions to Article 5, on letters of credit, have been adopted in all jurisdictions except Puerto Rico.²⁶⁴ The 2002 revisions to Article 3, on negotiable instruments, and Article 4, on bank deposits, have been adopted in only 11 states, one of which is Texas.²⁶⁵ The 2003 revisions to Article 7, documents of title, have been adopted in all states but Missouri and Wyoming.²⁶⁶ The 2010 revisions to Article 9, on secured transactions, have been adopted in all states except Oklahoma.²⁶⁷ The 2012 Amendments to Article 4A, making adjustments in response to the impact of the Dodd-Frank Wall Street Reform and Consumer Protection Act on electronic funds transfers, has been adopted in all states but Connecticut, Florida, Kansas, North Dakota, Oklahoma, Puerto Rico, Utah, Vermont and Wyoming.²⁶⁸

Assistant Professor Gregory E. Maggs covered, in his 2000 article called *Karl Llewellyn's Fading Impact on the Jurisprudence of the Uniform Commercial Code*,²⁶⁹ the degree to which the amendments and additions to the 1962 version of the U.C.C. have drifted away from Karl Llewellyn's Legal Realist vision. The trend has been to move away from standards and toward rules,²⁷⁰ and to introduce formalities in the creation of duties.²⁷¹ The drift toward rules also shrinks the role of purposive interpretation under the 1962 version of the Code, and new Articles 2A and 4A, as well as revised Articles 3, 4, 5, 6, and 8 have few provisions that expressly set out the purpose of the provision.²⁷² In particular, the official comment to Article 4A-102 states that the rules regarding electronic funds transfers were based on the need to predict risk with certainty, in order to make adjustments to operational and security procedures, and to price funds transfers

appropriately.²⁷³ The policy of excluding consequential damages, except where they have been specifically contracted for, continues.²⁷⁴ Professor Maggs also notes that courts appear to be taking a “textualist approach in commercial cases.”²⁷⁵

The NCCUSL (now calling itself the Uniform Law Commission) says that the UCC “has been entirely amended or revised between 1985 and 2003.”²⁷⁶ “All the major articles have been either revised or amended.”²⁷⁷ In connection with those revisions, the Uniform Law Commission promulgated a revised Article 1 of the U.C.C. in 2001. Article 1 provides definitions and default provisions that apply when other sections of the U.C.C. do not apply. Section 1-102 expressly states that the substantive rules contained in Article 1 apply only to transactions within the scope of the U.C.C., so that they are not applied outside of the U.C.C. “with potentially serious unintended consequences.”²⁷⁸ The revisions eliminate the general statute of frauds, and leave the requirement of writing to the specific sections where it is needed. The revisions also clarify when other law supplements the U.C.C. *Id.* Section 1-201 revises the definition of “good faith” to mean “honesty in fact and the observance of reasonable commercial standards of fair dealing.”²⁷⁹ And evidence of course of performance is added to course of dealing and usage of trade as tools to help interpret a contract. Revised Section 1-301 the parties’ ability to agree upon a choice-of-law is no longer limited to the previous requirement that the transaction bear a reasonable relation to that state. However, such provisions in consumer transactions cannot deprive the consumer of legal rights and remedies in the state where she resides or contracts and takes delivery of goods. Nor is a court required to apply the law of a jurisdiction where it would violate a fundamental public policy of the forum state. In the absence of a choice-of-law provision, the forum state’s law applies.²⁸⁰ The revised Article 1 has been adopted in all states except Georgia, Missouri and also Puerto Rico.²⁸¹

In 2003, the NCCUSL approved amendments to Articles 2 and 2A of the U.C.C., pertaining to leases and sales of personal property. The historical details, and the difficulties in the process of drafting these amendments, is described in George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEXAS TECH L. REV. 235 (2009). One area of disagreement was whether Article 2 should be expanded beyond “goods” to include “information,” and particularly licenses for software. *Id.* at 260-286. The 2003 revisions to Articles 2 & 2A have not been legislatively adopted anywhere.²⁸²

f. Texas’ Adoption of Amendments to the U.C.C. In 1993, Texas adopted Chapter 2A of the U.C.C., the Uniform Commercial Code–Leases, and Chapter 4A, Uniform Commercial Code–Funds Transfers. The Legislature made more amendments to the Code in 1995, 1999, 2001, 2003, and 2005. In 2011, Texas adopted the 2010 amendments to the 1998 version of Article 9 of the U.C.C., governing secured transactions in personal property.

VI. THE U.N. CONVENTION ON INTERNATIONAL SALE OF GOODS (1980). The United Nations Convention on the International Sale of Goods (“CISG”) was promulgated in 1980, and became effective in the United States on January 1, 1988. The CISG was designed to remove legal barriers to international trade and promote such trade. Creating the CISG required the melding of Civil Law and Common Law principles and rules. In some areas, a compromise was reached. In other areas an issue was left to local law. And in some areas countries were permitted to opt out of the CISG rule. While the CISG has been adopted in 83 countries (as of September 2014), including

the United States of America, it has not been adopted in Hong Kong, India, South Africa, Taiwan and the United Kingdom. An overview of the acceptance of the CISG into American Federal courts is contained in Marlyse McQuillen, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 610 MIAMI L. REV. 509 (2007) (“McQuillen”).

Like U.C.C. Article 2, the CISG applies to the sale of goods, only on an international scale. Unlike the U.C.C., the CISG does not apply to consumer transactions.²⁸³ The CISG also does not apply to auctions, sale by execution, investment securities, negotiable instruments, ships and aircraft, and electricity.²⁸⁴

The CISG says that it governs only the formation of contracts, not the validity or effect of them.²⁸⁵ CISG Article 8 says that statements or conduct are to be interpreted according to the party's actual intent, if that is known to the other party, or if the other party could not have been unaware of the intent. If that principle does not apply, then according to Article 8(1) & (2), statements and conduct are to be interpreted “according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.” Under Article 8(3), in determining what a reasonable person would understand, due consideration must be given to “all relevant circumstances” including negotiations, past practices, usages, and subsequent conduct. These rules thus reflect a combined subjective and objective approach to contract formation.

The CISG contains no statute of frauds or parol evidence rule. Article 11 provides: “A contract for sale need not be concluded in or evidenced by a writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” Article 12 permits countries to opt out of Article 11 for contracts and modifications of contracts, and offers and acceptances, but in ratifying the treaty the United States did not make the declaration permitted under Article 12, so statutes of frauds and the parol evidence rule do not apply to transactions governed by the CISG being litigated in Texas courts.

Article 14 of the CISG defines an offer as a “proposal for concluding a contract addressed to one or more specific persons . . . if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.” Under Article 15, the offer becomes effective “when it reaches the offeree.” Under Article 16, an offer can be revoked until the offeree has dispatched an acceptance. However, an offer cannot be revoked during any time fixed by the offer for acceptance, or where the offeree reasonably relied on the offer being irrevocable. Under Article 17, an offer is terminated when the offeree’s rejection reaches the offeror. Under Article 18, an acceptance is a statement or other conduct by the offeree “indicating assent to an offer.” An acceptance becomes effective upon receipt by the offeror, provided the offer has not expired. Thus, the CISG reverses the ordinary “mailbox rule.” See Section VIII.B.4.c. Past practices can vary how assent may be accomplished. Under Article 19, a reply to an offer that contains “additions, limitations or other modifications” is a rejection and constitutes a counteroffer. However, that rule applies only to changes that materially alter the terms of the offer. For changes that do not materially alter the offer, the changes become part of the agreement unless the offeror rejects them without undue delay. See discussion of the “battle of the forms” in Section VIII.F.3.e of this Article.

Under Article 29, a contract can be modified or terminated by agreement. However, a clause requiring such modifications to be in writing is binding, unless estoppel applies. Articles 30 to 34 are default rules governing the delivery of goods. Article 35 contains a warranty of merchantability, warranty of fitness for a particular purpose, warranty of similarity to sample or model, and a warranty of adequate packaging. Articles 38 to 40 state the buyer's duty to inspect and complain upon delivery. Article 41 provides for a warranty of good title. Article 42 provides that the goods must be free from adverse claims of intellectual property. Articles 46 to 52 and 74 to 77 set out the buyer's choices and remedies for breach. Articles 53 to 65 set out the buyer's obligations, including in Article 53 the duty to "pay the price for the goods and take delivery of them as required by the contract and this Convention." Articles 66 to 70 govern when the risk of loss transfers from seller to buyer.

Article 25 describes a breach of contract as "fundamental" if the resulting detriment deprives the other party of what he is entitled to expect from the contract. Under Article 28, a country is only required to allow specific performance in accordance with its own law governing non-Convention cases. Under Article 71, a party can suspend performance when it becomes apparent that the other party will breach the contract. Under Article 72, if a fundamental breach becomes clear, the first party can "declare the contract avoided." Article 81 provides for the parties to have restitution if the contract is avoided. Article 74 sets out the fundamental rule on damages:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 77 establishes a duty to mitigate damages, "including loss of profit." Article 79 excuses a party's breach if the failure to perform "was due to an impediment beyond his control and [if] he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

On October 23, 2004, the CISG Advisory Council adopted CISG Advisory Council Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, which stated:

1. The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.
2. In some common law jurisdictions, the Plain Meaning Rule prevents a court from considering evidence outside a seemingly unambiguous writing for purposes of contractual interpretation. The Plain Meaning Rule does not apply under the CISG.
3. A Merger Clause, also referred to as an Entire Agreement Clause, when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause

may bar evidence of trade usages.

However, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account.²⁸⁶

In one case, the Fifth Circuit Court of Appeals held that Texas' parol evidence rule applied despite the CISG, while in another case the Eleventh Circuit Court of Appeals held that the CISG preempted state law, and thus declined to apply the parol evidence rule.²⁸⁷ See McQuillen, at 521-23. Several federal district courts have recognized preemption of the parol evidence rule by the CISG. McQuillen, at 521-23.

To cover gaps in the CISG, the private organization UNIDROIT prepared Principles of International Commercial Contracts, in 1994. These principles do not have the force of law, and are perceived as scholarly opinion.

Efforts are underway to see how parties to international contracts with arbitration clauses are approaching the use of CISG or other international norms as opposed to contract law of individual nations. See Christopher R. Drahozal, *Contracting out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005). The early assessment is that they aren't opting out in favor of national law. *Id.*

VII. THE ALI'S RESTATEMENTS ON THE LAW OF CONTRACTS. Restatements of the Law are published by the American Law Institute (ALI), a non-profit corporation founded in 1923 and headquartered in Philadelphia, Pennsylvania. The ALI consists of 4,000 lawyers, judges, and law professors²⁸⁸ who work together to generate Restatements, model statutes, and statements of principles of the law.²⁸⁹ The ALI's Restatements are lengthy compilations of appellate court decisions that distill the legal principles underpinning the decisions and state them as rules or standards of law. The Restatements also give explanatory comments, illustrative hypothetical examples, and citations to state and Federal appellate opinions. Primary responsibility for drafting a Restatement is assigned to one or more law professors. The written product is subjected to comment and criticism by editorial committees and by members of the American Law Institute in public meetings, and the text is rewritten and rewritten again until a final product is achieved. University of Texas School of Law Professors Robert W. Hamilton, Alan Scott Rau, and Russell J. Weintraub wrote in their textbook: "Restatement provisions are usually drawn from case precedent, though they do not always reflect the 'majority' view. Sometimes a Restatement provision sets forth what the Reporter and Advisers think the rule should be even though there is little precedent for it."²⁹⁰ Restatements have been criticized for presenting legal rules bereft of any consideration of social or economic consequences.²⁹¹

The American Law Institute's two RESTATEMENTS OF THE LAW OF CONTRACTS tacitly suggest that the best way to organize and understand Contract Law is through a structuring of underlying legal principles, as opposed to presenting the law in the context of Theophilus Parsons' identifiably distinct fact patterns, or Lon Fuller's interests being protected, or in some other way. The Restatements' Sections are presented as legal rules or standards. The Comments to the Sections discuss the purpose or intent of the rule or standard, and give examples of how the rule or standard

should be applied to simple hypothetical situations stripped bare of factual context. The Comments also include case citations that either support or contradict the Section. The Restatements contain little discussion of the deep history of Contract Law principles, and little indication that for the last 120 years writers have made insightful suggestions on how Contract Law might be better explained, or better justified, or improved.

The RESTATEMENTS OF THE LAW OF CONTRACTS reflect the same combination of analogical, inductive, and deductive reasoning evident in the writings of Frances Bacon, John Stuart Mill, and the publications of Parsons, Langdell, and Williston. That is, a group of investigators (i) collects “specimens” or records observations (i.e., they read appellate court decisions), (ii) compares them analogically to aggregate the similar and segregate the dissimilar, and finally (iii) arranges the categories into an intellectual framework that we call the Law of Contracts.

A. THE RESTATEMENT OF THE LAW OF CONTRACTS (1932). The creation of the RESTATEMENT OF THE LAW OF CONTRACTS (1932) was a ten-year effort, spearheaded by Harvard Law Professor Williston. His collaborator Arthur L. Corbin wrote that Williston, Corbin and Professor George J. Thompson had about four conferences a year from 1922 to 1932, some a week in length, in the summer on the coast of Maine and in winter near Pinehurst, N.C., during which the Restatement was written. The RESTATEMENT OF THE LAW OF CONTRACTS (1932) contains 609 sections, each containing a tersely-stated rule of law, followed by a comment that often contains hypothetical fact situations in which the rule in the section is applied. While the RESTATEMENT (FIRST) OF THE LAW OF CONTRACTS was not designed to make new law, it did have to choose between conflicting decisions from different states, and the RESTATEMENT would sometimes identify a majority rule and minority rules or even the “better” rule. What the RESTATEMENT lacked by way of commentary and case citations could be gotten from the Reporter's treatise, Williston on CONTRACTS (1920). In the words of one writer: “It is common knowledge that the RESTATEMENT OF CONTRACTS was based to a considerable extent upon the first edition of [Williston's] Treatise.”²⁹²

A recounting of the process, from call to action through the final version of the first restatement, the RESTATEMENT OF THE LAW OF CONTRACTS (1932), by Charles E. Clark, Dean of Yale Law School, is set out in Clark, *The Restatement of the Law of Contracts* 42 YALE L. J. 643 (1933). Dean Clark, who himself was an advisor to the drafting of the Restatement of the Law of Property, expressed reservations about the attempt to reduce the Common Law to a series of black letter rules.

In his book *THE DEATH OF CONTRACT* 59 (1974), Professor Grant Gilmore said: “Williston and Corbin were unquestionably the dominant intellectual influences in the drafting of the Restatement of Contracts [T]he Restatement of Contracts is not only the best of the Restatements, it is one of the great legal accomplishments of all time.”

B. THE RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1981). The ALI began the task of preparing a second restatement of the Law of Contracts in 1962, thirty years after the First Restatement was finalized. Robert Braucher served as the Reporter on the RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS until 1971, when he was appointed to the Massachusetts Supreme Judicial Court, at which point Law Professor E. Allen Farnsworth became the Reporter.²⁹³ The project was completed in 1979, and was finally promulgated in 1981. The RESTATEMENT

(SECOND) was like the U.C.C. in adopting standards in lieu of rules. The RESTATEMENT (SECOND) OF CONTRACTS contains 385 sections, making it shorter than the RESTATEMENT (1937). Each section of the RESTATEMENT (SECOND) contains official Reporter's Notes, listing cases, to augment the official comments and illustrations. Professor Gregory E. Maggs, of George Washington University Law School, published an analysis of the two restatements. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508 (1998). Maggs characterized the RESTATEMENT (1937) as trying to clarify the law without changing it.²⁹⁴ Maggs characterized the RESTATEMENT (SECOND) as frequently ignoring prevailing rules and instead setting out rules that the draftsmen and the ALI thought were preferable, supported by citation to scholarly writing.²⁹⁵ Maggs noted several sections where the RESTATEMENT (SECOND) varied from traditional contract law doctrine. As an example, Section 86 deals with the ability to revoke an offer. Traditional Contract Law treats an offer as revocable unless consideration is given to make the offer non-revocable. Section 87(2) permits the court to bind the offeror to his offer to the extent necessary to avoid injustice, if the offeror should reasonably expect the offer to induce reliance and the offeree does rely on the offer. This extends the use of reliance as a substitute for consideration, not only for promises covered in Section 90, but for mere offers.²⁹⁶ The RESTATEMENT (SECOND) adopts the objective view of contract theory. The RESTATEMENT (SECOND) also, in nineteen sections, leaves the grant or denial of a remedy to the court, based upon "the requirements of justice" or "the avoidance of injustice."²⁹⁷

VIII. FUNDAMENTALS OF CONTRACT LAW (OLD AND NEW). In this Section, certain fundamental concepts of Contract Law are viewed from an historical perspective. Harvard Law Professor Edmund M. Morgan,²⁹⁸ in 1926, summarized the law of contracts in this way:

[T]he law of contracts consists in general of those rules which define what conduct, verbal or non-verbal, amounts to a promise, what circumstances must attend a promise to make it enforceable, what facts operate to justify or excuse non-performance or to discharge the promise, and what relief, if any, is to be given to persons injured by non-performance.²⁹⁹

A. WHAT IS A CONTRACT? The starting point of many treatises and codes and uniform laws is a description of a contract.

1. Definitions of a Contract. Pothier described a contract in this way: "A contract includes a concurrence of intention in two parties, one who whom promises something to the other, who on his part accepts such promise."³⁰⁰ Blackstone (1769) defined a contract as "an agreement, upon sufficient consideration, to do or not to do a particular thing." He went on to say that a contract is "an agreement, a mutual bargain, or convention" which must involve at least two contracting parties who have sufficient ability to make a contract. Powell (1790) gave three definitions: (1) "A contract, according to the common law definition of it, is an agreement between two or more concerning something to be done, whereby both parties are bound to each other, or one is bound to the other; (2) "the consent of two or more persons in the same thing, given with the intention of constituting, or dissolving lawfully some obligation; and (3) "A contract is a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other."³⁰¹ French Civil Code (1804) § 1101 says that "a contract is an agreement, by which one or more persons bind themselves to one or more others, to give, to do, or not to do, some thing."

The Louisiana Civil Code (1808) said: “A contract is an agreement by which one or more persons oblige themselves to one or more other persons, to give, to do, or not do a certain thing.” Chief Justice John Marshall wrote, in *Sturges v. Crowninshield*, 4 Wheat. 196 (1819), that a contract is “an agreement in which a party undertakes to do or not to do a particular thing.” Kent (1827) adopted Blackstone’s definition of contract. Parsons (1853) defined a contract as “an agreement between two or more parties, for the doing or not doing of some specified thing.”³⁰² Parsons’ definition of a contract is like Blackstone’s definition, only Parsons intentionally omitted the requirement for consideration because he thought that consideration was not essential to the contract, but was instead more in the nature of proof of the contract. See Section IV.C.3 of this Article. Anson (1879) defined a contract as “an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.”³⁰³ Williston (1920) said: “A Contract is a promise, or set of promises, to which the law attaches legal obligation.”³⁰⁴ The RESTATEMENT OF THE LAW OF CONTRACTS § 1 (1932) said: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” The RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) repeats that definition verbatim.

2. Contracts by Speciality Versus Simple Contracts. In *Rann v. Hughes*, 4 Bro Parl Cas 27.7 Term Rep 356n (1778), the court wrote: “All contracts are by the laws of England distinguished into agreements by speciality, (i.e., under seal) and agreements by parol; if there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved.” Kent (1827) cited *Rann v. Hughes* and divided contracts between specialty and parol, saying that specialty contracts were contracts under seal, while parol contracts were verbal and written contracts not under seal. Chitty (1834) recognized the distinction between simple contracts and specialty contracts. Simple contracts require consideration to be enforceable; specialty contracts require conformity to form (a writing, impressed with a seal, and formally delivered).³⁰⁵ Parsons (1853) recognized the distinction between contracts by specialty and simple contracts.³⁰⁶ Leake (1867) divided contracts into simple contracts, contracts under seal, and contracts of record. See Section IV.B.6 of this Article. Williston (1920) wrote, in more abstract terms, that “[c]ontracts which derive their efficacy from the substance of the transaction rather than its form are called simple contracts.”³⁰⁷ Nowadays nearly every state has abolished any advantage for documents under seal, so the distinction between specialty contracts and parol or simple contracts is no longer important.

3. Executed Versus Executory Contracts. Kent (1827) defined an executory contract using Blackstone’s definition of contract.³⁰⁸ Kent said that where a persons sells and delivers goods to another for a price paid, the contract is *executed*, “and rests in action merely.”³⁰⁹ If he agrees to sell and deliver at a future time, and the price is set and the offer accepted, the contract is *executory*. *Id.* at 363-64. Benjamin (1868) distinguished between an agreement where “the property in the thing sold passed immediately to the buyer (called “a bargain and sale of goods”) and an agreement where “the property in the goods” was to pass to the buyer at a later time, for example to allow weighing or measuring (called “an executory agreement”).³¹⁰ The 1888 American edition of Benjamin’s treatise (1888) restated the idea as a distinction between a “present transfer of the entire title for a consideration” and a contract to sell in future.³¹¹

4. Express and Implied Contracts. Blackstone (1769) said that an agreement may be either express or implied. See Section IV.B.1.b of this Article. An express contract is “openly uttered and avowed” at the time of contracting; an implied contract is “such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform.” See Section IV.B.1.b of this Article. Blackstone gives two examples of an implied contract: (i) hiring someone to perform a service without agreeing to compensation, and (ii) taking wares from a vendor without paying for them. In the first instance, there is an implied contract to pay “as much as his labor deserves”; in the second, the party receiving the wares must pay “their real value.” See Section IV.B.1.b of this Article. Kent (1827) adopted this distinction between express and implied contracts. Parsons (1853) also distinguished express from implied contracts, but he noted confusion arising from Blackstone’s use of “implied contract” to mean obligations imposed by law. Parsons differentiates obligations imposed by law from contracts implied from the acts of the parties. The only similarity between them, he says, is that the remedies offered are similar. Parsons suggests that obligations imposed by law be called “quasi-contracts” instead. See Section IV.C.3 of this Article. This differentiation took hold. See Section VII.A.8 of this Article. Leake (1867) recognized the distinction between contracts arising by agreement and contracts arising by operation of law. See Section IV.B.5 of this Article. However, Leake also used the term “implied agreement” to describe contracts which are not expressly stated, so that the terms must be inferred from circumstantial evidence. Leake distinguished this kind of contract from an obligation that the law imputes without any agreement existing in fact. Leake’s distinction can be restated as differentiating express contracts, contracts implied from facts, and contracts implied by law. Williston (1920) moved away from contracts implied by law, saying: “Contracts are express when their terms are stated by the parties. Contracts are implied when their terms are not so stated.”³¹² This implied-in-fact idea was recognized in *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592 (1923), where, in interpreting a Federal statute, the court defined an “implied contract” under the statute to mean “an agreement ‘implied in fact’ founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” Justice Steakley, of the Texas Supreme Court, wrote that “[o]ur courts have recognized that the real difference between express contracts and those implied in fact is in the character and manner of proof required to establish them.” *Haws & Garrett General Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972). Justice Steakley cited courts of civil appeals cases that in turn cited Corpus Juris. The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 4, Comment a (1981), states:

- a. Express and implied contracts. Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance. See Uniform Commercial Code § 1-201(3), defining “agreement.”

The RESTATEMENT (SECOND) thus echoes what Parsons wrote in 1853 and what Leake wrote in 1867. Contracts implied in law thus have departed from contract analysis to their present home in quasi-contract, or more generally restitution. See Section VIII.A.8 of this Article.

Professor Emily Kadens suggests a different distinction: an “implied contract assumes the agreement of two or more particular persons at a moment of private lawmaking.” This contrasts with obligations arising from custom, “when the community has over time tacitly assented to be bound by a certain law,” whether or not it is in the contemplation of the parties at the time of contracting.³¹³ Her distinction could also be applied to implied consent at the moment of contracting versus obligations arising by law. The U.C.C. has transformed certain accepted customs into substantive law, so these particular standards no longer rest upon tacit concurrence of the community, but rather are now the result of collective consent through legislation. Since the parties presumably contract with knowledge of the law, their failure to “opt out” of such implied terms can be taken as their consent to having those implied terms to become part of the contract. The same could be said of implied duties supplied by Common Law as opposed to statute. If contracting parties are charged with knowledge of the law (both statutory and case law), rather than ignorance of it, the distinction between implied obligations arising from the consent of the parties, and implied obligations arising by operation of law, tends to collapse, and Blackstone’s association of contracts implied-in-fact with contracts implied-in-law is sensible. They both result in unspecified terms being read into the contract.

5. Unilateral Versus Bilateral Contracts. Borrowing from Pothier, French Civil Code § 1102 (1804) said: “[a] contract is synallagmatical or bilateral when the contractors bind themselves mutually some of them towards the remainder.” Section 1103 said that a contract is unilateral “when it binds one person or several towards one other or several others, without any engagement being made on the part of such latter.” The Louisiana Civil Code of 1808 revised the wording slightly: “[a] contract is synallagmatic or bilateral, when the contracting parties reciprocally obligate themselves to each other;” it is “unilateral, when one or more persons have entered into an obligation towards one or more persons, without the latter being under any engagement.”³¹⁴ Williston credited the case of *Barrett v. Dean*, 21 Iowa 423 (1866), with first developing the distinction between unilateral and bilateral contracts.³¹⁵ Langdell, in his SUMMARY OF THE LAW OF CONTRACTS § 12 (1880), wrote: “[i]n a unilateral contract the offer becomes a contract in consequence of what the offeree *does*, in a bilateral contract in consequence of what he *says*.” Williston discredited Langdell’s distinction between unilateral and bilateral contracts, in his article *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27, 32-38 (1894). But in his treatise (1920) Williston described a unilateral contract as arising when one party promises performance “the consideration from the promisee being actually given.” With a bilateral contract, each party promises some performance.³¹⁶ Williston wrote that “[t]he recognition of unilateral contracts by the law antedated the recognition of bilateral contracts by about a century.”³¹⁷ Williston acknowledged “Professor Langdell” for the use of the terms unilateral and bilateral and notes that they “are now in common use in the reports.”³¹⁸ The idea of a unilateral contract was rejected in *High Wheel Auto Parts Co. v. Journal Co. of Troy*, 98 N.E. 442, 444 (Ind. Ct. App. 1912) (“A unilateral contract is a legal solecism. There is no such thing as a one-sided contract.”). The Kansas Supreme Court later rejected the concept of unilateral contract in *Railsback v. Raines*, 203 P. 687, 688 (Kan. 1922), saying: “A unilateral contract is exactly as impossible as any other one-sided thing of two sides.” Corbin, in his American edition of Anson’s treatise in 1879, recognized the distinction between “unilateral contracts” and “bilateral contracts,” which he said was “important.”³¹⁹ The RESTATEMENT OF THE LAW OF CONTRACTS § 12 (1932) used the terms “unilateral” and “bilateral” contract, and defined unilateral contract as one “in which no promisor receives a promise as consideration for his promise.”³²⁰ The

RESTATEMENT (SECOND) OF CONTRACTS (1981) eliminated the definitions of unilateral and bilateral contracts,³²¹ “because of doubt as to the utility of the distinction, often treated as fundamental, between the two types.” RESTATEMENT (SECOND) OF CONTRACTS § 1, Reporter’s Note, comment f goes on to say: “The principal value of the distinction has been the emphasis it has given to the fact that a promise is often binding on the promisor even though the promisee is not bound by any promise.”

The question of when a unilateral contract becomes a bilateral contract was considered in *Hutchings v. Slemons*, 141 Tex. 448, 453, 174 S.W. 487, 490 (Tex. 1943). There a landowner made an oral agreement with a broker to pay at 5% commission for selling the land. At the time of contracting, such oral promises were enforceable. The broker found the prospect who agreed to and then did purchase the property on terms consistent with the listing agreement. After the sale, the Statute of Frauds was amended to require such commission agreements to be in writing to be enforced. The seller refused to pay the commission. Under constitutional principles, the amendment to the Statute of Frauds would impair the obligations of a contract if, and only if, the contract was legally enforceable prior to the amendment. The Supreme Court held that the contract was bilateral, not unilateral, prior to the date of the amended statute, and was therefore enforceable. The court imagined a conversation in which the landowner promised to pay a commission upon sale, and the broker promised to use reasonable diligence to sell the land in accordance with the listing agreement. *Id.* at 452, 489. Thus, each party “is both a promisor and a promisee.” *Id.* The Court quoted the description, in the RESTATEMENT OF THE LAW OF CONTRACTS § 12 (1932), of a bilateral contract: “A bilateral contract is one in which there are mutual promises between two parties to the contract, each party being both a promisor and a promisee.” The Supreme Court cited two Texas court of civil appeals decisions for the proposition that “the test of mutuality is to be applied, not as of the time when the promises are made, but as of the time when one or the other is sought to be enforced.” The Supreme Court also cited a Texas court of civil appeals decision for the proposition that a contract is void for lack of mutuality when made and while it remains executory, but once there has been part performance by rendering services or incurring contemplated expenses, which confers “even a remote benefit on the other party,” the benefit constitutes “equitable consideration” that makes the contract enforceable. *Id.* 452, 489.

6. Void and Voidable Contracts. The distinction between void and voidable contracts has a long history. It can generally be said that a *void* contract is no contract at all, while a *voidable* contract can be rescinded or enforced at the option of the disadvantaged party. Chitty (3d ed. 1841) recognized the distinction between void and voidable, comparing an agreement that is “void for lack of mutuality” to an agreement with an “infant” that is enforceable by but not against the infant.³²² Chitty saw a contract procured by fraud to be voidable and not void, since the contract can be enforced by the victimized party but not by the party committing the fraud.³²³ The French Civil Code (1804) does not distinguish void from voidable contract, but Section 1109 does provide that contracts can be “nullified” for mistake, violence, or fraud. The draft New York Civil Code § 547 (1862) provides that where consent to a contract is not free or mutual it “voidable” at the option of the “party prejudiced.” The Indian Contract Act (1872) distinguishes void from voidable contracts. A contract is voidable (can be rescinded) if consent was procured by coercion, undue influence, fraud, misrepresentation, or mistake. Sections 14 and 19. Void contracts include contracts without consideration, and contracts in restraint of marriage and restraint of trade. Sections 25, 26, and 27.

Holmes, in Lecture IX later published in *THE COMMON LAW* (1881), distinguished between a *void* contract, which “fails to have been made when it seems to have been,” and a *voidable* contract, which “can be rescinded by one side or the other, and treated as if it had never been.” A voidable agreement, he said, could be “unmade at the election of one party . . . because of the breach of some condition attached to [the contract’s] existence either expressly or by implication.”³²⁴

The difficulties encountered in describing void and voidable contracts in the preparation of the *RESTATEMENT OF THE LAW OF CONTRACTS* (1932) is described in detail in Jesse A. Schaefer, *Beyond a Definition: Understanding the Nature of Void and Voidable Contracts*, 33 *CAMPBELL L. REV.* 193 (2010). The *RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS* § 7 says: “A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.” The *RESTATEMENT (SECOND)* does not use the term “void contract.” Instead it speaks to “unenforceable contracts,” saying: “An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification.” *RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS* § 8 (1981).

7. Sale Versus Contract. Blackstone (1769) defined a sale as a “transmutation of property from one man to another in consideration of some price.”³²⁵ Benjamin (1886) defined a sale as “a transfer of an *absolute or general* property in a thing for a price in *money*.”³²⁶ Benjamin distinguished a sale from a barter (exchange of goods for goods) and an exchange of goods for work, rent, board, lodging, or other consideration that is not money (a contract for the sale of goods).³²⁷

8. Quasi-Contracts. As noted above, Blackstone (1769) included in his description of “implied contracts” both contracts inferred from the non-verbal behavior of the parties and duties that the law imposes on persons who have received a contract-like benefit without payment or promise of payment.³²⁸ Chitty’s third edition (1841) used the term “quasi contract” to describe “purely voluntary acts of the parties, from which result any engagements whatsoever towards a third person, and sometimes a reciprocal engagement of two parties.” *Id.* at 27. Parsons (1853) suggested that the category of contract-like claims giving rise to a contract-like recovery be called “quasi-contracts.” See Section IV.C.3 of this Article. Dean William A. Keener, of the law faculty of Columbia College, published his *TREATISE ON THE LAW OF QUASI-CONTRACTS* (1893), in which he complained about Blackstone’s division of simple contracts into express contracts, contracts implied in fact, and contracts implied in law. Keener called the division “unscientific, and therefore theoretically wrong, but also destructive of clear thinking.” *Id.* at 3. Keener attributed the misperception to the fact that in Blackstone’s time, the Rules of Form required that a claim implied by law be classified either as a claim in contract or a claim in tort. For various reasons, classification of a claim implied by law as a tort was not feasible, so it ended up being classified as a contract, with the aid of a legal fiction that “the law implied a promise.” *Id.* at 14-15. Keener said that express contracts and contracts implied in fact were fundamentally different because they derive their force from the parties’ consent, while contracts “implied in fact” derive their force by operation of law, without regard to and even contrary to the parties’ consent. *Id.* at 3-5, 14-15. He therefore substituted the term “quasi-contract” for “contract implied in law,” acknowledging that in doing so he followed Pollock and Anson. *Id.* at 2. Keener included in quasi-contract claims based on: unjust enrichment, *Id.* at 19; a

husband's duty to pay for necessities for his wife or child, *Id.* at 22-23; money paid under mistake, *Id.* at 23; where a party has partially performed under a contract, at 214-ff, etc. Williston (1920) called obligations that arise by law without regard to the consent of the parties "quasi-contracts."³²⁹ As Harvard Law Professor Edmund M. Morgan explained, in his INTRODUCTION TO THE STUDY OF LAW (1926):

[T]here are certain non-contractual duties for the violation of which redress is given in the form of action usually reserved for contracts. They are imposed by law in the sense that the consent or lack of consent of the dutybearer to their creation is entirely immaterial. The wrong done by the transgression of such a duty would fit Professor Burdick's definition of a tort, but it is usually classified as a breach of quasi-contract, and in some instances the operative facts constituting the breach of duty would not support a tort action.³³⁰

The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 4, Comment b (1981) gives the modern view on the issue:

b. Quasi-contracts. Implied contracts are different from quasi-contracts, although in some cases the line between the two is indistinct. See Comment a to § 19. Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice. Such obligations were ordinarily enforced at common law in the same form of action (*assumpsit*) that was appropriate to true contracts, and some confusion with reference to the nature of quasi-contracts has been caused thereby. They are dealt with in the Restatement of Restitution.

B. THE ELEMENTS OF A CONTRACT. Blackstone (1769) gave three elements of a contract: the agreement, the consideration, the subject matter or type of contract. See Section IV.B.1.a of this Article. The French Civil Code § 1108 (1804) gave "[f]our conditions of an agreement: The consent of the party who binds himself; His capacity to contract; A certain object forming the matter of the contract; A lawful cause in the bond." Powell (1790) said that "the ingredients required to form a contract are, First, Parties. Secondly, Consent. Thirdly, An obligation to be constituted or dissolved." The Louisiana Civil Code (1808) reworded the language slightly to read: "the consent of the party who obligates himself; the capacity to contract; a determinate object forming the matter of an engagement; and a lawful purpose in the obligation."³³¹ Parsons (1857) defined the essentials of a contract to be: the parties, consideration, assent of the parties, and the subject matter of the contract.³³² Benjamin § 1 (Bennet ed. 1888) defined the essentials to be: (i) parties competent to contract; (ii) mutual assent; (iii) a thing transferred from seller to buyer; and (iv) a price in money paid or promised. Williston (1920), echoing Parsons, listed three requirements for the formation of a "simple contract:" (1) parties of legal capacity, (2) an expression of mutual assent of the parties to a promise, or set of promises, (3) an agreed valid consideration."³³³ "The agreement must also not be declared void by statute or common law."³³⁴ Williston rejected possibility of performance, genuineness of consent³³⁵ and intent to contract as "not properly classed as essential."³³⁶ Williston rejected Anson's suggestion as being essential "the legality of the object which the contract proposes to effect."³³⁷

C. THE CONCEPT OF A PROMISE. The focus on “promise” as an important component of Contract Law is a modern development. Blackstone (1769) focused mainly on the contract itself, and relegated promises to the second of four categories of consideration sufficient to create a contract. See Section IV.B1.c of this Article. Chitty (3d ed. 1841) discusses promises, sometimes as synonymous with “offer” and sometimes as a duty, such as with a promise implied by law. See Section IV.B.3 of this Article. Parsons (1853) mentions promise without detailed analysis. Leake (1867) did not focus on promise as an element of contract. Neither Pollock (1876) nor Anson (1879) used a promise-based analysis. Langdell (1880) spoke of an offeree converting an offer into a binding promise by providing consideration for the promise. The RESTATEMENT OF THE LAW OF CONTRACTS, § 2 (1932) provides: “A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.” The RESTATEMENT (SECOND) OF LAW OF CONTRACTS, § 2 (1981) carries forward this definition, saying that the promise is enforceable if it is supported by consideration and otherwise complies with law. However the U.C.C. (1962) steered away from a focus on promise and toward a focus on the ultimate contract. U.C.C. Section 1-201.1 says: “‘Contract’ means the total legal obligation which results from the parties’ agreement as affected by this Act and any other applicable rules of law.”

D. CAPACITY TO CONTRACT. The modern law on the capacity to contract is little changed from older law. The French Civil Code § 1124 (1804) lists persons incapacitated to contracts as being “Minors, Interdicted persons, Married women in the cases expressed by the law, And all those generally to whom the law has forbidden certain contracts.” The Louisiana Civil Code art. 24 (1808) denied capacity to contract to “Slaves; Minors; Persons under interdiction; Married women, in cases expressed by law; and “generally all those to whom the law has interdicted certain contracts.” Kent (1827) identified parties who could not contract: infants, married women, bankrupts, insolvents, persons under duress, and persons who are non compos mentis.³³⁸ Parsons (3d ed. 1857) listed as persons disabled from contracting: infants, married women, bankrupts or insolvents, non compotes mentis, drunkards, spend thrifts, seamen, aliens, slaves, outlaws, attainted, and excommunicated.³³⁹ The draft New York Civil Code of 1862 gave all persons the capacity to contract except infants, persons of unsound mind and persons deprived of civil rights.³⁴⁰ The RESTATEMENT (Second) of the Law of Contracts recognizes incapacity to contract for minors (§ 14), mental illness (§§ 13, 15), and intoxication (§ 16).

E. SUBJECTIVE VERSUS OBJECTIVE VIEW OF CONTRACTS. During much of the 1800s, Contract Law in the United States was influenced by the “will theory.”³⁴¹ Under the will theory,³⁴² the creation of a contract requires a “meeting of the minds” of the contracting parties. See *National Bank v. Hall*, 101 U.S. 43 (1879) (Swayne, J.) (“The minds of the parties, as shown by these letters, moved on parallel, not on concentric lines. There was not the meeting of minds and the mutuality of assent to the same thing, which are necessary to create a contract.”). Whatever the outward appearance of the conduct of the parties may be, no contract is made if the parties are not in true agreement. The subjective view of contracts evaluates offers, acceptance, and the interpretation of contracts based on the actual thoughts of the parties.

Toward the end of the 1800s, courts and writers began to shift from the subjective theory to the objective theory. Under the objective theory of contract formation the law will deem an offer to have

been made or acceptance given whenever a reasonable person could have understood the conduct of the party to reflect the intent to create a contract, regardless of the true intent of that party. A similar objective approach was applied to contract interpretation, where the goal was to determine not what each party meant, but instead what a reasonable person would think the contract means, given the words used, illuminated by the surrounding circumstances. Thus, the “objective” view of contracts concerns itself with what a reasonable person would do or think with respect to an offer or acceptance, or the words of a contract.

Professor Simon Greenleaf, in Section 277 of his *Treatise on the LAW OF EVIDENCE* (1842-1853), endorsed the objective theory of contract interpretation:

The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used.

This passage was cited approvingly by the U.S. Supreme Court in *Reed v. Merchants' Mut. Ins. Co. of Baltimore*, 95 U.S. 23, 30 (1877).

The subjective view can be inferred whenever a principle or rule of Contract Law involves the actual thoughts of a person; the objective view can be inferred whenever a principle or rule of Contract Law invokes a “reasonable person” standard or applies a “reasonableness” test. The objective view of contract formation and contract interpretation was a prominent feature in the writings of Oliver Wendell Holmes, Jr., and found its most poignant expression in Judge Learned Hand’s description in *Hotchkiss v. National City Bank of New York*, 200 F. 287, 293 (D.C.N.Y. 1911) (Hand, J.), *aff’d*, 201 F. 664 (2d Cir. 1912), *aff’d*, 231 U.S. 50 (1913), quoted in Section VIII.J.1 of this Article.

Williston (1920) adopted the objective view of contract formation, saying that “expressed mutual assent rather than actual mutual assent is the essential element in the formation of contracts.”³⁴³

Williston’s objective approach to contract formation is explained in Section 22 of his treatise on [SC] *The Law of Contract* [sc] (1920):

§ 22. Mutual assent must be expressed.

It is customarily said that mutual assent is essential to the formation of simple contracts, but it should further be stated that the mutual assent must be expressed by one party to the other, and except as so expressed is unimportant. In some branches of the law, especially in the criminal law, a person’s secret intent is important, but in the formation of contracts it was long ago settled that secret intent was immaterial; only overt acts being considered in the determination of such mutual assent as that branch of the law requires. During the first half of the nineteenth century there are many expressions which seem to indicate the contrary, but that the fundamental basis of contract in the common law is reliance on an outward act (that is a promise) is shown by the early development of the law of consideration as compared with that

of mutual assent. Courts of equity indeed have not shown the same indifference to the undisclosed intent of the parties, as have courts of law; but equity makes its views effective not by denying or altering the rules of law governing the formation of contracts but by subsequently reforming or rescinding legally valid contracts in cases coming within its own rules. Not only must assent to a contract be expressed by overt acts, but promises in contracts must be made by an expression of agreement moving from the promisor to the promisee. The assent of the promisee to a unilateral contract may be indicated by an act requested by the promisor, but of which he has no knowledge, and is not likely to acquire knowledge unless he takes steps to inform himself; but a promise necessarily implies either communication from the promisor to the promisee, or at least some action which will normally indicate to the promisee the intent of the promisor.

Justice Jerome Frank wrote a Concurring Opinion in *Ricketts v. Pennsylvannia R.R.*, 153 F.2d 757, 761 (2d Cir. 1946) (Frank, J., concurring), in which he comments on the subjective and objective views of contracts. Justice Frank's language is quoted extensively here, although it was not influential, because it is a well-articulated statement of the opposing view to the objective theory of contract espoused by Holmes, implemented by Williston, and now a fixture of American Contract Law.

In the early days of this century a struggle went on between the respective proponents of two theories of contracts, (a) the "actual intent" theory — or "meeting of the minds" or "will" theory — and (b) the so-called "objective" theory.² Without doubt, the first theory had been carried too far: Once a contract has been validly made, the courts attach legal consequences to the relation created by the contract, consequences of which the parties usually never dreamed — as, for instance, where situations arise which the parties had not contemplated.³ As to such matters, the "actual intent" theory induced much fictional discourse which imputed to the parties intentions they plainly did not have.

² Some adherents of the objective theory have suggested that the "actual intent" theory was undesirably transplanted into the common law, in the 19th century, from Roman-law dominated continental sources. See, e.g., Williston, *Contracts* (Rev. ed. 1936) §§ 20, 21, 94; cf. Patterson, *Equitable Relief for Unilateral Mistake*, 28 Col. L. Rev. (1928) 859, 861, 862, 888-890. The historical accuracy of that suggestion seems somewhat questionable to one who reads a 16th century English decision like *Thoroughgood's Case*, 1582, 2 Co.Rep. 9a, 76 Eng. Reprint 408, relating to a unilateral mistake. Sponsors of the "objective" theory did not, however, rest their case primarily on chauvinistic common law distaste for continental attitudes. Nor could they consistently have done so. For the "reasonable man," dear to the objectivists, seems to have been imported into the common law. Cf. *Beidler Bookmyer, Inc., v. Universal Insurance Co.*, 2 Cir., 134 F.2d 828, 830.

The "actual intent" theory, said the objectivists, being "subjective" and putting too much stress on unique individual motivations, would destroy that legal certainty and stability which a modern commercial society demands. They depicted the "objective" standard as a necessary adjunct of a "free enterprise" economic system. In passing, it should be noted that they arrived at a sort of paradox. For a "free enterprise" system is, theoretically,

founded on “individualism”; but, in the name of economic individualism, the objectivists refused to consider those reactions of actual specific individuals which sponsors of the “meeting-of-the-minds” test purported to cherish. “Economic individualism” thus shows up as hostile to real individualism. This is nothing new: The “economic man” is of course an abstraction, a “fiction.” See *Doehler Metal Furniture Co. v. United States*, 2 Cir., 149 F.2d 130, 132; cf. *Standard Brands v. Smidler*, 2 Cir., 151 F.2d 34, 38, notes 6 and 7. Patterson (loc. cit. 878 note) says that the “direct ancestry of [the objective] theory goes back to Paley, * * * a theological utilitarian, a contemporary of Adam Smith.”

³ See *Beidler Bookmyer, Inc. v. Universal Insurance Co.*, *supra*; *Kulukundis Shipping Co. v. Amtorg Trading Co.*, 2 Cir., 126 F.2d 978, 991, and note 43; *United States v. Forness*, 2 Cir., 125 F.2d 928, note 26; *Zell v. American Seating Co.*, 2 Cir., 138 F.2d 641, 647.

But the objectivists also went too far. They tried (1) to treat virtually all the varieties of contractual arrangements in the same way, and (2), as to all contracts in all their phases, to exclude, as legally irrelevant, consideration of the actual intention of the parties or either of them, as distinguished from the outward manifestation of that intention. The objectivists transferred from the field of torts that stubborn anti-subjectivist, the “reasonable man”;⁴ so that, in part at least, advocacy of the “objective” standard in contracts appears to have represented a desire for legal symmetry, legal uniformity, a desire seemingly prompted by aesthetic impulses.⁵ Whether (thanks to the “subjectivity” of the jurymen’s reactions and other factors) the objectivists’ formula, in its practical workings, could yield much actual objectivity, certainty, and uniformity may well be doubted.⁶ At any rate, the sponsors of complete “objectivity” in contracts⁷ largely won out in the wider generalizations of the Restatement of Contracts⁸ and in some judicial pronouncements.⁹

⁴ As to the lack of real objectivity attained through the use of that personage in the field of torts, and the vagueness of his personality, see the following articles by Dean Leon Green, *The Duty Problem*, 28 Col.L.Rev. 1014 (1928) and 29 Col.L.Rev. 255 (1929); *The Negligence Issue*, 37 Yale L.J. 1029 (1928); *Rules of Causation*, 77 Un. of Pa.L.Rev. 601 (1929). See these and other articles in his book, *Judge and Jury* (1930). Cf. *Aikens v. Wisconsin*, 195 U.S. 194, 204, 25 S.Ct. 3, 49 L.Ed. 154.

⁵ See, e.g., Wolfson, *Aesthetics In and About the Law*, 33 Ky.L.J. (1944) 33; Cohen, *Transcendental Nonsense and The Functional Approach*, 35 Col.L.R. 809, 845; Cf. Becker, *Some Problems of Legal Analysis*, 54 Yale L.J. 809 (1945).

⁶ See *Zell v. American Seating Co.*, *supra*, 2 Cir., 138 F.2d at pages 641, 647, 648; *In re J.P. Linahan, Inc.*, 2 Cir., 138 F.2d 650, 652, 653. Perhaps the most fatuous of all notions solemnly voiced by learned men who ought to know better is that when legal rules are “clear and complete” litigation is unlikely to occur. See, e.g., Kantorowicz, *Some Rationalism about Realism*, 43 Yale L.J. (1934) 1240, 1241; Dickinson, *Legal Rules*, 79 Un. of Pa. L.Rev. (1931) 833, 846, 847. Such writers surely cannot be unaware that thousands of decisions yearly turn on disputes concerning the facts, i.e., as to whether clear-cut legal rules were in fact violated. It is the uncertainty about the “facts” that creates most of the

unpredictability of decisions. See Frank, *If Men Were Angels* (1942) Chaps. VI and VII and Appendices II and V. Cf. Maine, *Early History of Institutions* (1875) 48-50; Maine, *Village Communities* (4th ed. 1881) 311-312, 318; *Zell v. American Seating Co.*, 138 F.2d at pages 647, 648; cf. *In re J.P. Linahan*, 138 F.2d at pages 652-654.

⁷ Williston, *Contracts* (Rev. ed.) § 35.

⁸ See, e.g., Rest. §§ 70, 71 and 503.

⁹ See, e.g., *Hotchkiss v. National City Bank*, D.C., 200 F. 287, 293.

Influenced by their passion for excessive simplicity and uniformity, many objectivists have failed to give adequate special consideration to releases of claims for personal injuries, and especially to such releases by employees to their employers. Williston, the leader of the objectivists, insists that, as to all contracts, without differentiation, the objective theory is essential because “founded upon the fundamental principle of the security of business transactions”.¹⁰

¹⁰ Williston, *Contracts* (Rev. ed.) § 23. He cites § 21, with approval, Holland’s *Jurisprudence*; Holland (13th ed.) 262, says that “when the law enforces a contract, it does so to prevent disappointment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise.” (Emphasis added.)

He goes to great lengths to maintain this theory, using a variety of rather desperate verbal distinctions to that end. Thus he distinguishes between (1) a unilateral non-negligent mistake in executing an instrument (i.e., a mistake of that character in signing an instrument of one kind believing it to be of another kind) and (2) a similar sort of mistake as to the meaning of a contract which one intended to make.¹¹ The former, he says, renders the contract “void”;¹² the latter does not prevent the formation of a valid contract. Yet in both instances “the fundamental principle of the security of business transactions” is equally at stake, for there has been the same “disappointment of well-founded expectations.”¹³ More than that, Williston concedes that a mistaken idea of one party as to the meaning of a valid contract (Williston’s second category) “may, under certain circumstances, be ground for relief from enforcement of the contract.” But he asserts that (a) such a contract is not “void” but “voidable,” and (b) that the granting of such relief is no exception to the objective theory, because this relief “is in its origin equitable,” and “equity” does not deny the formation of a valid contract but merely acts “by subsequently * * * rescinding” it.¹⁴ His differentiation, moreover, of “void” and “voidable” has little if any practical significance: He says that a “voidable” contract will be binding unless the mistaken party sets up the mistake as a defense;¹⁵ but the same is obviously true of agreements which (because of unilateral mistakes affecting their “validity”) he describes as “wholly void.”¹⁶

11. § 1541.

12. *Ibid*, §§ 94, 95A, 1535, 1541.

13. See quotation from Holland, *supra*, note 10.

14. Section 22, 94, 1537.

15. §§ 15, 20, 1538. Williston refused to concede that the mutual-mistake doctrine does not jibe with the “objective” theory. He perhaps had in mind this comment of Wigmore’s on the reformation of a contract for such a mistake: “The theory of reformation is to make the instrument state, objectively and in appearance to others, what it did subjectively state to the parties themselves * * *” Wigmore, *Evidence*, § 2418; cf. § 2417.

Williston, to whom all subjectivity was anathema, insisted that “the external expression” of the parties’ “will,” no matter how mistaken, results in a contract which “equity” recognizes as a contract but which, when the mistake is mutual, it sets aside because “it is just to do so.” See Williston, *The Formation of Contracts*, 14 Ill.L.Rev. (1919) 85, 92, 94. However (in part because of the formal “merger” of “law” and “equity” but even in jurisdictions where no such merger has occurred) the “law” courts have often refused to enforce such contracts.

Williston, undoubtedly a master, takes a position here which seems highly casuistical: Since “equity” — whether administered in a separate court or in a court of “law” — departs from the objective appearance, the objective theory, for all practical purposes, cannot be said to be consistently applied in our legal system. It is far more helpful to acknowledge frankly that there exist important exceptions to that theory. Cf. Patterson, *The Restatement of The Law of Contracts*, 33 Col.L. Rev. (1933) 397, 407-408; Robinson, *Law — An Unscientific Science*, 44 Yale L.J. 235, 259-261.

There is a danger, that through the merger of “law” and “equity,” the latter may lose its desirable elasticity. See Emmerglick, *A Century of The New Equity*, 23 Tex.L.R. (1945) 244. That danger may be augmented if, via the Restatement, the “objective” theory of contracts is not recognized as subject to exceptions.

¹⁶ § 20. In § 1538, Williston concedes that his distinction between “void” and “voidable” will “be generally unimportant for the defendant from a practical standpoint * * *.”

It is little wonder that a considerable number of competent legal scholars have criticized the extent to which the objective theory, under Williston’s influence, was carried in the Restatement of Contracts.¹⁷ One of them, Whittier, says that the theory, in its application to the formation of contracts, is a generalization from the exceptional cases; he points out that the theory of “actual mutual assent” explains the great majority of the decisions, so that it would be better, he believes, to adhere to it, creating an exception for the relatively few instances where one party has reasonably relied on negligent use of words by the other. “Why not,” asks Whittier, “say that actual assent communicated is the basis of ‘mutual assent’ except where there is careless misleading which induces a reasonable belief in assent?”¹⁸ There may be much in that notion: Williston admits that “the law generally is expressed in terms of subjective assent, rather than of objective expressions * * *”,^{18a} and that “a doctrine which permits the rescission of a contract on account of a unilateral mistake approaches nearly to a contradiction

of the objective theory * * *¹⁹ As able a judge as Cuthbert Pound said, not long ago, “The meeting of minds which establishes contractual relations must be shown.”²⁰

¹⁷ See, e.g., Sharp, *Williston on Contracts*, 4 Un. of Chi.L.Rev. (1936) 30; Oliphant, *Book Review*, 19 Mich.L.Rev. (1938) 358; Whittier, *The Restatement of Contracts and Mutual Assent*, 17 Calif. L.Rev.(1929) 441; Cf. Patterson, *The Restatement of The Law of Contracts*, 33 Col. L.Rev. (1933) 397, 407-408; Robinson, *Law — An Unscientific Science*, 44 Yale L.J. (1934) 235, 259-261; Clark, *The Restatement of The Law of Contracts*, 42 Yale L.J. (1933) 643; Pound, *An Introduction to the Philosophy of Law* (1922) 282, 283.

¹⁸ Whittier, loc. cit. 441, 443. Whittier cogently remarks (442 note 5): “All non-consensual legal obligations need not have identical bases either as to culpability or damage.”

18a § 1536; see also § 1538.

19 § 1579.

20 *300 West End Ave. Corp. v. Warner*, 250 N.Y. 221, 227, 228, 165 N.E. 271, 273.

Another critic²¹ suggests that, in general, Williston, because he did not searchingly inquire into the practical results of many of his formulations, assumed, unwarrantably, without proof, that those results must invariably have a general social value, although (as Williston admits as to the objective theory) they are “frequently harsh.”^{21a}

²¹ F.S. Cohen says that Williston, “a master of classical jurisprudence,” in many of his formulations “has in mind neither the question of * * * prediction which the practical lawyer faces nor the question of values which the conscientious judge faces. If he had in mind the former question, his studies would no doubt reveal the extent to which courts actually enforce various types of contractual obligation. His conclusions would be in terms of probability and statistics. On the other hand, if Professor Williston were interested in the ethical aspects of contractual liability, he would undoubtedly offer a significant account of human values, and social costs involved in different types of agreement and in the means of their enforcement. In fact, however, the discussions of a Williston oscillate between a theory of what courts actually do and a theory of what courts ought to do, without coming to rest either on the plane of social realities or on the plane of values long enough to come to grips with significant problems. This confused wandering between the world of fact and the world of justice vitiates every argument and every analysis.” Cohen, *Transcendental Nonsense and The Functional Approach*, 25 Col.L.Rev. (1935) 809, 840, 841. Cf. Fuller and Perdue, *The Reliance Interest in Contract Damages*, 47 Yale L.J. (1936) 52.

^{21a} Loc. cit. § 35.

Justice Frank’s Concurring Opinion goes on further, but his point is clear, that he and others felt that by embedding the objective approach into his articulation of Contract Law, Williston unwisely and unjustifiably sacrificed the actual intent of the parties, which is the foundation of Contract Law and,

it might be added, is largely what separates Contract Law from Tort Law.

Another perspective on the objection theory embraced in the first RESTATEMENT is set out in Professor Clarke B. Whittier's article *The Restatement of Contracts and Mutual Assent* 17 CAL. L. REV. 441 (1929), commenting on an Official Draft of the First RESTATEMENT. He noted, as Williston had pointed out in an article on contract formation,³⁴⁴ a rule developed in about 1850 that "one who did not actually assent to the contract may be held to it if he carelessly led the other party to reasonably think that there was assent." *Id.* at 441. Whittier called this a "misapplication of the principle of estoppel." *Id.* at 441. Whittier believed that it would have been better to find no contract and to compensate the other party in tort. *Id.* A modern suggestion might be to award the innocent party reliance damages under the doctrine of promissory estoppel. Notwithstanding such criticism, the objective approach to contract formation is reflected in RESTATEMENT OF THE LAW OF CONTRACTS § 26 (1932):

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but . . . neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1981) adopts the objective approach to both contract formation and contract interpretation, as reflected in Sections 3 and 230:

§ 3 Agreement Defined; Bargain Defined

An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.

§ 230 Standard of Interpretation Where There is Integration

The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.

The Supreme Court of Texas endorsed the objective view of contract interpretation in *Watrous' Heirs v. McKie*, 54 Tex. 65 (1880) (Gould, A.J.). Texas courts continue to adhere to the objective approach to contract interpretation. In *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968) (Smith, J.), the Court said:

It is the general rule of the law of contracts that where an unambiguous writing has been entered into between the parties, the Courts will give effect to the intention of the parties as expressed or as is apparent in the writing. In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that

controls. *Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617, 620 (1954). See generally: 3 Williston on Contracts § 610 (1936); Restatement of the Law of Contracts § 230 (1932).

F. CONTRACT FORMATION. Early writing on contracts discussed the bargain in its totality, without attention to the steps by which a bargain came in to existence. As time progressed, cases arose that required the courts to determine *when* the bargain occurred. This led to the adoption of the offer-and-acceptance paradigm.

1. Offer-and-Acceptance. The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 22(1) (1981) says that the manifestation of mutual assent, which forms the basis of a contract, ordinarily takes the form of an offer and an acceptance. When did this offer-and-acceptance paradigm arise?

Pothier (1772) wrote of offers and acceptances exchanged through correspondence, more than twenty years before the first English case mentioned contract formation based on offer-and-acceptance. His analysis of the problem of an offer sent and accepted by correspondence predates the earliest English cases on the subject by more than 40 years. Pothier wrote:

In order to constitute consent in this case, it is necessary that the intention of the party who writes to another to propose the bargain, should continue until the time at which the letter reaches the other party, and at which the latter declares that he accepts the bargain. This intention is presumed to continue as long as nothing appears to the contrary; but if I write to a merchant at Leghorn, a letter in which I propose to purchase of him a certain quantity of merchandise, at a certain price; and before my letter can have reached him, I write a second letter, by which I intimate that I no longer desire to make this purchase; or if before that time I die, or lose the use of my reason, although this merchant of Leghorn, at the receipt of my letter, in ignorance of the change of my intention, or my death, or my insanity, answers that he accepts the proposed bargain, yet no contract of sale arises between us, for my intention not having continued until the time at which my letter was received, and my proposal accepted, the consent or concurrence of our wills necessary to form a contract of sale, has not occurred.³⁴⁵

Blackstone did not mention offer-and-acceptance in his Commentaries (1769). He treated contracts as if they come to life by what is “openly uttered and avowed” at the time of contracting. Blackstone was essentially describing a barter or a face-to-face transaction in a marketplace where cash is paid and the buyer carries away the purchased goods. Contracting by correspondence may not have been frequent in his day, for a national postal service was not implemented in England until a hundred years later. According to researchers, the first English case to mention offer was *Payne v. Cave*, 3 Term. R. 148, 110 Eng. Rep. 501 (1789), where the court said that a bidder at an auction could withdraw his bid up until the time the auctioneer’s hammer fell, because “bidding is nothing but an offer on one side, which is not binding on either side til it is assented to.” In *Cooke v. Oxley*, 3 Term R. 653, 100 Eng. Rep. 785 (1790), the court held that an offeror was free to sell goods to another person up until the time that the offer was accepted, because without acceptance there was no contract. The first English language contracts treatise to mention offer-and-acceptance was Powell’s treatise in 1790,³⁴⁶ but that was only a passing reference to Roman law.³⁴⁷ William Evans’ 1806 translation of Pothier’s 1761 treatise on contracts said: “A contract includes an incurrance of intention in two parties’ which occurred when the promisor made an offer which was accepted by

the promisee.” The offer-and-acceptance process was not discussed in the French Civil Code (1804) or the Louisiana Civil Code (1808). In *Adams v. Lindsell*, 1 Barn & Ald 681, 106 Eng. Rep. 250 (1818), the court was required to determine the moment that the contract was formed in an exchange of correspondence, and found that the acceptance was effective and the contract formed at the moment the acceptance was mailed.³⁴⁸ Chitty’s treatise on contracts (3d ed. 1841), discussed both *Cooke v. Oxley* and *Adams v. Lindsell*, and concluded:

The principle seems to be, that a party is not bound simply by a mere offer not accepted; that he may, at all events, retract it, before it is accepted, by a communication to the person to whom the offer is made; but that if an offer be made to a party at a distance, by letter, it is *presumed* to be constantly repeated until the period for acceptance, and it is to be *inferred*, that there is a continuation of the intention to contract, and then the acceptance of the exact terms proposed, within the precise period limited, shall, when forwarded, complete the contract; the party making the offer not having, in the interim, withdrawn it.³⁴⁹

Offer-and-acceptance was not mentioned in Parsons’ treatise (1853). Offer-and-acceptance was not mentioned in the draft Civil Code of New York (1862). Leake’s treatise (1867) explicitly discusses offer-and-acceptance. Langdell’s first case book (1870) includes cases discussing offer-and-acceptance. The Indian Contract Act (1872) speaks of “proposal” and acceptance. Pollock (1875), after quoting the Indian Contract Act on the essentials of a contract, devotes the better part of his Chapter I to proposal and acceptance. Langdell’s SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880) discusses offer-and acceptance in great detail. Williston’s 1920 treatise discusses offer-and-acceptance in detail. Offer-and-acceptance was treated explicitly in the RESTATEMENT OF THE LAW OF CONTRACTS (1932). While the 1962 version of the U.C.C. explicitly acknowledges the role of offer and of acceptance, it contains a global provision saying that “[a] contract for the sale of goods may be made in any manner sufficient to show agreement,” including conduct recognizing the existence of the contract. U.C.C. § 2-204(1). Other sections of the 1962 U.C.C. set out special rules relating to offers, such as the firm offer (Section 2-205) and the battle of the forms (Section 2-207). The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1981) defines offer (§ 24) and various forms of acceptance (§§ 54, 56, 59, 60, 62, 63, 64, 65, 66, 69 & 70). The CISG adopts the offer-and-acceptance paradigm (CISG §§ 14-19), but with no statute of frauds and no Parol Evidence Rule, so that a bargain can be proved in any manner, even outside a structured sequence of offer-and-acceptance.

The original recognition of the offer-and-acceptance paradigm has been attributed by some subsequent writers to Langdell, but it is evident from this chronology that Pothier really originated the paradigm in 1761 in contemplation of Roman Law, that Powell in 1790 was the first English writer to employ the paradigm, and that Leake reinvigorated it in 1867, three years before Langdell assembled his case book and twelve years before Langdell wrote his first Summary. In point-of-fact, in Langdell’s view acceptance was irrelevant, and what transformed an offer into a promise was not acceptance but was instead the promisee’s providing consideration for the promise. Langdell’s paradigm was more of an offer-and-consideration model, a paradigm that was also espoused by Holmes in his second lecture on contracts in THE COMMON LAW³⁵⁰ but was never adopted by later writers of treatises or uniform laws, although Williston (1920) commented that an acceptance is frequently also “a giving of the consideration requested.”³⁵¹

2. The Offer. The RESTATEMENT OF THE LAW OF CONTRACTS (1932) says: “An offer is a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for the promise or its performance.” The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 24 (1981) defines an offer this way: “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” The Texas Supreme Court cited the RESTATEMENT (SECOND)’s definition in *City of Houston v. Williams*, 353 S.W.3d 128, 144 (Tex. 2011), where the Court said: “In order to qualify as a contract, the document or documents must evidence the parties’ intent to be bound. . . . That intention must be manifested in a way that justifies a promisee’s understanding that a promise has been made to him.” The Court thus morphed the offer-and-acceptance paradigm into the enforceable-promise paradigm. Article 14 of the CISG assumes that an “offer” is made to one or more specific persons.

3. The Acceptance. In his 1917 article on offer and acceptance, Corbin wrote: “An acceptance is a voluntary act of the offeree, whereby he exercises the power conferred upon him by the offer, and thereby creates a set of legal relations called a contract.”³⁵² The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 35(1) (1981) says: “An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer.” Section 35, Comment c, says: “Exercise of the power of acceptance concludes an agreement and a bargain, and thus satisfies one of the requirements for formation of an informal contract enforceable as a bargain. See §§ 17, 18. But a contract is not created unless the other requirements are met. Thus there may be no consideration; or impossibility or illegality may prevent any duty of performance from arising.” Thus, contrary to Langdell, the view persists that acceptance makes a bargain, and that providing consideration makes the bargain an enforceable contract.

a. What Constitutes an Acceptance? The RESTATEMENT OF THE LAW OF CONTRACTS § 52 (1932) says that an “acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror.” The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 50(1) (1981) provides that “[a]cceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” Article 18 of the CISG defines an acceptance as a “statement made by or other conduct of the offeree indicating assent to an offer.”

b. Series of Communications. Sometimes the last document in a series of communications can culminate in a contract. In *Patton v. Rucker*, 29 Tex. 402, 1867 WL 4538, *5 (Tex. 1867) (Coke, J.), the Court wrote:

A letter properly signed, and containing the necessary particulars of the contract, is sufficient. But it must be such a letter as shows an existing and binding contract, as contradistinguished from a pending negotiation, a concluded agreement, and not an open treaty, in order to bind the party from whom it proceeds. So a correspondence consisting of a number of letters between the parties may be taken together, and construed and considered with reference to each other, and the substantial meaning of the whole arrived at; and if, when thus blended, as it were, into one, and the result is ascertained, it is clear that the parties understood each other, and that the terms proposed by one were acceded to by the other, it is a valid and binding contract, and may

be enforced.

c. When Does The Acceptance Become Effective? The acceptance must be communicated to the offeror to be effective. In *Patton v. Rucker*, 29 Tex. 402, 1867 WL 4538, *5 (Tex. 1867) (Coke, J.), the Court wrote:

It is not only necessary that the minds of the contracting parties should meet on the subject-matter of the contract, but they must communicate that fact to each other, so that both may know that their minds do meet, and it is then only that the mutual assent necessary to a valid contract exists, and not until then that the contract is concluded.

In a barter transaction, and in a face-to-face marketplace transaction, acceptance or rejection of an offer is communicated immediately. When an offer is communicated by courier, or mail, or telegraph, where there is a time-delay between the time the offer is “sent” and the time it is “received” by the offeree, things can happen in between the sending of the offer and the receipt of the offer. Can the offeror revoke the offer before the offer is received? What happens if the offeree mails his acceptance before learning of the revocation? What if the acceptance is mailed *after* the offer is revoked but before the offeree learns that the offer was revoked?

Pothier, in his treatise on SALES (1762), expressed the view that an offer sent by correspondence could be withdrawn any time before it is received and accepted by the offeree, and that an acceptance would be ineffective even if it is sent before notice of revocation is received. Pothier’s rational was that mutual assent or concurrence of wills never occurred, since the offeror’s assent was extinguished before the offeree’s assent arose.³⁵³ This was not the view of English Common Law. In *Adams v. Lindsell*, 1 B & Ald. 681 (1818), the court held that, where the offer was sent by mail, the acceptance became effective when it was mailed to the offeror. Thus, a rescission of the offer was ineffective after the acceptance was mailed, even if the offeror had no actual knowledge that the offer had been accepted. This case presents the first instance of what is known to Anglo-American Contract Law as the “mailbox rule.” The idea behind the mailbox rule is that an acceptance of an offer is effective as soon as it is mailed. Holmes gave his opinion about the mailbox rule in Lecture VIII of THE COMMON LAW 305-06 (1881):

The question when a contract is made arises for the most part with regard to bilateral contracts by letter, the doubt being whether the contract is complete at the moment when the return promise is put into the post, or at the moment when it is received. If convenience preponderates in favor of either view, that is a sufficient reason for its adoption. So far as merely logical grounds go, the most ingenious argument in favor of the later moment is Professor Langdell's. According to him the conclusion follows from the fact that the consideration which makes the offer binding is itself a promise. Every promise, he says, is an offer before it is a promise, and the essence of an offer is that it should be communicated. /2/ But this reasoning seems unsound. When, as in the case supposed, the consideration for the return promise has been put into the power of the offeree and the return promise has been accepted in advance, there is not an instant, either in time or logic, when the return promise is an offer. It is a promise and a term of a binding contract as soon as it is anything. An offer is a revocable and unaccepted communication of willingness to promise. [306] When an offer of a certain bilateral contract

has been made, the same contract cannot be offered by the other side. The so-called offer would neither be revocable nor unaccepted. It would complete the contract as soon as made.

In *Brauer v. Shaw*, 168 Mass. 198, 200, 46 N.E. 617 (1897) (Holmes, J.), Justice Holmes considered the question of whether a contract had been formed when a steamship company telegraphed an offer to a shipping company to transport cattle at a certain price, and the shipping company telegraphed back an acceptance in different terms. The steamship company then telegraphed another offer at a higher price, and the shipper sent a telegram accepting the new offer. But before the acceptance was received the steamship company revoked its second offer. The court ruled that the revocation was to no avail. Holmes wrote that a contract had been formed, since the notice that the offer had been revoked was not received by the offeree before the acceptance of the offer was sent. Holmes did not justify the decision based on logical reasoning, as prior cases had done. Instead, Holmes supported this decision with the explanation that the *course of dealing* indicated that the shipper had the power to turn the offer into a contract, which it did before it received notice that the offer had been revoked.

The mailbox rule has been recognized in Texas. *Blake v. Homburg-Breman Fire Insurance Co.*, 67 Tex. 160, 2 S.W. 368, 370 (1886) (Gaines, J.) (with the added complication that the offer was mailed with without postage); *Scottish-American Mortg. Co. v. Davis*, 96 Tex. 504, 508, 74 S.W. 17, 18 (Tex. 1903) (Brown, J.).

Dean Langdell criticized the mail box rule for bilateral contracts in his SUMMARY OF THE LAW OF CONTRACTS ¶ 24, at 15 (1880), saying that when a contract is based on an exchange of promises, the acceptance is really a counter-offer by the offeree that must be accepted by the offeror before a contract is made. Since an offer is not effective unless it is communicated, an acceptance that is an offer of future performance must be received to become effective. In Langdell's words: "the letter of acceptance must come to the knowledge of the offeror for the same reason that the letter containing the original offer must come to the knowledge of the offeree." *Id.* at 19 ¶ 15.1. Williston wrote, of Langdell's argument, that the rule treating acceptance as effective upon mailing had been "ably criticized," but Williston also said that "Dean Langdell's assertion that the promise contained in the acceptance is itself an offer before a contract is completed, seems untenable."³⁵⁴ Williston extended the mailbox rule to a telegraph sent.³⁵⁵ Williston noted that the reason for the rule, "given in modern cases," is that the offeror expressly or impliedly authorized acceptance by mail or telegram. Williston stated that "[t]he question whether that medium was authorized is one of fact depending on what would reasonably be expected by one in the position of the contracting parties, in view of the prevailing business customs."³⁵⁶ The RESTATEMENT OF THE LAW OF CONTRACTS (1932) adopts the mailbox rule in Section 66, illustration 1. The RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981) adopts the mailbox rule, "unless the offer provides otherwise," but imposes the additional requirement that the offeree use due diligence to advise the offeror that the offer has been accepted or that notice of acceptance be received by the offeror "seasonably." Section 63 treats option contracts differently; acceptance of an option contract is not effective until it has been received by the offeror. CISG Articles 17 and 18 reverse the mailbox rule, because neither the rejection nor the acceptance of an offer become effective until the rejection or "the indication of assent" "reaches the offeror." RESTATEMENT (SECOND) OF CONTRACTS § 30 (1981) provides that an offer may specify the form that the acceptance may take; otherwise, an acceptance may be indicated in any manner and by any medium reasonable in the circumstances.

When the offer is to create a unilateral contract, the RESTATEMENT OF THE LAW OF CONTRACTS § 45 (1932) makes the offer binding when performance begins: “If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.”

d. When the Acceptance Varies From the Offer. When terms of the acceptance varies from the terms of the offer, courts traditionally found that no contract was formed (applying the “mirror image” rule). The U.S. Supreme Court, in *Eliason v. Henshaw*, 17 U.S. 225, 228, 1819 WL 1971, *2 (1819) (Washington, J.).

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

Leake’s 1867 treatise also said that where the acceptance varies from the offer, there is no agreement. See Section IV.B.5 of this Article. Langdell’s SUMMARY said: “An offer can only be accepted in the terms in which it is made. Acceptance, therefore, which modifies the offer in any particular, will go for nothing.”³⁵⁷ Early Texas cases took a strict view of the mirror image rule. The mirror image rule was expressed (without naming the rule) by the Texas Supreme Court in *Patton v. Rucker*, 29 Tex. 402, 1867 WL 4538, *6 (Tex. 1867) (Coke, J.):

An acceptance of a proposal to sell, in order to bind the maker of the proposition and conclude the contract, must be unconditional and unqualified. The exact terms of the proposition, without addition or variation, must be acceded to before the proposition is withdrawn; otherwise, the maker of the proposition is not bound by the acceptance.

In *Summers v. Mills*, 21 Tex. 70, 1858 WL 5419, *7 (1888) (Wheeler, J.), the court relied upon Parsons’ treatise for the proposition that the acceptance must correspond exactly to the offer or else no contract arises. In *Allis-Chalmers Mfg. Co. v. Curtis Elec. Co.*, 153 Tex. 118, 121, 264 S.W.2d 700, 702 (1954) (Wilson, J.), the Court loosened the mirror image rule, saying that “a substantial meeting of the minds” was sufficient and that one day difference in the acceptance regarding the maturity date did not defeat the creation of a contract. Nonetheless, some courts continue to require that the acceptance be identical to the offer. See *Kingwood Home Health Care, L.L.C. v. Amedisys, Inc.*, 375 S.W.3d 397, 400 (Tex. App.—Houston [14th Dist.] 2012, no pet.)

In a major relaxation of the mirror image rule, U.C.C. § 2-207 (1962) gives the offeree the flexibility to bring a contract into being, by issuing an acceptance that contains additional or different terms from those in the offer, as long as the offer did not preclude variations in the acceptance, and the variations from the offer are not material, and the offeror does not object within a reasonable time after receiving the acceptance.

Under Article 19 of the CISG, an acceptance that varies from the offer is a rejection of the offer and constitutes a counter-offer, unless the differences are additional or different terms that do not materially alter the offer, in which even the acceptance creates the terms of the contract unless the offeror without undue delay objects orally or sends notice of the objection. Terms relating to price, payment, quality and quantity of goods, place and time of delivery, the scope of liability, and the settlement of disputes, are considered to be material.

e. The Battle of the Forms. Under the Common Law's mirror image rule, if the acceptance did not exactly match the offer, no contract was created. Thus, the contract, if any, had the terms of the last offer or counter-offer that was accepted without modification by the other contracting party. The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 59 (1981) adopted the mirror image rule: "[a] reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." Sales transactions have increasingly been conducted based on the seller's and the buyer's forms. The "battle of the forms" describes the situation where the offer is a form and the acceptance is a form that contains additional or different terms from the offer. U.C.C. § 2-207 addressed this problem, by saying that if the acceptance is a form that contains additional or different terms from the form offer, the form acceptance is binding on the offeror unless the offer limits acceptance to the terms of the offer, or the acceptance materially alters the offer, or the offeror gives notice of an objection to the variations within a reasonable time. This provision has been heavily criticized. Article 19 of the CISG sets out the mirror image rule, but if the deviations in the acceptance are not material, they become part of the contract, unless the offeror objects. Examples of changes that are material, and therefore are governed by the "mirror image" rule, are "price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes" See Section XII.G of Orsinger, *175 Years of Texas Contract Law*.

4. The Counter-Offer. A counter-offer was traditionally viewed as an implied rejection of the original offer and the extending of a new offer. Under the U.C.C., however, a counter-offer operates as an acceptance provided it does not materially alter the terms of the original offer and that the variations contained in the counter-offer are not rejected by the original offeror within a reasonable time. See U.C.C. § 2-207.

5. Acceptance by Performance. It is clear that an offer can invite acceptance by performance. The question arises (sometimes in conjunction with a discussion of "unilateral" contracts) as to when the offer is accepted by an act of performance: when performance starts or when it is finished? The classic "hypothetical" presenting this problem is:

Suppose A says to B, "I will give you \$100 if you walk across the Brooklyn Bridge." . . . B starts to walk across the Brooklyn Bridge and has gone about one-half of the way across. At that moment A overtakes B and says to him, "I withdraw my offer." Has B then any rights against A?³⁵⁸

Langdell included in his casebook *Offord v. Davies*, (1862) 142 Eng. Rep. 1336, 1338 (C.P.), that said that A could revoke his offer mid-performance with no penalty. Williston initially agreed, but changed his position by the time of the RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmts. a &

b, at 53 (1932), which said that the offer could not be withdrawn once performance had begun.³⁵⁹ Comment b explained the rule by saying that the original offer contained an implied promise not to revoke the offer after performance had started.³⁶⁰ This explanation avoided the more obvious suggestion that detrimental reliance by the offeree was sufficient to support a contractual duty. RESTATEMENT § 45, illustration 1, says that the measure of damages for refusal to pay after part performance has begun is the contract price less the cost of completion.³⁶¹

6. The Promise Paradigm. As Contract Law grew away from the sales context to the more complicated circumstance of an offer that constituted a promise of future performance, the focus shifted from when and how an offer was accepted to when and how a promise of future performance became binding on the promisor. A promise became binding on the promisor when the promisee provided consideration for the promise. Since a detriment to the promisee was viewed as sufficient consideration to support a contract, the idea developed that a promise became binding when it was detrimentally relied upon by the promisee. Once detrimental reliance was accepted as a means of making a promise binding, the next stop was the development of promissory estoppel. See Section VIII.J of this Article. When promises became assignable, and especially when the assignee took the promise without defenses, we had negotiable instruments.

G. FORMALITIES OF A CONTRACT.

1. The Requirement of a Signed Writing. The requirement that a contract must be in writing and signed to be enforceable is generally stated in a statute of frauds. The first Statute of Frauds was adopted in England in 1840. However, in *Cleveland v. Williams*, 29 Tex. 204, 1867 WL 4513, *4 (Tex. 1867) (Coke, J.), the Supreme Court said that Texas' "receiving statute" did not import the English Statute of Frauds into Texas law, so for a time Texas had no requirement of a signed writing. However, the Texas Legislature did adopt a Statute of Frauds in 1840, and it continues in effect today in Texas Civil Practice and Remedies Code §§ 26.01-26.02.

The English Sale of Goods Act § 4(1) (1879) contained a requirement of writing for any contract for the sale of goods in excess of \$20.00. The rule did not apply where the buyer had accepted and received part of the goods, or "given something in earnest to bind the contract." *Id.* U.C.C. § 2-201 (1) requires a contract for the sale of goods priced at \$500.00 or more to be in writing.

2. Contracts Under Seal. In the English Common Law, and into the early Twentieth Century in America, contracts under seal were enforceable, regardless of whether they were supported by consideration. The fact that consideration was not required is attributable to the fact that the Covenant Form of Action, recognized in England as the vehicle for the enforcement of sealed contracts, predated the rise of the doctrine of consideration, but many later cases glossed over this fact by inventing the legal fiction that the seal is evidence of consideration, or creates an irrebutable presumption of consideration. The first contract case decided by the Supreme Court of the Republic of Texas was *Whiteman v. Garrett*, Dallam 374, 1840 WL 2790 (1840) (Rusk, C.J.), in which the Court ruled that specific performance would lie to enforce a contract under seal that the defendant would pay "certain monies" and the plaintiff would convey land to the defendant. In *English v. Helms*, 4 Tex. 228, 1849 WL 3998 (Tex. 1849) (Hemphill, C.J.), Chief Justice Hemphill sketched the history of seals back to early Norman times, but noted the disuse of wax seals in American states

and the substitution of scrolls, or written flourishes following a signature. Hemphill proposed that it would be better to abolish seals, but did not do so in the Opinion. He did write, however, that a written scroll on a contract had the same effect as a wax seal. In *Vineyard v. Smith*, 34 Tex. 454, 1871 WL 7426, *3 (Tex. 1870) (Roberts, J.), the Court said: “The contract was under seal, which imported a consideration which could only be denied under oath.”

The tension between the validity of a contract under seal and the requirement of consideration surfaced in *Callahan v. Patterson*, 4 Tex. 61, 1849 WL 3967 (1849) (Lipscomb, J.), an unusual seriatim opinion involving the enforceability of a contract to sell a wife’s separate property where the wife’s signature did not conform to the formalities prescribed by statute to make such a conveyance binding on the wife.

In 1858, the Texas Legislature enacted a statute that became Article 7093 of the 1911 codification providing as follows: “Every contract in writing hereafter made shall be held to import a consideration in the same manner and as fully as sealed instruments have heretofore done.” See *Unthank v. Rippstein*, 386 S.W.2d 134 (Tex. 1964) (Steakley, J.); *Harris v. Cato*, 26 Tex. 338 (1862) (Moore, J.). This statute eliminated the main distinction between sealed and unsealed contracts, which was the absence of a requirement of consideration for contracts under seal. Texas Civil Practice and Remedies Code Section 121.015 now provides: “A private seal or scroll may not be required on a written instrument other than an instrument made by a corporation.” The Texas Business and Commerce Code, Section 2.203, provides that “[t]he affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.” The same provision is contained in U.C.C. § 2A.203, applying to leases. Consequently, whether a contract is with or without seal now makes no difference in Texas.

H. THE REQUIREMENT OF CONSIDERATION. One of the signal features of English Contract Law is the requirement that, to be enforceable, a promise, not made enforceable by a seal or recordation with a court, must be supported by consideration. While in English law documents under seal did not require consideration, documents under seal have been eliminated in most American states, leaving the requirement of consideration for most contracts. The source of the requirement of “consideration” has an obscure origin. Treatise writers from Powell through Parsons attributed the English doctrine of consideration to the concept of *causa* in Civil Law (i.e., Roman law), but more recent writers reject that hypothesis. Regardless of its origin, today the requirement of consideration remains a primary divider in Common Law jurisdictions between contracts that are enforceable and those that are not. Contracts excluded from enforcement due to lack of consideration include “option contracts, promises to give a gift, and open-ended agreements that bind one party but not the other.”³⁶²

In *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burrows 1663, 1669 (1765), Lord Mansfield wrote: “I take it that the ancient notion about the want of Consideration was for the sake of Evidence only: for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no obligation to the want of consideration.” This was Mansfield’s valiant attempt to treat consideration—not as the sine qua non of contracts but instead—as just one method of proving the contract. He reasoned that consideration was not required of some contracts, such as contracts under seal. The affixing of a seal

to the contract proved the contract. To Mansfield this suggested that consideration was not always required to make a contract enforceable. If consideration was not required of all contracts, then its more likely role was as proof that the promisor intended to be legally bound to perform the contract, and consideration was therefore merely one way to prove the promisor's intent to be bound. The accepted view is that Mansfield's effort to diminish the importance of consideration was disapproved by the House of Lords in *Rann v. Hughes*, (1778) 7 Term. Rep. 346 n.a. 101 Eng. Rep. 1014 n.a. (K.B). Since *Pillans & Rose*, the doctrine of consideration has suffered encroachments, but no successful frontal assaults.

In 1769, Blackstone recited the requirement of consideration, and listed four types: (I) money or goods furnished at a price; (ii) an exchange of promises; (iii) an agreement to perform work for pay; and (iv) an agreement to pay another to perform work. See Section IV.B.c of this Article. Parsons (1853) wrote simply: "A PROMISE for which there is no consideration cannot be enforced at law. This has been a principle of the common law from the earliest times." See Section IV.C.3.d of this Article. Parsons noted Blackstone's division of consideration in four types, which he called "logically exact and exhaustive," but said that "it has never been so far introduced into the common law as to be of much practical utility in determining questions of law."³⁶³

The necessity and legitimacy of the requirement of consideration has been questioned many times, but as Justice Oliver Wendell Holmes, Jr. wrote: "A common law judge could not say: 'I think the doctrine of consideration a bit of historical nonsense, and shall not enforce it in my court.'"³⁶⁴ Whatever its source, the requirement of consideration continues in Anglo-American law to separate enforceable from unenforceable contracts.

The essential nature of the requirement of consideration in Texas dates back to *Jones v. Holliday*, 11 Tex. 412, 1854 WL 4298 (Tex. 1854) (Wheeler, J.), which said: "A consideration is essential to the validity of a simple contract, whether it be verbal or in writing." Justice Wheeler cited 2 Kent, 464 (5th Ed. 1827). Exceptions to the requirement of consideration were recognized for contracts under seal, and bills of exchange and negotiable instruments that had "passed into the hands of an innocent endorsee." *Id.* Justice Wheeler wrote that a recital in the contract, that consideration was given, is prima facie evidence of consideration. He continued that the plaintiff in a contract action must plead that consideration was paid. *Id.* The requirement of consideration for specific enforcement of a contract was recognized in *Short v. Price*, 17 Tex. 397, 1856 WL 5028 (Tex. 1856) (Hemphill, C.J.), where the Court said: "... it is believed to be a rule without exception, that equity will not interfere to enforce an executory contract, unless it be founded on a valuable consideration." Chief Justice Hemphill cited *Boze v. Davis' Adm'rs*, 14 Tex. 331, 1855 WL 4894 (Tex. 1855) (Hemphill, C.J.). In *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 111 (Tex. 2004) (Jefferson, C.J.) (concurring), then-Chief Justice Wallace Jefferson boldly advocated the elimination of the requirement of consideration to support an option contract. Nothing has come of his suggestion. The requirement of consideration to make a contract enforceable was recently reconfirmed in *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644, 659 (Tex. 2006) (Willett, J.).

The necessity of consideration does not apply to negotiable instruments.

1. What Constitutes Consideration? The RESTATEMENT OF THE LAW OF CONTRACTS § 75

(1932) defines consideration:

Section 75. DEFINITION OF CONSIDERATION.

(1) Consideration for a promise is

- (a) an act other than a promise, or
- (b) a forbearance, or
- (c) the creation, modification or destruction of a legal relation, or
- (d) a return promise, bargained for and given in exchange for the promise.

(2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

2. Consideration Must Be Bargained For. In *James v. Fulcrod*, 5 Tex. 512, 1851 WL 3915 (Tex. 1851) (Hemphill, C.J.), the Court said that “consideration may be defined to be something that is given in exchange, something that is mutual, or something which is the inducement to the contract, and it must be a thing which is lawful and competent in value to sustain the assumption.” The issue of what constitutes consideration is a question of law. *Williams v. Hill*, 396 S.W.2d 911, 913 (Tex. Civ. App.–Dallas 1965, no writ).

In *Philpot v. Gruninger*, 81 U.S. 570, 577 (1871) (Strong, J.), the Court said: “Nothing is consideration that is not regarded as such by both parties.” The rule was again stated in *Fire Ins. Ass’n v. Wickham*, 141 U.S. 564, 579 (1891) (Brown, J.), where the Court said: “To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might, under certain circumstances, be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect, it must have been offered by one party, and accepted by the other, as one element of the contract.”

Oliver Wendell Holmes, Jr., wrote in *THE COMMON LAW* (1881):

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.³⁶⁵

The RESTATEMENT OF THE LAW OF CONTRACTS § 75(1)(d) (1932) says that to constitute consideration reciprocal promises must be bargained for. Section 75, Comment b, says that “[c]onsideration must actually be bargained for as the exchange for the promise.” RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 71 (1981) says that “[t]o constitute consideration, a performance or promise must be bargained for.”

3. Benefit/Detriment. Chitty’s PRACTICAL TREATISE ON THE LAW OF CONTRACT (3d ed. 1841) recognized that consideration may consist of a benefit to the promisor or detriment to the promisee.

Id. at 30-ff. Parsons (1857) recognized the same.³⁶⁶

Holmes wrote: “It is said that any benefit conferred by the promisee on the promisor, or any detriment incurred by the promisee may be a consideration. It is also thought that every consideration may be reduced to a case of the latter sort, using the word ‘detriment’ in a somewhat broad sense.” Holmes, *THE COMMON LAW*, 289, 290 (1881). In Langdell’s view, the idea of benefit to the promisee was unnecessary, since all consideration is a detriment of sorts to the promisor. See Section IV.C.4.b(1) of this Article. Dean Ames (1899), wrote:

Professor Langdell has pointed out the irrelevancy of the notion of benefit to the promisor, and makes detriment to the promisee the universal test of consideration. This simplified definition has met with much favor. It is concise, and it preserves the historic connection between the modern simple contract and the ancient assumpsit in its primitive form of an action for damage to a promisee by a deceitful promisor.”³⁶⁷

Williston (1920) addressed the question of a benefit to the promisee or a detriment to the promisor. Williston noted that Pollock and Langdell had suggested that a promise is consideration sufficient to make a contract if it promises either a benefit to the promisee or a detriment to the promisor. Williston noted Leake’s alternative standing that a promise to do or not do something is consideration whenever the act or forbearance itself would constitute consideration. Williston sided with Leake, citing a 1701 case where Lord Holt said: “where the doing a thing will be a good consideration, a promise to do that thing will be too.”³⁶⁸

The Texas Supreme Court, in *Benson v. Phipps*, 87 Tex. 578, 29 S.W. 1061, 1061 (1895), said that “a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract.” In the recent past, the Texas Supreme Court defined “consideration” as “either a benefit to the promisor or a loss or detriment to the promisee.” *Northern Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998) (Hecht, J.). In giving this definition, Justice Hecht quoted a 1993 court of appeals opinion.³⁶⁹ That case cited a 1984 court of appeals opinion,³⁷⁰ which cited a 1962 court of civil appeals opinion,³⁷¹ which cited to Tex. Jur.2d.³⁷² This principle of law was first settled in Texas in *Bason v. Hughart*, 2 Tex. 476, 479 (Tex. 1847) (Lipscomb, J.), where the Court wrote: “We believe the doctrine to be well settled, that to constitute a consideration valid in law, it is not essential that it should be mutually beneficial to the promisor and the promisee; that it is sufficient if one or the other is to receive a benefit, or to be injured by it.” As authority, Justice Lipscomb cited two U.S. Supreme Court decisions, one being *Townsley v. Sumrall*, 2 Pet. 182, 1829 WL 3178, *9 (U.S. Sup. Ct. 1829), where Justice Story wrote without citation to authority that “[d]amage to the promisee, constitutes as good a consideration as benefit to the promisor.” The other cited decision was an earlier one, *Violet v. Patton*, 5 Cranch 142, 150, 1809 WL 1659, *5 (U.S. Sup. Ct. 1809), in which Chief Justice Marshall asserted, without citation to authority: “To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made; and that the promise is the inducement to the transaction.” The rule was recognized in *James v. Fulcrod*, 5 Tex. 512, 1851 WL 3915 (Tex. 1851) (Hemphill, C. J.) (“A valuable consideration is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made”).

In *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex.1991) (Cornyn, J.), the Supreme Court considered a summary judgment dismissing a contract claim based on a defense of no consideration. The defendants had obtained a deemed admission that their promise to the Roark was a promise to make a gift, which meant that Roark gave no contractual consideration to the defendants. *Id.* at 496. The Court ruled that proving that Roark gave no consideration to the defendants, however, did not negate the possibility that Roark suffered a detriment in connection with the promise, and contractual consideration can consist of either a benefit conferred or a detriment suffered. *Id.* at 496.

4. Adequacy of Consideration? The rule at Common Law was that courts did not concern themselves with the sufficiency of consideration. *See* Chitty, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 31 (1841). Since contracts are a bargained-for exchange, the parties agreed to a fair price and their agreement was conclusive. *See* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 79, cmt. c (1981). However, a greatly disproportionate value in the bargain is considered to be evidence of exploiting an advantage with bargaining parties who were comparatively weak. Chitty (1841) at 31; RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 79, cmt. c (1981).

5. Mutual Promises. In *James v. Fulcrod*, 5 Tex. 512, 1815 WL 3915, *6 (Tex. 1851) (Hemphill, C.J.), the Court wrote that “[a] mutual promise amounts to sufficient consideration, provided the mutual promises be concurrent in point of time.” This remains the law of Texas. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 (Tex. 1997) (Baker, J.). *See* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 75 (1981). On October 16, 1908 Frederick Pollock wrote to Oliver Wendell Holmes, Jr.: “Have you ever found any logical reason why mutual promises are sufficient consideration for one another (like the two lean horses of a Calcutta hack who can only just stand together)? I have not.”³⁷³

6. Recitals of Consideration. Early on, Texas courts considered a recital of “valuable consideration” in a contract to constitute prima facie evidence of consideration *Jones v. Holliday*, 11 Tex. 412, 1854 WL 4298 (Tex. 1854) (Wheeler, J.). In 1855, the Texas Legislature adopted a statute providing that all written contracts carried with them a presumption of consideration, which diminished the importance of rote recitals of consideration. Invariably, however, contracts and deeds in early 21st Century Texas law practice contain recitals of consideration, which shows that the law changes slowly but the habits of lawyers change even more slowly.

7. Pleading Consideration. A recital in the plaintiff’s pleading that a promise was supported by consideration was originally considered essential to the plaintiff’s claim. The requirement was undoubtedly essential when a claim could be defeated by a general demurer that tested the viability of the plaintiff’s claim on the plaintiff’s pleadings alone. Later, a recital of consideration was viewed as constituting prima facie proof of consideration. The importance of pleading consideration was diminished when the Texas Legislature adopted a statute that consideration could be put in issue only when the defendant denied consideration under oath. The rule exists today in Texas Rule of Procedure 93.9.

8. Proof of Consideration. In *Ellet v. Britton*, 10 Tex. 210 (1853) (Hemphill, C.J.), the Supreme Court addressed the question of whether parol evidence could be used to establish the payment of

consideration when the contract contained no recital of consideration, and the contract fell within the Statute of Frauds. Chief Justice Hemphill noted the similarity between the English Statute of Frauds and the Texas Statute of Frauds, and noted that, for more than a century after enactment, English courts held that consideration could be proved by parol evidence for contracts within the scope of the statute. That law changed, however, in 1804, when it was held in the English case of *Wain v. Warlters*, 5 East 10, that consideration must be expressed in the contract. According to Hemphill, the English courts did not enforce the requirement strictly, finding “loose expressions” in the contract as implying consideration. *Id.* at 210. Hemphill noted that most American courts had rejected *Wain v. Warlters*, or had watered it down. In the end, Hemphill saw the court as having to choose “between the two constructions which have been advanced, each upon the highest authority,” and the Court decided that consideration could be proven by parol evidence even when the Statute of Frauds applied. *Id.* at 212.

9. Presumption of Consideration. In 1855, the Texas Legislature enacted a statute that provided that every contract in writing made after the effective date of the statute “shall be held to import a consideration as fully, and in the same manner as sealed instruments have heretofore done.” The law was broadened in 1873 to apply to any instrument in writing. In 1890, the Texas Legislature enacted Revised Statute art. 4488 providing that all written instruments import a consideration. Revised Statute art. 1265 provided that a denial of consideration for a written instrument must be sworn. The sworn plea did not, however, put the burden on the party seeking enforcement to prove consideration. It was the party seeking to avoid enforcement had the burden to prove lack of consideration. *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157, 158 (1890). The presumption of consideration extends to a third-party purchaser of note, who makes a prima facie case of the right to recover upon producing the note with an endorsement. *Tolbert v. McBride*, 75 Tex. 95, 97, 12 S.W. 752, 752 (1889) (Stayton, C.J.). Section 28 of the Negotiable Instruments Act, adopted in Texas in 1919, provided that “absence or failure of consideration is a matter of defense against any person not a holder in due course.” Texas Rule of Civil Procedure 93.9 continues the requirement that a denial of consideration to support a contract be made under oath.

In *Burleson Heirs v. Burleson*, 11 Tex. 2, (1853) (Lipscomb, J.), the Court held that, when a grantor allowed a grantee to take possession of and improve land, and to allow the possession to continue through the grantee’s life and with his heir after that, “after such a lapse of time, of continued possession and improvement, a good consideration would be presumed” The circumstances gave rise to an equity that overrode the grantor’s legal title.

The presumption of consideration applies only to written contracts, and not oral contracts. *Okemah Const., Inc. v. Barkley-Farmer, Inc.*, 583 S.W.2d 458, 460 (Tex. Civ. App.--Houston [1st Dist.] 1979, no writ).

10. Lack of Consideration as a Defense to a Contract Claim. Since the Common Law required consideration in order for a promise to become binding, a lack of consideration meant that no binding promise had been made. “Lack of consideration occurs when the contract, at its inception, does not impose obligations on both parties.” *Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex. App.--Tyler 2010, no pet.). The defense must be pled and verified by affidavit. Tex. R. Civ. P. 93.9.

11. Failure of Consideration as a Defense to a Contract Claim. Failure of consideration is a defense to a contract claim. Texas Rule of Civil Procedure 94 requires that the defense be plead, and Rule 93.9 requires that it be verified by affidavit. A plea of failure of consideration entails a plea of partial failure of consideration, but in the case of partial failure of consideration the burden is on the defendant to prove the value of what he did receive pursuant to the contract. *Gutta Percha & Rubber Mfg. Co. v. City of Cleburne*, 102 Tex. 36, 38-39, 112 S.W. 1047, 1047-48 (Tex. 1908).

12. Reliance as a Substitute for Consideration. There has been a long-running dispute in American Contract Law over the use of reliance on a promise as a substitute for consideration from the promisee. Reliance was one of Arthur Corbin's interests regarding traditional Contract Law theory. The simmering dispute regarding reliance boiled over in the drafting of the RESTATEMENT OF THE LAW OF CONTRACTS (1932). Samuel Williston surprisingly sided with the proponents of reliance when he included Section 90 in the RESTATEMENT OF THE LAW OF CONTRACTS (1932). The critics of formalist contract doctrine long attributed Section 90 to Arthur Corbin's influence on the first Restatement. However, Corbin's personal correspondence reveals that Williston himself wrote Section 90 and the record reflects that Williston presented and defended it against criticism in an American Law Institute's public meeting. The episode reflects that Williston may not have been as doctrinaire as he is sometimes portrayed to be.

Detrimental reliance on a promise that did not lead to an enforceable contract was recognized prior to Section 90 of the RESTATEMENT OF THE LAW OF CONTRACTS (1932). Justice Benjamin Cardozo, in his famous Opinion on the much discussed case of *Allegheny College v. Chautaugau County Bank* 159 N.C. 173 (N.Y. 1927), considered whether a promise to make a gift upon death was enforceable against the promisor's estate. Cardozo framed the question "the question is not where a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel." *Id.* at 175. , The court in *Longbotham v. Ley*, 47 S.W.2d 1109, 1110 (Tex. Civ. App.—Galveston 1932, writ ref'd), invoked the doctrine of estoppel in pais where the holder of a promissory note promised, after the note was signed, not to demand prompt payment of interest when due. When an interest payment was missed, the note holder accelerated the note and sued. The jury found that the representation was in fact made and that the maker of the note relied upon it. The appellate court ruled that the holder of the note was estopped from accelerating. The court went on to state:

Neither is a consideration necessary to create this equitable estoppel, as was also declared by the Supreme Court of the United States in the *Dickerson* Case, *supra*, in this language: "The rule does not rest on the assumption that he [the promisor] has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect."

The cited case was *Dickerson v. Colgrove*, 100 U. S. 578, 581 (1879) (Swayne, J.), where the Supreme Court held that a brother, who wrote a letter to his sister disclaiming an interest in inherited real estate, could not later assert a claim to the property against someone who bought the property from the sister and then in reliance on the letter resold the property. The Court acknowledged that

no contract existed, but invoked the legal principle of equitable estoppel, or estoppel in pais, to preclude the brother from asserting a claim to the land. The event that gave rise to estoppel in *Longbotham v. Ley* was a promise of future behavior.

Professor Grant Gilmore's prominent book *THE DEATH OF CONTRACT* (1974) predicted that reliance would supplant consideration as the basis for contractual liability, but that has not come to pass. However, reliance has cropped up in a number of cases as a basis for enforcing a promise, with or without consideration.

Detrimental reliance by the promisee can be considered to be just a different perspective on the idea that consideration can consist of a detriment to the promisee. With a bilateral contract where one party performs first, that party necessarily relies upon the promise of the other party in performing first.³⁷⁴ Thus, Corbin could state in *CORBIN ON CONTRACTS* § 202 (1950): "In practically all cases in which consideration is given in exchange, it consists of some kind of action or forbearance in reliance on the promise." The *RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS* (1981) Section 90, comment a, says that reliance is one basis for enforcement of a half-completed exchange.

13. Legislative Modifications of the Requirement of Consideration. The requirement of consideration is a court-created rule, but it is subject to legislative override. As detailed in Section XVIII.A of Orsinger, *175 Years of Texas Contract Law*, many American legislatures eliminated contracts under seal, which effectively eliminated contracts made without consideration that relied purely on the form of the contract (i.e., a seal) for enforceability. U.C.C. § 1-107 permits a party, without consideration, to release another party from liability for a breach of contract by signing and delivering a written waiver or renunciation. Under the Common Law, promises to leave an offer open were not binding due to lack of consideration. U.C.C. § 2-205 permits a merchant, without consideration, to make a "firm offer" that remains open for a set period of time not to exceed three months. U.C.C. § 2-209(1) provides: "[a]n agreement modifying a contract within this Article needs no consideration to be binding." In 1983, the NCCUSL issued the Uniform Premarital Agreement Act, which in Section 2 provides that premarital agreements may be enforced without consideration. The Act was adopted into Texas law in 1987.³⁷⁵

I. AVOIDANCE BASED ON DURESS, ON FRAUD, OR MISTAKE.

1. English Courts of Law. Catharine MacMillan, in her book *MISTAKES IN CONTRACT LAW* (2010), said that mistake was not a doctrine recognized by Common Law courts before the 1800s.³⁷⁶ She suggests several reasons for this. First, equity courts gave relief for mistakes, so an equity court would be the first choice to file a suit based on mistake. Second, the Forms of Action provided other ways to rectify mistake, and the procedures tended to obscure the existence of a mistake.

2. The Civil Codes. The French Civil Codes of 1804 sets out rules and definitions relating to duress, fraud and mistake. This may be attributable to the primary emphasis the Civil Law placed on consent as the foundation for contractual obligation. While contests over the capacity to contract, and over claims of duress, fraud, or mistake, represent a tiny portion of all contract disputes, the Civil Law's emphasis on the consensual nature of contract makes these issues foundational.

3. French Civil Code. The French Civil Code (1804) said: “There can be no valid consent if such consent have been given through mistake, or have been extorted through violence or surreptitiously obtained by fraud.” Section 1109. The mistake, however, must occur “in the very substance of the thing which is the object thereof.” Section 1110. An agreement cannot be nullified due to a mistake of the other party, “unless the consideration of such person were the principal cause of the agreement.” Section 1110. “Violence” against a contracting party will nullify an agreement, even if it is applied by a third party. Section 1111. To nullify an agreement, the violence must be “of a nature to make an impression on a reasonable person, and which may inspire him with fear of exposing his person or his fortune to a considerable and present injury.” Section 1112. In making the determination, “[r]egard must be had, on this subject, to the age, to the sex, and condition of persons.” Section 1112. The violence can be exercised against not only the contracting party, but also against “his or her husband or wife, over their descendants or ancestors.” Section 1113. Reverential fear toward a parent or ancestor will not suffice. Section 1114. A contract cannot be impeached if it is ratified after the violence ends, or if the legal time to remedy the violence has passed. Section 1115. “Fraud is a cause of nullity of the agreement when the stratagems practised by one of the parties are such, that it is evident that without such stratagems the other party would not have contracted,” and fraud is not presumed but must be proved. Section 1116. Mistake, violence or fraud does not void a contract, but only makes it voidable (i.e., unenforceable at the election of the victim). Section 1117. The Louisiana Civil Code (1808) tracks the French Civil Code. Louisiana Civil Code (1809), articles 9 - 17. See Section V.A.2 of this Article.

4. The Indian Contract Act. The Indian Contract Act (1872) is similar in structure and content to the French codes, with Common Law concepts added and civil law concepts removed where appropriate. Under the Act, consent is not “free” when caused by coercion, undue influence, fraud, misrepresentation, or mistake. Section 14. The Act requires “but for” causation before invalidating a contract for lack of “free” consent. Section 14. The contract is void, but is instead voidable by the victim. Section 19. One difference is that, under the Act, fraud or misrepresentation will not invalidate a contract where the victim “had the means of discovering the truth with ordinary diligence.” Section 19. Another difference is that a mistake as to price will not invalidate a contract, nor will a mistake as to the law. Sections 20 & 21. For more discussion of the Indian Contract Act, see Section V.B.1 of this Article.

5. In the Restatements. The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 152 (1982) makes a contract voidable by the adversely affected party for a mutual mistake that is material, unless that party “bears the risk of mistake.” A mistake is material when it has “a material effect on the agreed exchange of performances,” and that party shows that “the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out.” RESTATEMENT (SECOND) §§ 152 & § 152, comment c. A party bears the risk of mistake when the contract allocates that risk to him, or where he contracted with an awareness that his knowledge was incomplete, or where court allocates the risk to that party “on the ground that it is reasonable in the circumstances to do so.” RESTATEMENT (SECOND) § 154(c). A unilateral mistake can be used to rescind a contract only where the conditions and Section 152 have been met, and additionally “the adversely affected party proves that enforcement of the contract would be unconscionable, the counterparty had reason to know of the mistake, or the counterparty’s fault caused the mistake.”³⁷⁷

The RESTATEMENT (SECOND) § 175 (1982) makes a contract voidable for duress, where “a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative.” Where the duress is applied by a third party “the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.” *Id.* Comment c to Section 175 says:

c. Subjective test of inducement. In order to constitute duress, the improper threat must induce the making of the contract....A party’s manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest his assent. The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress.

Thus, the applicability of a claim of duress turns on a subjective evaluation of the victim’s state of mind.

6. Texas Law. The earliest Texas case on duress was *Hall v. Phelps*, Dallam 435, 1841 WL 3125 (1841) (Hutchinson, J.). The Court cited no law but did express outrage at the facts, in upholding a decision to nullify a deed signed under duress. The case of *Walker v. McNeils*, Dallam 541 (1843) (Morris, J.), involved a defense of duress related to threats of violence. The Court ruled that the fear from the duress must exist at the time the deed is executed, but the threats giving rise to the fear need not be made at that time. *Id.* In *Mitchell v. Zimmerman*, 4 Tex. 75, 1849 WL 3970, *5 (Tex. 1849) (Wheeler, J.), the Court held that a buyer who is a victim of fraud in the inducement can set the contract aside, or as an alternative have the purchase price adjusted to reflect the real value of what was received. In *Henderson v. San Antonio & M.G.R. Co.*, 17 Tex. 560, 1856 WL 5057 (Tex. 1856) (Wheeler, J.), Justice Wheeler wrote that it is not necessary to prove that the wrongdoer had knowledge that a representation is false in order to prove fraud. Making an assertion as true, that the speaker does not know is true, is also fraudulent. Wheeler cited Story on Contracts § 506 for the proposition that “[i]f, therefore, a party undertake to make a material statement, not knowing whether it is true or false, and thereby mislead another to his injury, it is no difference that he did not know that the statement was false; since, before making the affirmation, he should have ascertained its truth.” In *Harrell v. De Normandie*, 26 Tex. 120 (1861) (Wheeler, C.J.), Chief Justice Wheeler wrote that a contract that results from a mutual mistake of fact will be rescinded, because the requisite intent to make a contract is lacking. The Court cited only Story’s Treatise on EQUITY JURISPRUDENCE. *Id.* Chief Justice Wheeler went on to note that equity will not relieve a party from a mistake of law. *Id.* In *May v. San Antonio & A.P. Town Site Co.*, 83 Tex. 502, 502, 18 S.W. 959, 960 (1892) (Marr, J.), the Court said: “A court of equity may grant relief in case of a mutual mistake, but not on account of one entirely unilateral, and in the absence of fraud.” A history of the doctrine of duress in Texas was given in *Dallas Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 877 (Tex. 2005) (Wainwright, J.). Justice Wainwright described the current conception of duress in this way: “A common element of duress in all its forms (whether called duress, implied duress, business compulsion, economic duress or duress of property) is improper or unlawful conduct or threat of improper or unlawful conduct that is intended to and does interfere with another person’s exercise of free will and judgment.” *Id.* at 878-79.

J. PROMISSORY ESTOPPEL. The idea that a promisor can be bound by a promise, not

otherwise enforceable, based on reliance by the promisee is a modern concept that extends the law of obligation (and the law of estoppel) beyond traditional limits.

The RESTATEMENT OF THE LAW OF CONTRACTS (1932) included the doctrine of promissory estoppel in Section 90:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

When first proposed by Professor Samuel Williston, Section 90 was envisioned as a test for the enforceability of gratuitous promises. Williston explained to an American Law Institute conference that Section 90 “covers a case where there is a promise to give and the promisor knows that the promisee will rely upon the proposed gift in certain definite ways.”³⁷⁸ Once the RESTATEMENT was published, American courts began to accept Section 90 as a tenet of Contract Law that applied outside of charitable pledges.³⁷⁹

Professor Corbin disliked the name “promissory estoppel” and preferred the idea of the enforceability of a promise based on reliance. See the discussion of reliance as a substitute for consideration in Section VIII.H.12 of this Article.

The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 90 (1981) changed the first RESTATEMENT’s description of promissory estoppel:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The RESTATEMENT (SECOND) removed the language “of a definite and substantial character” contained in the first RESTATEMENT, but that idea was included in a comment as a factor for the court to consider. The RESTATEMENT (SECOND) also expanded the reach of the principle to third parties who relied on the promise. And the RESTATEMENT (SECOND) added that the remedy under Section 90 can be limited in the court’s discretion. Note that both Restatements use a “reasonableness” test, rather than a subjective test, and both Restatements phrase the issue as being whether the promisor should reasonably expect reliance, rather than whether the promisee reasonably relied on the promise. Professor William Harvey has noted that the concept of promissory estoppel appears in ten different sections of the RESTATEMENT (SECOND), Sections 84, 86, 87, 89, 90, 94, 129, 139, 150 and 332.³⁸⁰

In Texas, the doctrine of promissory estoppel was an extension of the doctrine of estoppel in pais or equitable estoppel. In *Johnson v. Byler*, 38 Tex. 606 (Tex. 1873), the Supreme Court considered a case where land was purchased on a promise to make payments over time. The allegations were that the buyer was unable to make payment, but agreed for the buyer to resell the land to a third party for Confederate money which would then be turned over to the original owner in discharge

of the debt. The land was then sold and the Confederate money tendered to the original owner, who refused to accept it. After the end of the Civil War, Texas courts would not grant specific performance of contracts payable in Confederate money, because they were considered to be illegal. In this instance, however, the Supreme Court said that the original owner was the prime cause of the illegal contract between the first buyer and the second buyer, and the original owner was not permitted to set up illegality of the tender of Confederate money as a justification for refusing to accept payment. The Court made it clear that it was not holding the original owner to a contractual obligation. Instead, the original owner was “estopped by his acts from taking advantage” of his buyer or the third-party buyer. The Court described the principle of equitable estoppel in these terms: “A party is estopped by his acts whenever he has gained an undue advantage, or has caused his adversary a loss or injury.” *Id.* at *5.

In *Edwards v. Dickson*, 66 Tex. 613, 617, 2 S.W. 718, 720 (Tex. 1886) (Gaines, J.), the Supreme Court rejected a claim of estoppel in pais where the representation relied upon was a promise to do something in the future. The Court cited John Norton Pomeroy’s treatise on EQUITY JURISPRUDENCE for the rule that, to support an estoppel, the fact misrepresented or concealed must be present or past, not future. *Id.* at 721. The Court quoted Pomeroy: “A statement concerning future facts would either be a mere expression of opinion, or would constitute a contract, and be governed by the rules applicable to contracts.” The Court noted an exception for a representation that “relates to the intended abandonment of an existing right, . . . made to influence others, and by which they have been induced to act.” But that rule did not apply here. The Court noted: “[i]f accepted by the attorneys, the promise contained every element of a contract, and upon its breach the plaintiff . . . had his remedy at law.” *Id.* at 618. Thus, equitable principles did not apply. In *Risien v. Brown*, 73 Tex. 135, 142-43, 10 S.W. 661, 664 (Tex. 1889) (Hobby, J.), the Court applied the doctrine of estoppel to a landowner who acted in such a way to lead another to build a dam across a creek and similar activities suggesting the continuation of an existing agreement or license. The theory relied upon was called “estoppel” and “estoppel by conduct.” The Court said:

If Brown, by a course of conduct or actual expressions, so conducted himself that Risien might reasonably infer the existence of an agreement or license, whether so intended or not, the effect would be that Brown could not subsequently gainsay the reasonable inference to be drawn from his conduct.

The Court was clear that fraud need not be intended for the principle to apply. In retrospect, this case could be viewed as a “unilateral contract,” where an offer was reasonably inferred from a party’s conduct or actual expressions, and the offer became a binding promise when accepted by performance. Or it could be seen as reasonable reliance upon an apparent promise foreclosing the other party from denying the promise.

The problem with using equitable estoppel as a basis for enforcing promises was the rule that equitable estoppel could not arise with regard to a representation of a future fact, thus ruling out promises of future performance as a basis for estoppel. The world of promises was the world of contract, not the world of equity. By extending the principle of estoppel to include promises, the doctrine of promissory estoppel thus carried equitable estoppel across the threshold into the world of failed contracts.

The doctrine of promissory estoppel was explicitly recognized in *Citizens Nat. Bank at Brownwood v. Ross Const. Co.*, 146 Tex. 236, 240, 206 S.W.2d 593, 595 (Tex. 1947) (Simpson, J.). The Supreme Court said that “ordinarily an estoppel will not be grounded upon a promise to do something in the future.” However, the court went on to say:

what the writers have called a promissory estoppel may, in a proper case, be raised upon a promise to do something in the future even if the promise is unsupported by any consideration. But this species of estoppel contemplates, among other elements, a breach of a promise or conduct inconsistent with it

Note that the Supreme Court referred to the doctrine of promissory estoppel as a principle espoused by “the writers,” as opposed to one or more prominent courts.

In *Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1966) (Smith, J.), the Court said:

We agree with the reasoning announced in those jurisdictions that, in cases such as we have before us, where there is actually no contract the promissory estoppel theory may be invoked, thereby supplying a remedy which will enable the injured party to be compensated for his foreseeable, definite and substantial reliance. Where the promisee has failed to bind the promisor to a legally sufficient contract, but where the promisee has acted in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained. Since the promisee in such cases is partially responsible for his failure to bind the promisor to a legally sufficient contract, it is reasonable to conclude that all that is required to achieve justice is to put the promisee in the position he would have been in had he not acted in reliance upon the promise.

Thus, in *Wheeler v. White*, the Supreme Court recognized promissory estoppel, not just as a defense that prohibited a party from claiming that a promise was unenforceable, but as a basis for an affirmative claim of damages despite the fact that there was no enforceable promise. The recovery was not for the benefit of a bargain that is unenforceable; instead it was for reliance damages to rectify the harm caused to the promisee. The Supreme Court mentioned Williston’s treatise and Corbin’s treatise as authority. *Id.* at 96.

In *Cooper Petroleum Company v. LaGloria Oil and Gas Co.*, 436 S.W.2d 889, 896 (Tex. 1969), the Court relied on promissory estoppel to preclude the assertion of a Statute of Frauds defense for a promise to guarantee the debt of another. The Supreme Court cited the RESTATEMENT OF THE LAW OF CONTRACTS § 90 (1932). In *Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1973), promissory estoppel was applied to preclude the assertion of a Statute of Frauds defense. The Court noted Professor Corbin’s objection to the term “promissory estoppel” in his treatise, but also noted that Corbin recognized the soundness of the principle in Section 90, which he preferred to call “reliance on a promise.” *Id.* at 937. It is interesting to note that the Supreme Court conservatively chose to cite the formulation of promissory estoppel in the First RESTATEMENT, rather than the Second RESTATEMENT, which demoted the requirement that the reliance be of a “definite and substantial character” to a comment.

K. USAGE AND CUSTOM. In evaluating a contract (whether determining if an implied promise

was made, or supplying omitted terms, or interpreting the words of a contract), an issue exists as to what extent a court can consider usage or custom in evaluating the contract. Pothier (1761) proposed two rules of contract interpretation that involved usage and custom: “4th Rule. Any thing, which may appear ambiguous in the terms of a contract, may be explained by the common use of those terms in the country where it is made”; and “5th Rule. Usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses although they are not expressed.”³⁸¹ Blackstone (1769) wrote about *leges non scriptae* (unwritten laws), which he said consisted of general and local customs.³⁸² According to Blackstone, for a custom to have the effect of law, it must: “have been used so long, that the memory of man runneth not to the contrary”; it must have been in use continuously; it must be uncontested; it must be reasonable; it must be certain; it must be compulsory; and it must be consistent with other customs.³⁸³ Chitty (1841) wrote that usage or custom could give rise to an implied promise provided that the usage or custom is “uniform and universal; and not merely a course of dealing at particular houses. It must be so universal that every one in the trade must be taken to know it.” See Section IV.B.3 of this Article.” Parsons (8th ed. Williston ed. 1893) said that “[a] custom which may be regarded as appropriate to the contract and comprehended by it, has often very great influence in the construction of its language.”³⁸⁴

Parsons distinguished custom from usage in this way: “Custom and usage are very often spoken of as if they were the same thing. But this is a mistake. Custom is the thing to be proved, and usage is the evidence of the custom.” Professor Llewellyn (1941) compared “practice” and “standard,” the former being “a moderately discernible line of actual behavior” and the latter “an actually held ideal of what the proper line of actual behavior should be.”³⁸⁵ Professor Kadens (2012) reminded us of the medieval distinction that a *usage* is a widespread behavior, while a *custom* is a widespread behavior that is obligatory, although not expressly required by law.³⁸⁶ A modern example of obligatory customs is the set of trading rules adopted by private associations in the cotton and grain trades, which are obligatory on members by virtue of their membership in the trading associations. They do not have the force of law, yet they determine the outcome of disputes which, by agreement, must occur in arbitration. The cotton traders and grain traders thus operate under a system of private “laws.”

In *Dwyer v. City of Brenham*, 70 Tex. 30, 7 S.W. 598 (1888) (Willie, C.J.), the court held that evidence of custom and usage was admissible in construing a contract, where the evidence did not contradict an express term of the contract. The court cited a 1843 case from the Supreme Court of New York for the proposition that “‘where there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties.’” *Id.* at 599. The court also cited a Missouri Supreme Court case and 2 Parsons on CONTRACTS 537. *Id.* The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1981) deals with usage in Sections 219 through 222. Section 219 merges custom into usage, saying that “[u]sage is habitual or customary practice.” Section 220 recognizes the parties’ right to expressly include usage in their contract. Section 221 provides that usage not mentioned in a contract can supplement or qualify contractual terms as long as each party does or can know of the usage and neither party knows or has reason to know that the opposing party has a contrary intent (a subjective approach). Section 222(a) involves a usage of trade, which it defines as “a usage having such regularity of observance in a place,

vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. It may include a system of rules regularly observed even though particular rules are changed from time to time.” The existence of a usage of trade is a fact issue. *Id.* A usage of trade can supplement or qualify an agreement, so long as it is or could be known to the parties and the parties have not agreed otherwise. *Id.*

The general sense, then, is that it has long been part of the Common Law that contracts are drawn in the context of usage and custom. Article 2 of the U.C.C. elevates some usages to substantive law, and doing so made them default rules that apply to every contract unless expressly rejected. These customs thus became uniform across America.

L. CONTRACT INTERPRETATION. Although Pothier (1761) discussed contract interpretation extensively, see Section VIII.L.4 of this Article, explicit rules regarding the interpretation of contracts are missing from Blackstone (1769) and Chitty (1826). Parsons (1853) wrote extensively on contract interpretation, as did Leake (1867). The issue of contract interpretation arose in Holmes’s writing as well, particularly in connection with his support for the objective theory of contract interpretation.

1. Subjective Vs. Objective View of Interpretation. The subjective approach to contract interpretation, in theory anyway, says that a court’s interpretation of the meaning of a contract should be determined by the actual intentions of the parties at the time of contracting. The objective approach to contract interpretation says that, after a lawsuit has been filed, what people say they originally intended will be colored by subsequent events, and by self-interest, and that type of evidence is not reliable and should not be considered. Where the contract is in writing, the objective approach would be to take the written contract as the embodiment of the parties intent, and that the legal meaning of the contract will be drawn from the words that were used in writing the contract.

In *The Path of the Law*, 10 HARV. L. REV. 457 (1897), Holmes set out his objective view of Contract Law:

In the law of contract the use of moral phraseology led to equal confusion, as I have shown in part already, but only in part. Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on

the agreement of two minds in one intention, but on the agreement of two sets of external signs — not on the parties' having meant the same thing but on their having said the same thing. Furthermore, as the signs may be addressed to one sense or another — to sight or to hearing — on the nature of the sign will depend the moment when the contract is made. If the sign is tangible, for instance, a letter, the contract is made when the letter of acceptance is delivered. If it is necessary that the minds of the parties meet, there will be no contract until the acceptance can be read; none, for example, if the acceptance be snatched from the hand of the offerer by a third person.

Holmes later expressed the objective approach to contract interpretation in this way:

[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.

O.W. Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

Justice Learned Hand, at the time a Federal District Judge, quintessentially explained the objective approach to contract interpretation, in *Hotchkiss v. National City Bank of New York*, 200 F. 287, 293 (D.C.N.Y. 1911) (Hand, J.), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913):

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.

While it is sometimes said that the objective approach to contract interpretation is an aspect of modern contract law, Professor Joseph M. Perillo, of Fordham University School of Law, in his article *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000), makes a case that the objective view of contract interpretation has dominated the Common Law “since time immemorial.”

Holmes suggested the idea of applying a “prudent man” standard to contract formation and contract interpretation, like the standard used for determining negligence. The essence of a “reasonable person” standard, as used in tort law, is that reasonableness is a fact question to be determined by a jury, which collectively represents the community’s standards of what is “reasonable.” However, it is universally the rule that only judges and not juries can interpret a contract (absent ambiguity). So a “reasonable person” standard devolves down to the subjective opinion of one person, albeit one

educated in the law and appointed or elected to the post of judge. Few judges would think their own opinions to be unreasonable, so a “reasonable person” standard for contract interpretation essentially boils down to what the judge thinks, for whatever reason. Viewed in this light, the “reasonable person” standard in contract interpretation amounts to little more than an intellectual construct, devoid of practical significance.

The objective approach to contract interpretation is reflected in the RESTATEMENT OF THE LAW OF CONTRACTS (1932), drafted largely by Professor Williston. Section 230 provides:

§ 230. Standard Of Interpretation Where There Is Integration

The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.

Comment b to Section 230 notes:

Where a contract has been integrated the parties have assented to the written words as the definite expression of their agreement. . . They have assented to the writing as the expression of the things to which they agree, therefore the terms of the writing are conclusive, and a contract may have a meaning different from that which either party supposed it to have.

The RESTATEMENT OF CONTRACTS § 226, comment b (1932), said that “[t]he meaning that shall be given to manifestations of intention is not necessarily that which the party from whom the manifestation proceeds, expects or understands.”

The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 212 (1981) provides:

§212. INTERPRETATION OF INTEGRATED AGREEMENT

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

Comment a to Section 212 provides:

a. “Objective” and “subjective” meaning. Interpretation of contracts deals with the meaning given to language and other conduct by the parties rather than with meanings established by law. But the relevant intention of a party is that manifested by him rather than any different

undisclosed intention. In cases of misunderstanding, there may be a contract in accordance with the meaning of one party if the other knows or has reason to know of the misunderstanding and the first party does not.

A comparison of the two RESTATEMENTS suggests that the RESTATEMENT (SECOND) is less stringent on applying the objective view of contract interpretation than the original RESTATEMENT. The RESTATEMENT (SECOND) actually adopts a subjective approach to contract interpretation in Section 201, which says that “[w]here the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.” But where the parties have attached different meanings, the contract is to be interpreted in accordance with the meaning attached by party A if, at the time of contracting party B knew of party A’s meaning and party A did not know or have reason to know that party B had a different meaning. If the foregoing rule does not resolve the meaning in favor of one party, then “neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.” *Id.* This is an outright adoption of the subjective approach, in that it requires the court to determine party A’s intended meaning, and then delve into party B’s awareness of party A’s meaning.

2. The “Four Corners” Rule. The “four corners rule” is widely applied in interpreting deeds, will, and contracts. What may be the first application of the “four corners rule” in America is *Lynn’s Lessee v. Downes*, 1 Yeates 518, 1795 WL 730 (Pa. 1795), where the court said: “The will is obscurely penned; but the intention of the testator, extracted from the words of the will taken all together, shall govern its construction, and not the opinion of his family.” This case expressed the “four corners rule” as a rule limiting the court’s inquiry into the intent of the parties to the words of the deed, or contract, or will itself, without evidence of other things. Subsequent cases were all Pennsylvania cases repeating the rule until the case of *Hoxie v. Hoxie*, 7 Paige Ch. 187, 4 N.Y. Ch. Ann. 118 (N.Y. Ch. 1838), which said: “The construction of a will must depend upon the intention of the testator, to be ascertained from a full view of everything contained within the four corners of the instrument.” The next case to apply the rule was *Dismukes v. Wright*, 3&4 Dev. & Bat. 346, 1839 WL 528 (N.C. 1839), where the court said: “In the construction of deeds, the first rule is, that the intention of the parties is, if possible, to be supported; and the second rule is, that this intention is to be ascertained by the deed itself; that is, from all parts of it taken together. In general, no expression can be contradicted or explained by extrinsic evidence; and the intention collected from the four corners of the deed, is to govern the construction of every passage in it,” citing Touch. 87 and Burton on Real Property, 164, 165.” The “four corners rule” was applied to interpreting a will in *Egerton’s Administrator v. Conklin*, 25 Wend. 224 (N.Y. Ct. of Corr. 1840).

In *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 544 (1837) (Taney, C.J.), Chief Justice Taney wrote, without citation to authority: “The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.” This can be taken as an expression of the four corners rule.

In *Ulbricht v. Friedsam*, 159 Tex. 607, 325 S.W.2d 669, 672 (Tex. 1959) (Griffin, J.), the Court said: “It is elementary that unless the deed be ambiguous, it is the duty of all courts to construe the deed within its four corners. In such construction the court seeks the intention of the parties as shown by the deed.” In *Luckel v. White*, 819 S.W.2d 459, 462, 463 (Tex. 1991) (Gammage, J.), the Court recited the “four corners rule”: “The primary duty of a court when construing such a deed is to

ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the ‘four corners’ rule. . . .”

Section 1.201(b)(3) of the U.C.C. defines “agreement” as “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade” While the U.C.C. permits the court to look beyond the four corners of the agreement to ascertain meaning, the meaning is determined from the language of the agreement or from their actual behaviors. U.C.C. Section 2-202 sets out a parol evidence rule that applies where the parties have reached a “final expression” of their agreement, banning evidence of a contrary prior agreement or contemporaneous oral agreement. However, Section 2-202 permits a final expression to be explained or supplemented by evidence of course of performance, course of dealing, or usage of trade, and evidence of consistent additional terms, unless the final expression was a “complete and exclusive statement of the terms of the agreement.”

3. Parol Evidence Rule. It is said that the parol evidence rule was first stated by Lord Coke, in his review of *Isabel Countess of Rutland’s Case*, 6 Rep. 52; 9 Hale, 240 (1604),³⁸⁷ where he wrote:

[I]t would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted.

Professor Corbin (1944) described the Parol Evidence Rule in this way:

When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.³⁸⁸

The Parol Evidence Rule was recognized in Texas in *Rockmore v. Davenport*, 14 Tex. 602, 1855 WL 4944, *2 (Tex. 1855) (Wheeler, J.), where Justice Wheeler wrote:

The general rule, subject to a few exceptions not applicable to the present case, undoubtedly is that parol evidence cannot be received to contradict or vary a written agreement.

Justice Wheeler cited the 8th American edition of Samuel March Phillipps’ treatise on the LAW OF EVIDENCE (1849). The Treatise refers to Lord Coke’s report of the *Countess of Rutland’s* case, discussed above.

RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §§ 213 & 215 adopt the Parol Evidence Rule. Section 213 says that “[a] binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them,” and that “[a] binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.” Section 215 says that “[a] binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.”

The CISG contains no Parol Evidence Rule. Article 11 provides: “A contract for sale need not be concluded in or evidenced by a writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” So the Parol Evidence Rule do not apply to transactions governed by the CISG that are litigated in Texas courts.

4. Rules of Construction. As an aid to contract interpretation, the Common Law developed “rules of construction” to help discern the meaning of a contract, particularly where it is vague, ambiguous, or internally-inconsistent. The rules of construction include: give words their plain meaning; construe the contract as a whole; favor an interpretation that harmonizes all parts of the contract over an interpretation that leads to internal inconsistencies, or that would render certain provisions useless; to resolve an internal conflict, consider the principal object of the contract; *noscitur a sociis* (take words in their immediate context); *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another); *eiusdem generis* (broad terms used in conjunction with a list of particulars will be limited to the type of items listed); specific provisions prevail over general ones; earlier terms prevail over later ones; handwritten terms prevail over typed terms, and typed terms prevail over preprinted terms; words prevail over numbers and symbols; *contra proferentem* (construe the contract against the party who drafted it); and many more. Rules of contract construction are examined in greater detail in Orsinger, *175 Years of Texas Contract Law*, Section VII.F. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 206 adopts the *contra proferentem* rule:

§ 206. Interpretation against the draftsman

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

Many of these rules of construction date back to Pothier’s (1761) *TREATISE OF THE LAW OF OBLIGATIONS* (Evans trans. 1806), where he sets out twelve rules for interpreting contracts:

“1st Rule. We ought to examine what was the common intention of the contracting parties rather than the grammatical sense of the terms.” *Id.* at 53.

“2nd Rule. When a clause is capable of two significations, it should be understood in that which will have some operation rather than that in which it will have none.” *Id.* at 54.

“3rd Rule. Where the terms of a contract are capable of two significations we ought to understand them in the sense which is most agreeable to the nature of the contract.” *Id.* at 55.

“4th Rule. Any thing, which may appear ambiguous in the terms of a contract, may be explained by the common use of those terms in the country where it is made.” *Id.* at 56.

“5th Rule. Usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses although they are not expressed.” *Id.* at 56-57.

“6th Rule. We ought to interpret one clause by the others contained in the same act, whether

they precede or follow it.” *Id.* at 57.

“7th Rule. In case of doubt, a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation.” *Id.* at 58.

“8th Rule. However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears, that the contracting parties proposed to contract, and not others which they never thought of.” *Id.* at 59.

“9th Rule. When the object of the agreement is universally to include every thing of a given nature, (une universalité des choses) the general description will comprize (sic) all particular articles, although they may not have been in the knowledge of the parties.” *Id.* at 59.

“10th Rule. When a case is expressed in a contract on account of any doubt which there may be whether the engagement resulting from the contract would extend to such case, the parties are not thereby understood to restrain the extent which the engagement has of right, in respect to all cases not expressed.” *Id.* at 61-62.

“11th Rule. In contracts as well as in testaments, a clause conceived in the plural may be frequently distributed into several particular clauses.” *Id.* at 62.

“12th Rule. What is at the end of a phrase commonly refers to the whole phrase, and not only to what immediately precedes it, provided it agrees in gender and number with the whole phrase.” *Id.* at 63.

Leake’s AN ELEMENTARY DIGEST OF THE LAW OF CONTRACTS 217-237 (1878), sets out rules for construction which sound like they could have been lifted from a modern contract case. Leake says that “they do not appear to be of much practical efficacy; the rules themselves being for the most part self-evident propositions, and the difficulty consisting chiefly in choosing which to follow in each particular case.” *Id.* at 221. Leake indicates that: unreadable writing may be referred to a jury to determine what was written, *Id.* at 219; the meaning of a foreign language contract is for the court, *Id.* at 219; where printed and hand-written words are both used, the handwritten language “is naturally more in harmony with what the parties are intending,” *Id.* at 220; numbers spelled out in words should prevail over numerals, *Id.* at 220. The “leading rule of construction” is that “a written document is to be construed in the primary literal meaning of the words according to the rules of language and grammar,” *Id.* at 222; “words, in general, are to be understood in their plain ordinary and popular sense,” *Id.* at 222; “technical words used in technical subjects are to be understood in their technical” sense, and mercantile terms in their “ordinary mercantile meaning,” *Id.* at 222; “the meaning of a particular word may be shown by parol evidence to be different in some particular place, trade, or business from its proper and ordinary acceptance,” *Id.* at 222; “or” should be read as disjunctive unless the context or facts require conjunctive meaning, *Id.* at 224; every part of the document is to be construed to best effectuate the intention of the parties, “to be collected from the whole of the agreement,” *Id.* at 224; covenants, leases, and deeds with broad language are “restricted to the objects specified in the recitals,” *Id.* at 225-25; an obvious mistake, like clerical or grammatical errors, misspelling, misnomer, and the like “may be rectified in construing it by the context without further evidence of the mistake,” *Id.* at 225-26; words that are repugnant to the

general intention of the agreement may be disregarded if they have no sensible meaning, *Id.* at 226; “the meaning of words and expressions must be construed with reference to the subject matter,” *Id.* at 226; “general words following particular or specific terms are to be construed either as extended or restricted in meaning to matters or things ejusdem generis with those mentioned before,” *Id.* at 227; “general expressions are restricted by particular descriptions or additions appended to them,” *Id.* at 228; multiple instruments in one transaction are construed together, *Id.* at 229; a subordinate rule is to favor the meaning that lends support to the agreement, *Id.* at 229.

5. The Age-Old Question: Do Words Have Meaning or do People Project Meaning Onto Words? For over 2,000 years philosophers in the Western tradition have debated the nature of language and the meaning of words. More recently, scientists studying childhood development and the electrochemical operations of the human brain have entered the discussion. Some writers ask, if words do not have an inalterable meaning in and of themselves, then how can a court achieve an understanding of a contract just by looking at the words? Justice Oliver Wendell Holmes, Jr. poetically put it this way, in *Towne v. Eisner*, 245 U.S. 418, 425 (1918):

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Although Holmes was an advocate of an objective standard for interpreting contracts, he also supported the view that the court should consider the surrounding circumstances in determining what the parties intended.

Arthur Corbin, too, believed in the importance of factors beyond the words themselves, in determining a contract’s meaning. Corbin wrote: “Words, in any language have no meaning whatever apart from the persons by whom they are used and apart from the context and the circumstances of their use.” He also wrote that “[t]he final interpretation of a word or phrase should not be adjudged without giving consideration to all relevant word usages, to the entire context and the whole contract, and to all relevant surrounding circumstances.” 3 Corbin on CONTRACTS § 555, at 236 (1960).

6. Surrounding Circumstances. The objective view of contract interpretation does not necessarily entail looking only at the words of the contract. The idea that a contract should be viewed in the context of surrounding circumstances has a long history in Contract Law.

The melding of the objective view of contract interpretation with consideration of surrounding circumstances is exemplified in *Watrous’ Heirs v. McKie*, 54 Tex. 65 (1880) (Gould, A.J.), where the Texas Supreme Court said:

But the parties saw fit to make a very different agreement, one which it was competent for them to make, and which is plain in its terms, making the right to a judgment in this suit depend on the fact of recovery, not the grounds of recovery. Surrounding circumstances may be looked to in order to arrive at the true meaning and intention of the parties as expressed in the words used, “but as they have constituted the writing the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts

in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used.”

Id. at *4. The Court cited 1 Greenleaf Evid. § 277, and the U.S. Supreme Court case of *Reed v. Insurance Company*, 95 U.S. 23, (1877) (Bradley, J.), which itself cited Greenleaf’s Treatise on Evidence, Section 277.

Section 230 of THE RESTATEMENT OF CONTRACTS (1932) quoted above, couples its “reasonably intelligent person” standard with consideration of “all of the circumstances prior to and contemporaneous with the making of the integration.”

7. Course of Dealing. Under the English Uniform Sales Act (1895), where the price was not fixed in the contract, and the manner of calculating the price was not described in the contract, the court was allowed to determine a price based on “the course of dealing between the parties.” *Id.* § 9(1). U.C.C. § 1-303(b) defines “course of dealing” in this way:

(b) A “course of dealing” is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

U.C.C. § 2-202 permits a final expression to be explained or supplemented by evidence of course of dealing, unless the final expression was a “complete and exclusive statement of the terms of the agreement.”

8. Course of Performance. U.C.C. § 1-303(a) defines “course of performance” in this way:

(a) A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

U.C.C. § 2-202 permits a final expression to be explained or supplemented by evidence of course of performance, unless the final expression was a “complete and exclusive statement of the terms of the agreement.”

M. GAP-FILLING. Many contracts omit certain details of the parties’ agreement. In the early Common Law, material omissions were fatal to the contract. However, in more recent times courts have been willing to fill in the gaps (called “gap-filling”) in order to achieve a contract that the parties intended. Courts have assisted in completing contracts for some time. Parsons (5th ed. 1866) stated the law on implying omitted terms in a contract:

The law, as we have already had occasion to say in reference to various topics, frequently supplies by its implications the wants of express agreements between the parties. But it never overcomes by its implications the express provisions of parties. If these are illegal, the law

avoids them. If they are legal, it yields to them, and does not put in their stead what it would have put by implication if the parties had been silent. The general ground of a legal implication is, that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties do themselves make express provision, the reason of the implication fails.³⁸⁹

Sir Edward Fry's TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS (1858) said: "Besides the express terms of the contract, there are others which, in the absence of any expression to the contrary, are implied by presumption. With regard to such terms, therefore, whether they be necessary terms or not, the silence of the contract does not render it incomplete: thus, an agreement to sell land, not specifically expressing what interest, is taken to be an agreement to sell the whole of the vendor's interest. An agreement to sell a house simply, implies that the interest sold is the fee simple; and an agreement to renew is presumed to be for the same term as the preceding lease." *Id.* at 99.

1. Time For Performance. Where the parties failed to specify a time for performance, the court will infer a reasonable time. *Self v. King*, 28 Tex. 552, 1866 WL 4032, *2 (Tex. 1866) (Moore, J.) ("[W]hen no specific time is fixed for the delivery of cumbrous property, it is the settled construction that it is payable within a reasonable time, which is generally a question of law, but often of law and fact"). Under Section 2-309(1), where merchants fail to specify a the time for a sale to be concluded, a reasonable time is supplied. If the contract calls for successive performances with no ending time provided, Section 2-309(2) allows either party to terminate at any time. If the date for payment is not specified, U.C.C. § 2-310 requires payment when the goods are due to be delivered.

2. Failure to Specify Price. In *Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966) (Walker, J.), the Supreme Court said that where a contract is complete except as to price, the contract "is not so incomplete that it cannot be enforced." Instead, "it will be presumed that a reasonable price was intended." The Court cited a U.S. Supreme Court case, two Texas court of civil appeals cases, and Williston's Law of Contracts (3d ed. 1957), § 41. U.C.C. § 2-305 applies to contracts with an "open price term," and it provides that the parties can conclude a contract that (i) does not specify a price, or (ii) provides that an agreement will later be reached and no agreement is reached, or (iii) establishes a market standard or other measure of price. In that case, the law implies a reasonable price at the time for delivery. If a later agreement on price is thwarted by a party, the other party can either cancel the contract or fix a reasonable price. If the price is to be set by a party to the contract, that party must use good faith.

3. Failure to Specify Quantity. An "output" contract provides for the buyer to purchase everything the seller can produce, or for the seller to sell everything that the buyer wants, within a certain period. Early contract cases had difficulty in finding such contracts to be enforceable. U.C.C. §2-306 recognizes output contracts for "such actual output or requirements as may occur in good faith" Neither party can demand performance for outputs or requirements that are "unreasonably disproportionate" to stated estimates or to normal output or requirements. *See Pace Corp. v. Jackson*, 155 Tex. 179, 185-86 284 S.W.2d 340, 345 (1955) (Calvert, J.) (failure to specify quantity not fatal to "[e]xecutory bilateral contracts for the sale and purchase of goods to meet the

business requirements of the purchaser”).

IX. DUTY OF GOOD FAITH. The duty of good faith in connection with contracts has ancient roots. Aristotle wrote: “If good faith has been taken away, all intercourse among men ceases to exist.”

In 44 B.C., Marcus Tullius Cicero wrote a letter to his son, entitled *De Officiis* (On Obligations), in which he advocated that a seller who has adverse information about the property being sold should, in good faith, disclose that information to the buyer. Cicero cited the high priest (pontifex maximus) of the Roman religion, known as a wise arbitrator of disputes, who “held that the expression ‘good faith’ had a very extensive application, for it was employed in trusteeships and partnerships, in trusts and commissions, in buying and selling, in hiring and letting - in a word, in all the transactions on which the social relations of daily life depend; in these he said.” *Id.* Book III, xvii. Cicero was advocating good faith in the *formation* of contracts.

Good faith in the *performance* of a contract was required by Article 1134 of the French Civil Code (1808), which provided: “the agreements legally formed have the force of law over those who are the makers of them. They cannot be revoked except with their mutual consent, or for causes which the law authorizes. They must be executed with good faith.” The German Civil Code (1900) (BGB) likewise mandated good faith in the performance of a contractual duty, in Article 242, “Faith and Credit,” which provides: “The debtor is obliged to perform in such a manner, as faith and credit with regard to custom requires.” The BGB also mandates good faith in interpreting contracts. Section 157 provides that “[c]ontracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.”

In *Carter v. Boehm*, 97 Eng. Rep. 1162, 1164 (K.B. 1766), Lord Mansfield referred to good faith as “[t]he governing principle . . . applicable to all contracts and dealings,”

Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

Lord Mansfield, thus, announced a duty of good faith in the *formation* of Contracts. However, Lord Mansfield went on to say that this obligation did not extend to things known to both parties, or which the ignorant party ought to know. Later English courts did not accept Lord Mansfield’s suggestion of a broad-based duty of good faith in contract formation, and restricted the duty of disclosure to the acquiring of insurance coverage. However, contracts could be rescinded for fraudulent inducement and for unilateral mistake on the part of one party known to the other bargaining party; these principles tended to grant relief that would be available under a broad doctrine of good faith.

The issue of the duty to disclose adverse information in the formation of a contract arose in the American case of *Laidlaw v. Organ*, 15 U.S. 178 (1817) (Marshall, C. J.), where the buyer knew that

the War of 1812 had been concluded by the Treaty of Ghent while the seller did not, with the implication that the British embargo on American tobacco would soon be lifted and tobacco would rise in price shortly after the buyer purchased it. The seller asked the buyer if he knew anything that would affect the price of the tobacco, and the buyer said “no.” After the purchase but before delivery, the ending of the war became known and the value of the tobacco rose, leading the seller to refuse to deliver the tobacco. The buyer sued, and the case went all the way to the U.S. Supreme Court. In a brief Opinion, Chief Justice Marshall wrote:

The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of the opinion that he was not bound to communicate it.

Chief Justice Marshall provided no citation to authority, but he did offer a policy argument: “It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.” *Id.* at 194.

The concept of an implied covenant of “good faith” in *performing* a contract arose in America in the second half of the 1800s.³⁹⁰ Justice Cardozo’s Opinion in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917), mentions an obligation of fairness on the part of contracting parties. In *Kirk La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163 (N.Y. 1933), the court said: “[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.”³⁹¹ Both cases suggested a duty of good faith in *performing* a contract.

The English Uniform Sales Act (1895) mentions “good faith” in a number of its provisions. In the Act, “good faith” means “when in fact done honestly, whether it be done negligently or not.” *Id.* § 60(2). Where the seller’s title was defective, the buyer nonetheless acquired good title provided he bought the goods in good faith and without notice of the seller’s defect in title. *Id.* § 23, 25.1; 26. Where a buyer receives a document of title in good faith and for valuable consideration, any lien in the goods or right to stoppage in transitu is subject to the rights of the purchaser. The use of good faith in this Act relates to the idea of a bonafide purchaser for value, who is protected from harm for relying in good faith on the legitimacy of the transaction. The Act contained no general duty of good faith in forming or performing a contract.

The U.C.C. 1-203 states: “Every contract or duty within this Act imposes an obligation of good faith in its performance and enforcement.” Section 2-103(1)(b) (relating to sales) provides: “‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” This articulation of good faith involves subjective honesty and objective reasonableness.

The RESTATEMENT OF THE LAW OF CONTRACTS (1932) contained no broad assertion of a duty of good faith. In 1968, Professor Robert S. Summers wrote an article, Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968), in which he proposed a broader duty to avoid bad faith in contracts, which he divided

into four areas: bad faith in the negotiation and formation of contracts, bad faith in performance, bad faith in raising and resolving contract disputes, and bad faith in taking remedial action. Professor Robert Braucher, the Reporter for the RESTATEMENT (SECOND) later acknowledged that Professor Summers' broad conception of good faith "substantially influenced the recognition and conceptualization of good faith in section 205."³⁹² The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 205 (1981) provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Section 205, Comment a, "Meaning of 'good faith'," refers to U.C.C. § 1-201(19) and goes on to say: "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Section 205, Comment a says: "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Comment d, "Good faith performance," says:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

In 1982, Professor Summers wrote an article entitled *The General Duty of Good Faith--Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 810 (1982), in which he commented on the duty of good faith included in the RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1981): "The first Restatement of Contracts, which appeared in 1932, did not include a section comparable to section 205. This new section reflects one of the truly major advances in American contract law during the past fifty years."

As noted, the RESTATEMENT (SECOND) and the U.C.C. do not apply the duty of good faith to the negotiation and formation of contracts. The RESTATEMENT (SECOND) § 205, Comment c, notes: "This Section, like Uniform Commercial Code § 1-203, does not deal with good faith in the formation of a contract."³⁹³

The CISG contains no general duty of good faith, but Article 7(1) says: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

There are instances where American law puts a duty of disclosure on parties who ought not be allowed to profit from superior knowledge. An example is the area of investment securities. The Securities Exchange Act of 1934, and Securities Exchange Commission Rule 10b-5 (1948), regulate disclosure of relevant information in the purchase and sale of investment securities. SEC Rule 10b-5

provides:

Rule 10b-5: Employment of Manipulative and Deceptive Practices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Note that Rule 10b-5 only prohibits fraud, misrepresentation, or failure to disclose a material fact such that the statements made are misleading. Note that the duty to disclose arises only if other express statements are thereby rendered misleading. This does not quite reach Cicero's concept of general duty to disclose adverse information.

Although there is no general duty of good faith in negotiating a sale or a contract, the doctrines of fraud in the inducement, unilateral mistake by one party that is known to the other, and remedies for breach of express and implied warranties, all impose a form of good faith on contract formation. These traditional doctrines, each with specific elements that must be proved, have served the purpose of a qualified duty of good faith while avoiding the subjectivity and lack of predictability that would accompany a broad duty of good faith.

X. WARRANTIES. English warranty law developed as express warranties incident to sales transactions, where the item purchased was not as it was expected or represented to be. Under the doctrine of caveat emptor, the fact an item was not what the buyer expected gave rise to no claim (i.e., there were no implied warranty as to the quality of the goods). However, if the sale involved an express warranty, and that warranty was breached, then the deficiency in the item purchased was actionable under the Form of Action called Deceit, a cause of action which today we would classify as a tort.

According to Professor Williston, the law of warranty is at least a century older than the rise of Special Assumpsit.³⁹⁴ He says that the first breach of warranty claim brought in Assumpsit, the forerunner of modern contract claims, occurred in 1778.³⁹⁵ In *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991) (Phillips, C.J.), the Court said: "The UCC recognizes that breach of contract and breach of warranty are not the same cause of action." This bifurcation goes back centuries in English Contract Law. In *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352 (Tex. 1987) (Spears, J.), the Court said: "[i]mplied warranties are created by operation of law and are grounded more in tort than in contract." See Section XX in *175 Years of Contract Law*.

A. EXPRESS WARRANTIES. Express warranties were mentioned in William Wetmore Story's, *A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY* § 357 (1853) (cited in *Blythe v. Speake*, 23 Tex. 429, 1859 WL 6294, *3 (1859) (Roberts, J.). The nature of express warranties in Texas was stated in *Henderson v. San Antonio & M.G.R. Co.*, 17 Tex. 560, 1856 WL 5057, *12 (Tex. 1856)

(Wheeler, J.): “The representations as to what the defendants would do, when used as inducements to others to contract with them, became assurances and undertakings which they were bound to fulfill. They were obligatory upon them, and must be so held, or the contract would be void for the want of mutuality. If such assurances were not binding, there could be no binding promise to perform an act in future.” The Uniform Sales Act § 12 (1906) recognized express warranties as affirmations, not part of the promise. Uniform Commercial Code Section 2-313 (1962) says this about warranties: “[T]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell”³⁹⁶ The U.C.C. (1962) lists several express warranties, although to some extent they impliedly arise by operation of law, if certain things occur. Under U.C.C. Section 2.313(b), a warranty can arise even when the seller does not “use formal words such as ‘warrant’ or ‘guarantee,’” and can arise even if the seller does not “have a specific intention to make a warranty.”

B. IMPLIED WARRANTIES. Various implied warranties have been recognized in law going back centuries. Williston noted in his treatise on Sales (1920) that early English law did not imply a warranty of title, but that by Blackstone’s time such an implied warranty impliedly arose. Under Roman law, and later under French, Spanish and Italian law, the vendor impliedly warranted that goods sold were merchantable.³⁹⁷ In *McKinney v. Fort*, 10 Tex. 220, * 8 (Tex. 1853) (Hemphill, C.J.), the Supreme Court said: “The rule at common law now appears to be that the purchaser buys at his own risk, unless the seller give either an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of a fraudulent concealment or representation in respect to a material inducement to the sale. (Story on Sales, sec. 349; 2 Kent, 478). A fair price implies a warranty of title, but not, unless under special circumstances, a warranty of soundness. A purchaser must, at his own risk, attend to the quality of the article which he buys, supposed to be within the reach of his observation and judgment.” In *Brantley v. Thomas*, 22 Tex. 270, 1858 WL 5635, *3 (Tex. 1858) (Bell, J.), the Texas Supreme Court recognized three implied warranties in merchant transactions: that in a sale by sample, the goods will correspond to the sample; that goods shall correspond to the order; that goods are merchantable and suitable to the market where they are sold. Justice Bell noted the rule of caveat emptor, but said it does not apply where the purchaser does not have the opportunity to inspect and must rely on the vendor (as in an interstate sale). This point was reconfirmed by the Texas Supreme Court in *White, Ward & Erwin v. Hager*, 248 S.W. 319 (Tex. Com. App. 1923, opinion adopted) (Powell, J.). In *City Bank v. First Nat. Bank*, 45 Tex. 203, * 10 (Tex. 1876) (Gould, Assoc. J.), the Supreme Court held that the indorsement of a check amounted to a representation and warranty that the check was genuine, citing 2 Parsons on Notes and Bills, 589. The Uniform Sales Act (1906) recognized various implied warranties. The UCC (1962) contains a number of implied warranties in the sale of goods. The CISG (1980) contains implied warranties of merchantability, fitness for a particular purpose (provided that the purpose was made known to the seller, unless non-reliance is shown), representativeness of samples or models, and an implied warranty of customary packaging. These implied warranties can be waived or disclaimed by agreement. In *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968) (Norvell, J.), the Court recognized an implied warranty, in an agreement between a homebuilder and an owner, that the home would be constructed in a good and workmanlike manner and that the home would be suitable for human habitation. In *Centex Homes v. Buecher*, 95 S.W.3d 266, 275 (Tex. 2002) (Phillips, C.J.), the Court held that “the implied warranty of habitability extends only to latent defects. It does not include defects, even substantial ones, that are known by or expressly disclosed to the buyer.” The Court also held that “the implied

warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance or quality of the desired construction,” but that “the warranty of habitability may not be disclaimed generally.”

XI. BREACH OF CONTRACT. The Texas Supreme Court recently defined breach of contract in *Greene v. Farmers Ins. Exchange*, 446 S.W.3d 761, 765 (Tex. 2014) (Johnson, J.): “‘Breach’ of a contract occurs when a party fails to perform an act that it has contractually promised to perform.” Whether a party has breached a contract is a question of law for the court, not a question of fact for the jury, when the facts of the parties’ conduct are undisputed or conclusively established. *Sullivan v. Barnett*, 471 S.W.2d 39, 44 (Tex.1971).

XII. PRIVACY OF CONTRACT. In the Common Law, non-contracting parties could not sue to enforce a contract. “The principle obtains, both in Law and in Equity, that a stranger to the contract cannot sue on it: and this is not varied by the mere fact that the stranger takes a benefit under it, except in certain cases that will be afterwards mentioned.” Edward Fry, TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS § 102 at 41 (1858). Fry gave the following exceptions to the rule: a spouse’s beneficial entitlement under a marriage settlement agreement, § 106 at 42; trustees suing a settlor for refusing to settle a trust, § 108 at 43; when the stranger to the contract is a near relative (like a daughter), § 112 at 45; and where the stranger to the contract has detrimentally relied on the promise, § 113 at 45. It is still a rule of Contract Law that only parties in privity with promisor can sue for breach of contract. *Pagosa Oil and Gas, L.L.C. v. Marrs and Smith*, 323 S.W.3d 203, 210 (Tex. App.--El Paso 2010, pet. denied) (“To establish its standing to assert a breach of contract cause of action, a party must prove its privity to the agreement, or that it is a third-party beneficiary”). Since most suits for breach of contract are brought by a contracting party or his assigns against the other contracting party or his assigns, the issue of privity is not often discussed.

The requirement of privity in a suit against a manufacturer for personal injury arising from tainted food was jettisoned in *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (Tex. 1942) (Alexander, C.J.), where the Supreme Court held a manufacturer of food liable for breach of an implied warranty that food is wholesome and fit for consumption. The Court said that the claim did not arise in tort or contract; instead it arose from public policy. And the manufacturer was liable even absent privity of contract between the manufacturer and the consumer. The Court noted that English law had long held purveyors of food and drink strictly liable for unsafe consumables. The Supreme Court’s innovation was to adapt the strict liability concept to a multi-level distribution system and to extend liability back to the manufacturer, who created the problem and who was in the best position of all participants to avoid the harm in the first place. In *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788–89 (Tex. 1967) (Norvell, J.), the Supreme Court turned to tort law to rectify injury from a consumer product, adopting the “strict liability” espoused in Section 402A of the RESTATEMENT (SECOND) OF THE LAW OF TORTS (1964). In *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977) (Pope, J.), the Supreme Court eliminated a privity requirement for suing a manufacturer for economic loss resulting from a breach of the Uniform Commercial Code’s implied warranty of merchantability. With *McKisson* and *Nobility Homes*, the privity barrier for Texas suits by a consumer against the manufacturer was eliminated for both qualifying tort claims and qualifying contract claims. U.C.C. § 2-318 took no position on whether privity of contract was necessary to a suit for breach of warranty. However, U.C.C. Section 2-318 extended a seller’s warranties to a guest in the buyer’s home and to members

of the buyer's family or household. In adopting the U.C.C. in 1966, the Texas Legislature omitted U.C.C. Section 2-318, and instead enacted a comment saying that the scope of the seller's warranty would be determined by common law. Thus it can be seen that in Texas some duties to purchasers arise from contract, some from tort, and some from public policy that is not based on either tort or contract.

The privity requirement for suing on a contract is long-standing. Sir Edward Fry's TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS (1858) noted: "The principle obtains both at Law and in Equity, that a stranger to the contract cannot sue on it . . . " *Id.* at 41.

XIII. REMEDIES. The selection of remedies available to the party aggrieved by breach of contract or, more generally a broken promise, has a modern cast to it.

A. VOIDABLE CONTRACTS. It has been the case since before the modern period that contracts entered into by children or legally incompetent persons are voidable at the election of the person under legal disability.

Under most contract regimes, the party who repudiates a contract due to a disability must restore the benefits received under the contract. In *Cummings v. Powell*, 8 Tex. 80 (1852) (Hemphill, C.J.), the Court held that a minor, asserting that a conveyance during minority was voidable, should offer to restore the purchase money. In *Pearson v. Cox*, 71 Tex. 246, 249-50, 9 S.W. 124, 125-26 (Tex. 1888) (Walker, J.), the Supreme Court ruled that parties setting aside a conveyance based on the insanity of the grantor had to repay all money they had received from the sale. The Court said: "He that seeks equity must do equity." The 1895 Sale of Goods Act, Section 3 (1895) provides that, where the contract is for necessities, the person avoiding the contract based on disabilities must pay for the value of anything received under the contract.

B. RESCISSION FOR MATERIAL BREACH. It is widely recognized that where one party to a contract materially breaches the contract, the other contracting party may choose to seek damages for breach of contract or may instead declare the contract to be rescinded. The right to rescind a contract when the other contracting party commits a material breach goes back far in time. Under the Spanish Law in force in Texas before 1840, called the Siete Partidas, if the buyer failed to pay the purchase price when due the seller has the option to rescind the contract or to recover the purchase price. The right of the non-breaching party to rescind the contract was recognized in the English Common Law. Kent (1827) suggested that, if there is a defect of title in land or chattels which "renders the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether." In support Kent cited Pothier, Lord Erskine and Lord Kenyon, but also cited cases indicating an abatement of the sales price for a partial failure of title.³⁹⁸ The right of the non-breaching party to rescind the contract was recognized in Texas law in *Todd v. Caldwell*, 10 Tex. 236 (1853) (Wheeler, J.), and continues today. *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam). In *Brantley v. Thomas*, 22 Tex. 270 (Tex. 1858), (Bell, J.), the Court held that a vendee, who rescinded a sales contract for breach of express or implied warranty and sought return of the purchase price, must return the goods, or at least tender a return, within a reasonable time, unless the goods are worthless. In *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323, 345 (Tex. 2011) (Green, J.), the Court said:

““Rescission is an equitable remedy and, as a general rule, the measure of damage is the return of the consideration paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract.””

C. LON FULLER’S THREE INTERESTS. In 1936, Lon Fuller, then a Professor at Duke University, wrote a seminal article of lasting fame, entitled *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52 (1936). Professor Fuller wrote that the legal rules can be understood only in the context of the purposes they serve. *Id.* at 52. He said that this insight was absent from legal treatises, which failed to clearly define the purposes which the definitions and legal distinctions were designed to serve. *Id.* at 52. Sorting through Contract Law from the perspective of remedies, Fuller divided the purposes in awarding contract damages into three interests: the expectation interest, the reliance interest, and the restitution interest. *Id.* at 53-54. Fuller’s seminal insight has brought increased clarity to the discussion of different types of recoveries and when they are available. Fuller’s three-part division is reflected in the RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 344 (1981), which provides:

Section 344. Purposes of Remedies.

Judicial remedies under the rules stated in this RESTATEMENT serve to protect one or more of the following interests of a promisee:

(a) his “expectation interest,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,

(b) his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or

(c) his “restitution interest,” which is his interest in having restored to him any benefit that he has conferred on the other party.

D. DAMAGES. The recovery of money damages for breach of contract or broken promise has undergone some modernization in the Twentieth Century.

1. Expectancy Damages. Expectancy damages give the non-breaching party the benefit of the bargain, which puts the non-breaching party in the position he would have been in if the contract had been performed. Fuller, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 54 (1936).

a. Damages Under the Civil Law. The French Civil Code §1149 (1804) provided:, “[t]he damages and interest due to the creditor are, in general, to the amount of the loss which he has sustained or of the gain of which he has been deprived; saving the exceptions and modifications following”: § 1150, “[t]he debtor is only bound for the damages and interest which were foreseen, or which might have been foreseen at the time of the contract, when it is not in consequence of his fraud that the obligation has not been executed”; §1151, “[e]ven in the case where the non-performance of the contract results from the fraud of the debtor, the damages and interest must not comprehend, as regards the loss sustained by the creditor and the gain of which he has been

deprived, any thing which is not the immediate and direct consequence of the non-performance of the contract.”

German Civil Code § 240(1) (1900) is similar to the French law. It says: “A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.” As to how broad the damage award can be, German Civil Code § 252 provides: “The damage to be compensated for also comprises the lost profits. Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected.”

b. Direct Pecuniary Loss. The historical rule for damages recoverable for breach of contract in Texas was stated in *Graham v. Roder*, 5 Tex. 141, 1849 WL 4070, *4 (Tex. 1849):

“In all cases growing out of the non-performance of contracts, and in those of the infringement of rights or the non-performance of duties created or imposed by law, in which there is no element of fraud, willful negligence, or malice, the compensation recovered in damages consists solely of the direct pecuniary loss.” (Sedgw. Meas. Dam., 36, 37.) No indirect loss is accounted for. But in this class of cases the direct pecuniary loss and the costs of the suit are all that the law means when it speaks of compensation. And whether the engagement be broken through inability or design, the amount of remuneration is the same. (Ib.) If the present case belonged to this class, the measure of damages would be restricted to compensation for the direct pecuniary loss.

c. Natural and Foreseeable. Benjamin (3d ed. 1841) wrote that “the jury may take into their consideration any consequential injury the plaintiff has sustained; if such injury be the fair and natural result of the defendant’s violation of his agreement.” *Id.* at 870. This articulation states a causation requirement but not a foreseeability requirement. The central case establishing the modern view of the scope of a claim for damages for breach of contract is the English case of *Hadley v. Baxendale*, (1854) EWHC J70. Hadley was a miller who used a steam engine to grind grain. The crankshaft for the steam engine broke, and Hadley sent the broke shaft to a manufacturer to fashion a replacement. Hadley contracted with Baxendale to deliver the crankshaft by a date certain, but Baxendale failed to deliver on time. Hadley sued Baxendale for lost profits resulting from the delay. The court rejected Hadley’s claim for lost profits as not being contemplated as part of the bargain. The Court said: “Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.” The rule has since been articulated that damages for breach of contract must be foreseeable to be compensable, and that damages beyond what would normally be expected are compensable only if they are contemplated as part of the bargain.

A year before *Hadley v. Baxendale* was decided, the scope of damages for breach of contract was addressed in *Hope v. Alley*, 9 Tex. 394, 1853 WL 4211 (Tex. 1853) (Wheeler, J.). In that case, the plaintiff bought two slaves at auction, and tendered payment, but the payment was refused and the

slaves were not delivered. The plaintiff sued for breach of contract, and claimed loss of the labor of the slaves, and that he had advanced expenses of enlarging his plantation and splitting many rails. At trial, the buyer offered proof of the lost profit in the cotton production. The Supreme Court rejected lost profits as a measure of damages, in that the proof was “too remote and depended upon too many contingencies, and was too speculative.” *Id.* at 2. The Court would have allowed recovery for a loss that was certain, such as the value of his preparation for the crop in anticipation of the labor of the two slaves. *Id.* at *2. The Court further held that, even absent proof of special damages, the plaintiff could recover nominal damages. The limitation on damages in *Hope v. Alley* was not foreseeability, as in *Hadley v. Baxendale*, but rather the difficulty of proving remote damages. The Court essentially would have allowed reliance damages but not gross profits.

In *Calvit v. McFadden*, 13 Tex. 324, 1855 WL 4782, *1 (Tex. 1855) (Wheeler, J.), the seller failed to fulfill a contract to sell certain cattle. The Court held that the buyer could recover the highest market value of the cattle between the appointed date for deliver and the date of trial. *Id.* at *3. But the court rejected additional damages for making inclosures and improvements. *Id.* at *2. The limitation did not appear to result from difficulty in proving remote damages, but rather a limitation on the scope of the claimed harm that was compensable. In this case, reliance damages were rejected and damages were set based on market value.

In *Jones v. George*, 61 Tex. 345, * 7 (Tex. 1884) (Stayton, Assoc. J.), the Court held that the scope of actual damages is the same for breach of contract as it is in tort: “In actions based on either of these grounds the offending party is liable for the injury direct, although the damage may not have been in contemplation of the parties; and they are also further liable for such loss as would, in the ordinary or usual course of things, result from the breach of contract or tort, for the contract is supposed to have been made and broken, or the tort committed, in contemplation that the injury will thereby likely result.”

d. General and Special Damages. In *Moore v. Anderson*, 30 Tex. 224, 1867 WL 4583 (Tex. 1867), (Coke, J.), the Court described the distinction between general and special damages. General damages necessarily result from the breach of contract; special damages are a natural consequence of, but not the necessary result of, the contract breach. *Id.* at *5. General damages can be recovered upon a general plea of damages; the latter must be specifically pled and proved in order to recover. The Court found proof of special damages lacking. *Moore v. Anderson* is getting at the same point that was decided in *Hadley v. Baxendale*, only under the conceptual scheme of general and special damages. In *Buffalo Co. v. Milby*, 63 Tex. 492, 500 (Tex. 1885) (Walker, P.J. Com. App.), the Court ruled that “where the parties, at the time of making the contract, contemplate or had reason to contemplate particular losses and more remote damages from the delay, that such may be recovered for its violation.”

In the case of *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 543-44 (1903) (Holmes, J.), Justice Oliver Wendell Holmes, Jr. expounded on the rationale for contract damages:

Whatever may be the scope of the allegations which we have quoted, it will be seen that none of the items was contemplated expressly by the words of the bargain. Those words are before us in writing, and go no further than to contemplate that when the deliveries were to take place the buyer's tanks should be at the defendant's mill. Under such circumstances the question is

suggested how far the express terms of a writing, admitted to be complete, can be enlarged by averment and oral evidence; and, if they can be enlarged in that way, what averments are sufficient. When a man commits a tort, he incurs, by force of the law, a liability to damages, measured by certain rules. When a man makes a contract, he incurs, by force of the law, a liability to damages, unless a certain promised event comes to pass. But, unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage v. Genning*, 1 Rolle, 368; *Hulbert v. Hart*, 1 Vern. 133. It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and, in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and, whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance, in the present case, the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.

e. Direct and Consequential Damages. At the current time, courts no longer talk of general and special damages. Instead they talk of direct and consequential damages. *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 816 (Tex. 1997) (Cornyn, J.), described contract damages as being either direct or consequential:

Actual damages are those damages recoverable under common law. . . . At common law, actual damages are either “direct” or “consequential.” . . . Direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong. . . . Direct damages compensate the plaintiff for the loss that is conclusively presumed to have been foreseen by the defendant from his wrongful act. [Citations omitted.]

The current law regarding consequential damages was summarized in *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998) (per curiam), with echoes of *Moore v. Anderson*:

Consequential damages are those damages that “result naturally, but not necessarily, from the defendant's wrongful acts.” *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). They are not recoverable unless the parties contemplated at the time they made the contract that such damages would be a probable result of the breach. *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex. 1981) (citing *Hadley v. Baxendale*, 9 Ex. Ch. 341, 354 (1854)). Thus, to be recoverable, consequential damages must be foreseeable and directly

traceable to the wrongful act and result from it. *Arthur Andersen*, 945 S.W.2d at 816; *Mead*, 615 S.W.2d at 687.

In *Stuart v. Bayless*, the Supreme Court held that a law firm's alleged lost contingency fees were not consequential damages arising out of a client's breach of contract to pay attorney's fees. *Id.* at 921.

U.C.C. Section 2-715 (1962) covers the scope of recoverable damages from the breach of a sale contract:

§ 2-715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the sellers' breach include:

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

Thus, the U.C.C. utilizes the concept of proximate cause in connection with damages from breach of warranty.

RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 347 (1981) describes recoverable damages in this way:

§ 347. Measure of Damages in General

Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform.

The RESTATEMENT (SECOND) § 351 limits the recovery of damages in this way:

§ 351. Unforeseeability and Related Limitations on Damages

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

- (a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

f. Recovery for Misrepresentations. In *George v. Hesse*, 100 Tex. 44, 93 S.W. 107, 107 (1906) (Gaines, C. J.) the Supreme Court held that, where the “plaintiff sues to recover damages for a fraudulent representation by which he has been induced to enter into a contract to his loss[,]” the proper recovery is the “difference between the value of that which he has parted with, and the value of that which he has received under the agreement.” This recovery has come to be known as the “out-of-pocket” rule. *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984) (Robertson, J.). Where the claim is the failure to fulfill representations made at the time of contracting, “the measure of damages . . . would ordinarily be the difference between the contract price and the actual value of the property.” *Greenwood v. Pierce*, 58 Tex. 130, 1882 WL 9588, *3 (1882) (Watts, J. Com. App.). Where an action is brought for misrepresentations that are essentially breaches of warranty, the law provided for recovery for “the difference between the value of the goods as warranted and the value as received.” *Johnson v. Willis*, 596 S.W.2d 256, 262-63 (Tex. Civ. App.—Waco 1980), writ ref’d n.r.e., per curiam, 603 S.W.2d 828 (Tex. 1980). *Accord*, *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d at 373. See Section XIII.D.5 of this Article, regarding exemplary damages.

2. Reliance Damages. The second interest mentioned in Professor Fuller’s 1936 paper was the reliance interest. This interest is protected by what is now called reliance damages. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 349 discusses reliance damages:

§349. Damages Based on Reliance Interest

As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

The first recognition of reliance damages, per se, in Texas occurred in *Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1966) (Smith, J.), where the Court said:

We agree with the reasoning announced in those jurisdictions that, in cases such as we have before us, where there is actually no contract the promissory estoppel theory may be invoked, thereby supplying a remedy which will enable the injured party to be compensated for his foreseeable, definite and substantial reliance. Where the promisee has failed to bind the promisor to a legally sufficient contract, but where the promisee has acted in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained. Since the promisee in such cases is partially responsible for his failure to bind the promisor to a legally sufficient contract, it is reasonable to conclude that all that is required to achieve justice is to put the promisee in the position he

would have been in had he not acted in reliance upon the promise.

The Court cited *Goodman v. Dicker*, 169 F.2d 684 (U.S. D.C. 1948), which had ruled in a case of reliance that the promisee was entitled to be restored his costs incurred in reliance on the promise, but not lost profits from failure to perform the promise. The Court also cited Professor's Fuller's 1936 paper on *The Reliance Interest in Contract Damages*.

3. Restitution Damages. The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §§ 370 & 371 (1981) address compensation based on the restitution interest. Section 370 provides that “[a] party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.” Section 371 provides:

§371. Measure of Restitution Interest

If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either

- (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
- (b) the extent to which the other party's property has been increased in value or his other interests advanced.

4. Limitations on Damages. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §§ 350-352 limit damages based on avoidability, unforeseeability, and uncertainty.³⁹⁹

5. Exemplary Damages are Not Recoverable in Contract. In *Houston & T.C.R. Co. v. Shirley*, 54 Tex. 125, 1880 WL 9375, *9-10 (1880) (Gould, A.J.), the Court ruled that there was no precedent for allowing the recovery of exemplary damages for breach of contract, and to do so would be “greatly to increase the intricacy and uncertainty” of contract litigation. The rule was reiterated in *A. L. Carter Lumber Co. v. Saide*, 140 Tex. 523, 526, 168 S.W.2d 629, 632 (Tex. 1943) (Alexander, C.J.), where the Court said: “The rule in this State is that exemplary damages cannot be recovered for a simple breach of contract, where the breach is not accompanied by a tort, even though the breach is brought about capriciously and with malice.” In *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 659 (Tex. 2012) (Lehrmann, J.), the Court said: “The rule in this State is that exemplary damages cannot be recovered for a simple breach of contract, where the breach is not accompanied by a tort, even though the breach is brought about capriciously and with malice.”

However, where deceit or fraud occurred in connection with a contractual transaction, exemplary damages may be recovered. *Graham v. Roder*, 5 Tex. 141, 1849 WL 4070, *4 (Tex. 1849) (Wheeler, J.). In *Graham v. Roder*, the defendant purported to convey title to land he did not own. He was sued, and the court considered whether the claim supported contract damages or another type of damages.

“In all cases growing out of the non-performance of contracts, and in those of the infringement of rights or the non-performance of duties created or imposed by law, in which there is no element of fraud, willful negligence, or malice, the compensation recovered in damages consists solely of the direct pecuniary loss.” (Sedgw. Meas. Dam., 36, 37.). . . . But the present

belongs to a different class of cases, in which (it is said) “the common law loses sight of the principle of compensation and gives damages by way of punishment for acts of malice, vexation, fraud, or oppression.” (Sewg. Meas. Dam., 34.) In these cases it has been found difficult to set any fixed or precise limits to the discretion of the jury, or in fact to prescribe any rule whatever.” Where either of the elements of fraud, malice, gross negligence, or oppression “mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. This rule seems settled in England and the general jurisprudence of this country.” (Id., 38, 39.)

In *Hall v. York*, 22 Tex. 641, *1 (1859) (Bell, J.), the Court held that a party’s mere failure to own title to land that he sold does not permit the recovery of exemplary damages. The Court said: “Every man who sells land that does not belong to him, commits a fraud. But unless there be additional circumstances of fraud, and special damages resulting to the vendee, the measure of damages against such a vendor, would be only the purchase money and interest.”

In *Oliver v. Chapman*, 15 Tex. 400 (1855) (Wheeler, J.), the Court upheld an award of exemplary damages against a defendant whom the jury found had fraudulently induced an older man to transfer property to him.

The current rule was in Texas stated in *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61 (Tex. 2008) (Jefferson, C. J.): “When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract.”

The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 355 (1981) provides that “[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”

E. SPECIFIC PERFORMANCE. The remedy of specific performance is a court order that requiring a contracting party to fulfill his obligation under a contract. Pothier, in his *TREATISE ON THE CONTRACT OF SALE* (1772), discussed the rationale for the recovery of damages and the rationale for a forced sale, when the seller under a contract of sale fails to deliver the object of the agreement. Pothier wrote that forcing the sale “appears to be adopted in practice, as more conformable to the integrity which ought to govern men in the performance of their promises.” *Id.* at 294. Historically, in England, specific performance was considered to be an equitable remedy and was therefore available only from chancery courts. One study of chancery petitions filed in equity courts in England found indications that equity courts granted specific performance for the sale of land as early as the 1400s.⁴⁰⁰

The first modern English treatise on specific performance was written by Sir Edward Fry, *A TREATISE ON SPECIFIC PERFORMANCE OF CONTRACTS* (1858). In the preface to the first edition, Fry said that his treatise differs from earlier ones, in that they treated specific performance as on mode of enforcing a contract respecting land, while Fry’s treatise “is designed to elucidate the principles of specific performance in general” Fry points out: “the common law treats as universal a

proposition which is for the most part, but not universally, true, namely that money is the measure of every loss.” *Id.* at 34. The initial consideration for specific performance, then, is when the remedy at law (i.e., damages) is not adequate. Fry notes that courts seldom grant specific performance for personal property (“chattels”), because the variability of the price of such items is such that a party might be ruined by being forced to perform a contract when “that party might not have paid perhaps above a shilling damages.” *Id.* at 13. That rule is not applied when the chattel is unique. *Id.* at 13. Fry notes that courts will not order specific performance of a contract where consideration did not issue from the plaintiff, whether the contract is under seal or not. *Id.* at 25.

Specific performance in English courts was by no means limited to sales of land. When the damages could not be calculated, it was considered that there was not adequate remedy at law. *See Adderley v. Dixon*, Chancery (1824), 1 S. & S., 607, where specific performance was granted for the failure of the defendant to transfer debts, on the grounds that the profit to be made on the transaction was too difficult to measure. The Court cited a case granting specific performance of a contract to deliver 800 tons of iron over a period of years, and specific performance on a contract to pay an annual sum for life, where damages were too uncertain to calculate.

In present-day England, and in American states where law and equity courts are combined into one system, a party can seek specific performance in the same court and in the same suit as he seeks a money recovery of damages for breach of contract.

U.C.C. Section 2.716 (1962) provides that “specific performance may be decreed where the goods are unique or in other proper circumstances.”

The RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 359 (1981) provides:

§359. Effect of Adequacy of Damages

(a) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.

§360. Factors Affecting Adequacy of Damages

In determining whether the remedy in damages would be adequate, the following circumstances are significant:

- (a) the difficulty of proving damages with reasonable certainty,
- (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and
- (c) the likelihood that an award of damages could not be collected.

Article 28 of the CISG failed to state a universal rule for specific performance. Instead it says that a country is only required to allow specific performance in accordance with its own law governing non-Convention cases.

The very first contract case decided by the Supreme Court of the Republic of Texas was *Whiteman*

v. Garrett, Dallam 374, 1840 WL 2790 (1840) (Rusk, C.J.), where the court afforded the seller specific performance against the buyer in connection with the sale of land.

Texas courts of appeals have said that the remedy of specific performance is not available from a Texas court when damages are an adequate remedy. *See Sammons Enters., Inc. v. Manley*, 540 S.W.2d 751, 757 (Tex. App.--Texarkana 1976, writ ref'd n.r.e.); *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684, 689 (Tex. Civ. App.--Dallas 1924) (citing no authority), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (Tex. 1928) (Pierson, J.). Where the transfer of land is involved, specific performance is normally available, on the view that land is unique. *Burnett v. Mitchell*, 158 S.W. 800, 801 (Tex. Civ. App.--Fort Worth 1913, writ ref'd).

Courts require specificity in the contract before they will award specific performance. The idea was expressed in the RESTATEMENT OF THE LAW OF CONTRACTS § 370 (1932):

Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.

In *Durst v. Swift*, 11 Tex. 273, 1854 WL 4278 (1854) (Wheeler, J.), the Court noted that a contract to convey land generally, that does not specify any particular tract of land, cannot be specifically enforced. *Id.* at *5. In *Wilson v. Fisher*, 188 S.W.2d 150 (Tex. 1945) (Folley, Comm'r), the Court refused to specifically enforce a contract for the sale of land, drafted by the two contracting parties who were lay persons, that did not adequately describe the property. In *Langley v. Norris*, 173 S.W.2d 454 (Tex. 1943) (Smedley, Comm'r), the Court enforced a contract for the sale of land, saying that “the certainty required in a contract which renders its subject to an action for specific performance is a reasonable certainty.” In *Bryant v. Clark*, 358 S.W.2d 614 (1962) (Culver, J.), the Supreme Court refused to grant specific performance of a contract, between two lay persons, which said: “Price to be \$10,000.00 (Ten thousand dollars). Mr. Bryant agrees to pay \$2,000.00 cash and balance at 6% interest, payments to be agreed upon by seller and buyer. We have agreed as follows: 15 annual installments as balance.” The Majority resisted the Dissenting Justices’ suggestion that the Court should use its equitable powers to provide the dates of annual payments and the dates on which interest should be paid.

Lord Mansfield observed that a suit to force the payment of a promised sum is not a suit for damages but is really a suit for specific performance. *Robinson v. Bland*, (1760) 2 Burr. 1077, 1088 (“Although this be nominally an action for damages, and damages be nominally recovered in it; yet it is really and effectually brought for a special performance of the contract. For where the money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract to pay the money at the given time; and to pay interest for it from the given day, in case of failure of payment at that day. So that the action is, in effect, brought to obtain a specific performance of this contract.”). Nothing much has come of this interesting suggestion.

XIV. LAW MERCHANT, NEGOTIABLE INSTRUMENTS, THE U.C.C. & THE CISG. Beginning in the Eleventh Century, persons involved in trade, especially international trade,

developed a system to resolve disputes regarding the purchase and sale and transport of goods, the extending of credit, commercial methods of payment, and remedies for non-performance. The common practices that were relied upon on resolving such disputes were called “law merchant” or *lex mercatoria*. Merchant courts were held at periodic trade fairs and other convenient locations and, until much later, existed independent of state authority. In 1353, England adopted a statute establishing “courts of staple,” where commercial disputes could be heard in preference to the courts of law. The judges or arbitrators of merchant courts were often themselves merchants, and their goal was to facilitate trade through fairness. In merchant court proceedings, procedures were kept informal to allow quick resolution of disputes among merchants unaided by lawyers. An award of a merchant court, being without the sanction of law, was enforced through reputation or ostracism and boycott.

A. A REVISIONIST HISTORY. The widely-held view is that the law merchant was made up of law-like norms that were voluntarily usually complied with, but if disregarded were forced on litigants by merchant tribunals. It is said that the legal principles and rules applied in the merchant courts were developed from the actual usages and customs of merchants. This view has been challenged by Emily Kadens, then a Professor at the University of Texas School of Law, in *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012). According to Professor Kadens, mercantile customs varied from locale to locale, and true consistency only occurred when merchants turned to government to enact legislation that would standardize practices. *Id.* at 1158. Professor Kadens observes that form bills of exchange, insurance policies, partnership agreements, etc. spread widely, which created a contract-based uniformity. *Id.* at 1160 & 1161. But the fact that a form was widely used did not make the terms in the form “legally binding rules.” *Id.* at 1163. Professor Kadens says that the forms “were essentially business techniques rather than law.” *Id.* at 1167. Professor Kadens points out that a lack of universal standards was not important in medieval times, because “contracting was not itself international.” *Id.* at 1160. Her examination of historical records suggests that most merchant dispute resolution “rested on questions of fact, good faith, and fairness rather than law.” *Id.* at 1160. Professor Kadens relies upon the writings of medieval scholars to offer a distinction between usages, customs, and law. She cites Fourteenth Century jurist Bartolus of Sassoferrato for the idea that a *usage* is a permitted way of doing things that most people follow, while a *custom* is a required way of doing things, based on the desire to conform, while a law is a required way of doing things enforced by governmental sanction. *See Id.* at 1164-65. Professor Kadens says that “for a usage to become a custom, it must switch from being permissive to being mandatory.” *Id.* at 1165. Professor Kadens herself focuses on the fact that customs become binding through the tacit consent of the public, while contractual obligations and laws become binding because they are consented to. *Id.* at 1166.

B. LORD MANSFIELD INCORPORATES THE LAW MERCHANT. Lord Mansfield wrote, in *Hamilton v. Mendes* (1761) 2 Burr. 1198:

[T]he daily negotiations of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense drawn from the truth of the case.

Mansfield believed that the law merchant should become part of the English Common Law, and he

made sustained efforts to cause that to happen. These efforts included not only informal consultations with representatives of business, but also his empaneling special juries of merchants to decide his commercial cases in the 1760s. The procedure was without the sanction of law. *See* ENGLISH COMMON LAW IN THE AGE OF MANSFIELD ch. 2 (James Oldham, ed. 2004). Of Mansfield's importance in the development of commercial law, Justice Story said: "He was one of those great men raised up by Providence, at a fortunate moment he became what he intended, the jurist of the Commercial World." STORY, MISCELLANEOUS WRITINGS 262 (1835). The matter is explored further in Bernard L. Shientag, *Lord Mansfield Revisited-- A Modern Assessment*, 10 FORDHAM L. REV. 345 (1941).

C. NEGOTIABLE INSTRUMENTS. Merchants and shippers needed convenient and reliable methods of payment in far-away-places, as an alternative to the physical delivery of coins or silver or gold, or even the delay of visiting a bank. To address this need, bills of exchange came into use. The practice flourished and a number of treatises were written to instruct lawyers on the applicable rules. Commerce required not only easy methods of long-distance payments but it also created a demand for credit, to permit merchants and shippers to borrow against future profits in order to do business deals. This need led to the development of promissory notes. Joseph Chitty, in A PRACTICAL TREATISE ON BILLS OF EXCHANGE, PROMISSORY NOTES, AND BANKER'S CHECK (1834), wrote that bills of exchange, promissory notes, and checks or drafts on banks "and other mercantile negotiable instruments of that description," are in essence simple contracts (i.e. obligations not under seal). *Id.* As such, they have their place in Contract Law.

Bills of exchange are said to have originated in the trading cities of Northeastern Italy in the 1200s. Chitty defined a bill of exchange, in his PRACTICAL TREATISE ON BILLS OF EXCHANGE, PROMISSORY NOTES, AND BANKERS' CHECKS (1834), as "an open letter of request from one man to another, desiring him to pay a sum named therein, to a third person, on his account." *Id.* at 1. Unlike powers of attorney, the directive was not terminated by death, so Chitty conceived of a bill of exchange as an actual assignment of an interest in the money specified. *Id.* at 2. Chitty (1834) defined a promissory note as "a promise or engagement in writing, to pay a specified sum of money, at a time therein limited, or on demand, or at sight, to a person therein named, or his order, or to the bearer." *Id.* at 17. Chitty said that "[t]he origin of promissory notes cannot be traced, as in the case of bills of exchange, to the custom of merchants" *Id.* at 18. Instead, they were a political creation, contemporaneous with the creation of the Bank of England. *Id.* at 18. Thus Chitty suggested that bank notes were invented to assist England's official bank borrowing money for its own purposes. Chitty's comments apply more to bank notes and less to private promissory notes. Bank checks arose as a particularized form of bill of exchange that came into their own as a separate negotiable instrument governed by separate but similar law.

The first step toward the creation of commercial instruments was to establish their assignability. It was thus necessary to overcome the rule of Common Law that a chose in action could not be assigned. This rule was an application of the requirement of privity, which said that "a person not privy to a contract" could not sue on the contract by virtue of having received an assignment of the claim. Chitty, at 30. The next step was to overturn the Common Law rule that an assignee of a contract took the contract subject to all defenses. Immunity from such claims was required to assure the negotiability of these instruments. This immunity was established by English Statute of 3 and 4 Anne, c. 9, enacted in 1704. However, bills and notes continued to be non-negotiable in most of

the United States. In *Riddle v. Mandevill*, 5 Cranch 322 (1809) (Marshall, C.J.), Chief Justice Marshall wrote that negotiability was governed by state law. This left a hodge-podge of state laws on the subject that helped to spur the uniform state law movement of the early 1900s.

D. THE U.C.C. AND THE CISG, AS MODERN LAW MERCHANT. U.C.C. Article 2, governing sales, is a conscious effort by the drafters to articulate certain usages and customs observed by merchants, and to give them the force of law. Codifying these practices had the effect of extinguishing local differences in usages and customs, and giving these practices the stature and force of law. Since parties can avoid those terms by expressly opting out of them, the U.C.C. essentially provides “default terms” that will apply unless the parties agree for them not to. In these instances, the U.C.C. is not mandatory law in the same sense that most laws are mandatory. Thus, over the centuries, usages became customs, and customs became laws, but these laws remain optional, preserving the consensual nature of contractual obligations, which is the essence of contract. The same movement has occurred in the international scale, with the CISG, a “U.C.C. of sorts” for international trade. By virtue of the CISG’s status as a formal treaty, it binds courts of subscribing nations to apply a uniform set of international trade rules.

E. MODERN MERCHANT COURTS. Modern descendants of medieval merchant courts exist in the form of arbitration tribunals that derive their authority from the agreement of the parties. In order to make arbitration awards enforceable, in 1958, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was promulgated, and since that time 154 countries have adopted the convention, including China, Russia, the United Kingdom, and the United States.

The cotton industry has established its own modern law merchant, with arbitration tribunals and principles for deciding disputes. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, Univ. of Chicago Law & Economics, Olin Working Paper No. 133 (2001).⁴⁰¹ According to Professor Bernstein, most merchant-to-mill transactions in the United States are governed by the Southern Mill Rules jointly adopted by the American Cotton Shippers Association and the American Textile Manufacturers Institute. *Id.* at 3. Most merchant-to-merchant transactions are conducted under rules promulgated by the Memphis Cotton Exchange covering (75% of U.S. trade and 35% of world trade), or one of four regional cotton shipper associations. *Id.* at 3-4. International cotton sales are mostly governed by the rules of the Liverpool Cotton Association. The shippers and manufacturers’ organizations have created a framework for arbitration, involving two arbitrators’ who decide disputes based on written submissions. *Id.* at 4-5. If the arbitrators disagree, they involve a third arbitrator. Between 1975 and 1996, the arbitration panel heard only twenty-eight disputes. *Id.* at 5 n. 18. The Memphis Cotton Exchange has a tribunal of seven members, which have oral hearings, witnesses, and cross-examination. *Id.* at 6. In both systems, there is no discovery between parties, although arbitrators can request additional information. *Id.* at 6. Both tribunals issue written opinions, which one organization distributes to all members, with names redacted, while the other organization keeps its rulings private. *Id.* at 7-8. Prior decisions are not considered binding precedent. *Id.* at 8. The shipper-manufacturer panels apply Southern Mill Rules, which are “a comprehensive set of bright-line contract default rules that cover contract formation, performance, quality, delay, payment, repudiation, excuse, and damages, and include numerous industry-specific definitions of terms like ‘prompt,’ ‘raingrown,’ and ‘long staple.’” *Id.* at 9-10. The Memphis Cotton Exchange

panel uses its own trading rules. *Id.* at 10. Professor Bernstein writes that these industry rules do not contain open standards like the U.C.C., such as “reasonable,” “seasonable,” or “without objection in the trade.” Instead, the rules “contain primarily clear, bright-line, rules.” *Id.* at 10. The damage remedies vary significantly from American law, with the aggrieved party receiving only “market difference damages” plus a trivial per pound penalty. *Id.* at 11. Consequential damages are not available. *Id.* at 11. Good faith does not appear as a factor in the rules or the published decisions. *Id.* at 12-13. Custom or usage rarely appears as a factor. *Id.* at 14-15. Compliance by merchants with arbitration rulings is assured by expulsion from the organization, which is widely publicized. *Id.* at 16. The shippers association expels members who take a discharge in bankruptcy, and readmission is not allowed without an affirmative vote from a large majority of members. This has in some instances had the effect of making the business pay its discharged creditors in order to regain access to the benefits of membership. *Id.* at 17 n. 72. Professor Bernstein writes that the substantive rules “facilitate contracting in ways the Code does not. They reduce the cost of entering into an agreement by providing a comprehensive set of well-tailored default rules that reduce the negotiation costs, specification costs, information costs, and relational costs of contracting, as well as the risk of transaction breakdown. The clarity of the rules, together with the efforts associations make to ensure that transactors understand them, reduce the likelihood that misunderstandings will arise in the first place, and helps to promote settlement when disputes do arise by making arbitral outcomes easier to predict.” *Id.* at 20-21.

A private legal system has existed for grain traders in the United States since 1901. Parties who include a clause in their contracts that they will operate under trade rules of the National Grain and Feed Association, and will arbitrate disputes through that organization, get justice in the Association’s private justice system. A now-dated study by Professor Lisa Bernstein, discussed in Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 UNIV. PA. L. REV. 1766 (1996), showed that the arbitrators shy away from flexible standards and adhered to the prescribed rules of trade. Many of the arbitration awards are default judgments for small sums of money.

XV. LAWS ALTERING CONTRACT RIGHTS. There are innumerable Federal and state statutes that alter the parties’ “freedom” to contract any way they want.

A. BANKRUPTCY. Article 1, Section 8, Clause 4, of the U.S. Constitution authorizes Congress to enact uniform bankruptcy laws. The U.S. Congress enacted several short-lived bankruptcy statutes between 1800 and 1898. Since that time, the Federal law on bankruptcy has been more stable. One of the signature features of bankruptcy is the ability to cancel or alter contracts of the bankruptcy petitioner.

B. LAWS REGULATING INTERSTATE COMMERCE. The U.S. Congress has enacted substantial legislation regulating interstate commerce. The Interstate Commerce Act of 1877 was the first major legislation governing commerce. It was designed to regulate railroad charges through the Interstate Commerce Commission (ICC). More laws were passed that expanded the range of activities coming under ICC jurisdiction. The ICC was eliminated in 1995. In 1890, Congress passed the Sherman Antitrust Act, to curtail the power of monopolies. Other Federal regulatory agencies include the Federal Trade Commission (1914), the Federal Communications Commission (1934), the U.S. Securities and Exchange Commission (1934), the National Labor Relations Board (1935),

the Civil Aeronautics Board (1940), Postal Regulatory Commission (1970), the Consumer Product Safety Commission (1975), and the Federal Energy Regulatory Commission (1977).⁴⁰² All of these regulatory bodies have impacted Contract Law in the areas under regulation. However, Congress has not adopted a general code that cover Contract Law akin to the civil codes in European countries.

C. BANKING. The American banking industry is heavily regulated by the Federal government, and state banks by the state governments. The Civil War Congress passed the National Bank Act of 1863, which established a single currency, then passed the National Bank Act of 1864 which permitted the creation of nationally-chartered banks. Modern Federal bank regulation started with the Federal Reserve Act of 1913. Bank regulation was revamped during President Roosevelt's New Deal in the 1930s, with Presidential Executive Orders and with legislation such as the Glass-Steagall Banking Act (1933). Banking oversight is now provided by the United States Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the Securities and Exchange Commission, and state banking regulators and a number of other government agencies.

D. LABOR LAWS. Various aspects of employment relationships are subject to Federal and state laws. In *Hammer v. Dagenhart*, 247 U.S. 251 (1917), the U.S. Supreme Court, by a vote of 5-to-4, declared unconstitutional a Federal Child Labor Act of 1916, which prohibited the interstate shipment of goods produced by child labor. However, the Supreme Court, in *West Coast Hotel Company v. Parish*, 300 U.S. 379 (1937), by a vote of 5-to-4 upheld a minimum wage law adopted by the state of Washington. Shortly thereafter, the U.S. Congress passed the 1938 Fair Labor Standards Act (1938),⁴⁰³ which set a 44-hour maximum work week, established a minimum wage (of 40¢ per hour), and set a minimum working age of 16 in certain industries, covering about 20% of the labor force in America. The 1963 Equal Pay Act prohibits discrimination on account of sex in the payment of wages by employers. The 1964 Civil Rights Act, Title VII, prohibits discrimination in employment based on race, color, religion, sex or national origin.

E. CONSUMER PROTECTION LAWS. The U.S. Congress and state legislatures have adopted consumer protection legislation that alters duties and rights from what they otherwise would be under general principles of Contract Law. Important Federal statutes include: the Consumer Credit Protection Act (1968), the Truth in Lending Act (1968), the Fair Credit Reporting Act (1970), the Fair Credit Billing Act (1974), the Equal Credit Opportunity Act (1974), the Consumer Leasing Act (1976), the Fair Debt Collection Practices Act (1977), and the Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009. States, including Texas, have adopted legislation curtailing deceptive trade practices. Between 1919 and 1924, many American cities adopted rent control laws, that prohibit landlords from raising the rents of existing tenants in rental housing. They continue to exist in New York City, Oakland, San Francisco, Los Angeles, and Washington, D.C.

XVI. THE RIGHT OF MARRIED WOMEN TO CONTRACT. Under the doctrine of conjugal unity of English Common Law, the legal identity of a married woman merged into the legal identity of her husband.⁴⁰⁴ As described by the U.S. Supreme Court in *Thompson v. Thompson*, 218 U.S. 611 (1910) (Day, J.):

At common law the husband and wife were regarded as one, the legal existence of the wife during coverture being merged in that of the husband; and, generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other (emphasis added).

Under the Common Law, all property owned by a woman when she married, and all property that came to her during marriage, became the property of her husband. *Hawkins v. Lee*, 22 Tex. 544, 1858 WL 5673, *3 (Tex. 1858) (Wheeler, C.J.). A contract with a married woman was void, not voidable, and thus could be rendered unenforceable at the election of the wife.⁴⁰⁵ However, the wife was permitted to contract for necessities from merchants.⁴⁰⁶ And equity courts recognized the ability of the wife to contract so as to subject her separate property to payment of her debts.⁴⁰⁷

In adopting the community property system of Spanish law for the Republic of Texas, The Act of January 20, 1840, the Texas Congress gave the wife equal ownership of community property, but did not give her the power to enter into contracts, even with the joinder of the husband. So the wife's disability to contract under English Common Law carried forward into Texas law. *Kavanaugh v. Brown*, 1 Tex. 481, 1846 WL 3641, *2-3 (1846) (Lipscomb, J.).

Married Women Property Acts were adopted in America beginning in 1839.⁴⁰⁸ These Acts recognized the right to women to manage their separate property (i.e., property owned before marriage or received during marriage by gift or inheritance).⁴⁰⁹ Texas adopted its Married Woman Property Act in 1913.

Under early Texas law, the husband had exclusive management rights over community property.⁴¹⁰ An exception existed for the homestead, which the husband could not convey without the joinder of the wife.⁴¹¹ The wife acquired full management powers, however, if she was deserted by the husband, or the husband was imprisoned.⁴¹² In 1846, the Texas Legislature adopted an act specifying the mode for conveying property in which the wife had an interest. The law required that a wife, who had signed and sealed a deed or other document of conveyance, be taken outside the presence of her husband and before a judge of the Supreme Court or a district court, or a notary public, where she was to be "privily examined," and she had to declare that she had signed the document freely and willingly, then the document had to be shown and explained to her, and she had to state that she did not wish to retract it, and she must then acknowledge the instrument, which would then be certified by the judge or notary public to verify that she was making the conveyance of her own free will, realized what she was doing, and was not being pressured by her husband. In *Morris v. Geisecki*, 60 Tex. 633, 1884 WL 8692 (1884) (Stayton, A.J.), the Court held that a husband could not transfer a community property homestead to a third party, without the wife's joinder or over her objection, with an intent to defraud her. If the husband became mentally incompetent, the wife had to secure appointment as a guardian in order to transfer community property. When so empowered, the wife could sell an entire community asset, but not just her half.⁴¹³ In 1911, the Legislature adopted a statute permitting the spouses together to secure a ruling from a court that the wife's disability to contract would be removed "for mercantile and trading purposes," in which case she could subject her separate property but not community property to her creditors' claims.⁴¹⁴ In 1913, the Legislature adopted a statute giving wives management rights over their personal earnings and the income from their separate property. The statute required the husband's joinder for disposing

of community property lands or securities managed by the wife. The property managed by the wife was protected from the husband's creditors.⁴¹⁵ In *Gohlman, Lester Co. v. Whittle*, 114 Tex. 548 (Tex. 1925) (Greenwood, J.), the Supreme Court determined that the Legislature, when it gave the wife management power over her separate estate in 1913, also gave her the right to contract with regard to their separate estate, as if they were unmarried.⁴¹⁶ Then in 1925, the Legislature passed a law making the husband sole manager of all community property.⁴¹⁷ However, the wife's income was exempt from the claims of her husband's creditors. The Texas Supreme Court, in 1932, ruled that the wife continued to have management rights over the income produced by her separate property.⁴¹⁸⁴¹⁹

According to SMU Law Professor McKnight, the 1913 act giving women management rights over their community property income as originally proposed would have given women full contract rights, but opposition from Governor Colquitt caused that part of the statute to be removed.⁴²⁰ The disabilities of coverture were repealed by the 58th Legislature in 1963. However, the need for a privy examination of the wife was not repealed until 1967.⁴²¹ In 1967, the Legislature gave married women management rights over their own income.

At a higher level of abstraction, what happened to women's right to contract was part of a re-conceiving of the law, which had treated relations inside the family as a domain separate from, and largely unaffected by, the law that applied to persons and property generally. Harvard Law Professor Duncan Kennedy analyzed this feature of Western law in a chapter he wrote that was published in 2006, entitled *Three Globalizations of Law and Legal Thought: 1850-2000*. Professor Kennedy noted "the distinction between the law of the market and the law of the household." *Id.* at 31. Under pre-modern law, the family was conceived of as a "patriarchy," that extended to the wife, children, and servants, collectively called "the household." The rights and duties inside the household were governed not by the law of obligations but by family law. Family law governed as to "seducers and virgins; husbands and wives; fathers and abused or rebellious daughters; husbands and mistresses; ex-husbands, ex-wives; and their children; rich patriarchs and their proletarian boy lovers; and so on." *Id.* at 32. Professor Kennedy points to Blackstone's COMMENTARIES, which reflected a state of law where "the patriarch was legally obliged to support his wife and minor children, entitled to their obedience, which he could enforce through moderate physical punishment, had arbitrary power with respect to many aspects of their welfare and property, and was protected against sexual and economic interference by third parties." *Id.* at 32. In many ways, Professor Duncan says, "[f]athers legally owed less to family than to strangers except that in exceptional cases they owed more." *Id.* at 32. The law considered the father/husband's obligations to be more moral or ethical, and not legal, with the result that there was no basis to legally enforce such obligations. *Id.* at 32. Professor Kennedy writes that, around 1850, the law began to address this situation, by allowing divorce only for fault or not at all; adopting inheritance rules that preserved blood-and-marriage-based rights in property; criminally prohibiting same-sex sex and female adultery (male adultery was sanctionable only if there was "cohabitation or concubinage"); "snuffing" out legal claims of mistresses and illegitimate children; and awarding custody of children to the father. *Id.* at 32-22. Professor Kennedy writes that this framework was liberalized "at different speeds in different countries." For example, the French Civil Code (1804) permitted divorce by mutual consent, but that was rescinded in 1815 and was not restored until 1975. *Id.* at 33. Liberalization in "the North Atlantic countries" did not begin until the 1850s. *Id.* at 33. At that time, those countries began to re-conceptualize family relations into "formal equality with reciprocal duties," based on status (i.e., issuing from law and

not contract). *Id.* at 33. But family law remained apart from contract, property, and tort law until much later, with the result that most of this formal equality could not be legally enforced due to “a powerful doctrine of legal nonintervention in the family.” *Id.* at 33-34. In Texas, the vestiges of nonintervention were thrown off by the abrogation of the doctrine of interspousal immunity for intentional torts in *Bounds v. Caudle*, 560 S.S.2d 925 (Tex. 1977), and for negligent torts in *Price v. Price*, 732 S.W.2d 316 (1987), and the Legislature’s 1983 elimination of the spousal exemption for rape (a spousal exemption still exists for statutory rape in Tex. Penal Code § 22.011(a)(2)). Woman began to achieve equal civil rights outside the family. The U.S. Constitution was amended in 1920 to give women the right to vote in Federal elections. Women first served on juries in Texas in 1954. Discrimination against women in pay and in other areas was prohibited by the 1963 Equal Pay Act and Title VII of the 1964 Civil Rights Act. The Equal Rights Amendment to the Texas Constitution was adopted in 1972 .

XVII. CHOICE-OF-LAW ISSUES. Kent in his COMMENTARIES (1827), said that a contract is valid or void by the law of the place where it is made.⁴²² Kent wrote that the remedies for breach of contract are regulated by the law of the forum.⁴²³ Leake (1867) wrote that “[f]oreign contracts must be construed, in general, according to the law of the country where the contract was made.”⁴²⁴

The traditional conflict of law rules used in Texas were: *lex domicilli* (the capacity of a party to contract is governed by the law of their domicile); *lex loci contractus* (the formation and construction of a contract is governed by the law where the contract was formed); and *lex fori* (the remedies available to enforce the contract are governed by the law of the forum). *Hill v. McDermot*, Dallam 419, 422 (1841) (Hutchinson, J.); *Huff v. Folger*, Dallam 530 (1843) (Baylor, J.). Where the law of the place of contracting was not proved by evidence, the law of the forum would be applied. *Hill v. McDermot*, Dallam 419, 422, 1841 WL 3123 *2 (1841) (Hutchinson, J.) (refusing to take judicial notice of laws of Georgia). Where a contract was made in one state and the place of payment was another state, interest was to be computed according to the law of the place of payment. *Cook v. Crawford*, 1 Tex. 9 (1846) (Lipscomb, J.); *Burton v. Anderson*, 1 Tex. 93 (1846) (Lipscomb, J.); *Andrews v. Hoxie*, 5 Tex. 171, 1849 WL 4073 (Tex. 1849) (Wheeler, J.) (Louisiana usury law applied); *Wheeler v. Pope*, 5 Tex. 262 (1849) (Lipscomb, J.). The rule also developed that, upon failure to prove the interest allowable under the other state’s law, no interest could be recovered. *Anderson v. Hoxie*, 5 Tex. 171 (1849) (Wheeler, J.), criticized in *Able v. McMurray*, 10 Tex. 350 (1853) (Wheeler, J.) (where Justice Wheeler said that he would prefer to presume that the sister state’s law was identical to Texas law).

In 1945 Indiana became the first state to overturn the *lex loci contractu* rule and to apply the most significant relationship rule.⁴²⁵ The RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) adopted a new standard for conflict-of-law decisions: the “most significant relationship” standard. The standard is defined in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971):

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international system,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Thus, the RESTATEMENT (SECOND) supplanted the *lex domicilii* rule and the *lex loci contractus* rule with the most significant relationship balancing test. In *Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439, 445 (Tex. 1984) (Spears, J.), the Texas Supreme Court abandoned the *lex loci contractu* rule for contracts, and adopted the most significant relationship standard.

XVIII. SO WHAT ABOUT THE RISE OF MODERN AMERICAN CONTRACT LAW?

The myth has existed that: Harvard Law School Dean Christopher Columbus Langdell invented modern American Contract Law with his 1870 case book on contracts and his 1880 SUMMARY OF THE LAW OF CONTRACTS; that his disciples emanated out into the world to spread the Gospel of formalism to the rest of America; that one of his disciples was Samuel Williston, author of a preeminent treatise and principal draftsman of the American Law Institute's first Restatement, the RESTATEMENT OF THE LAW OF CONTRACTS (1932), which spread formalistic rules of Contract Law across the land; that modern thinkers assailed formalism by suggesting social science as opposed to physical science as a model for legal doctrine; that other modernists advanced private prejudices of judges as the real force behind judicial decisions; that yet others advocated that public policy arguments should mitigate or prevail over established rules in deciding contract cases. An examination of the treatises and law review articles and civil codes and commercial statutes and leading cases stretching from Blackstone (1769) through recent times suggests a different narrative. The alternative narrative suggests: that William Blackstone drafted the first legal treatise on the Common Law; and dedicated only a few pages of his work to what we today call Contract Law; that in Blackstone's day, commercial transactions involved the transfer of ownership and possession of physical items, so that Contract Law was just Property Law applied to personal property; that J.J. Powell wrote the first English treatise on Contract Law in 1790; that the French Civil Code (1804), and the 1808 Civil Code of Louisiana, contained an elaborate framework of principles and rules for contract that contain many of the concepts in current law; that the English Forms of Action dominated the English and American intellectual framework of Contract Law until the Forms of Action were effectively abolished in New York in 1848 and in England in 1852; that Theophilus Parson's treatise of 1853 dominated the American Contract Law landscape from its publication until Williston published his treatise in 1921; that Englishman Stephen Leake wrote the first modern treatise on English Contract Law in 1867, succeeded most notably by Pollock in 1876 and then Anson in 1879; that the Indian Contract Act of 1872 set out the rules of English Contract Law with terms and concepts still in use today; that in 1880 C.C. Langdell could have but didn't write a treatise to set out his view of the principles and rules underlying court decisions in contract cases; that Samuel Williston heavily impacted the standardization of American Contract Law through his drafting of the Uniform Sales Act (1906) and Uniform Warehouse Receipts Act (1906), his treatises on sales law (1909), negotiable instruments (1915), commercial and banking law (1918), his own treatise on Contract Law (1920), the Uniform Written Obligations Act (1925) and finally the

RESTATEMENT OF THE LAW OF CONTRACTS (1932); that the RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1981) to a small degree relaxed the rigidity of some of the rules set out in the first RESTATEMENT; that the U.C.C. has been under continual revision since it was initially promulgated in 1952 to stay abreast of developments in the way business is done; and that the CISG has created a set of rules for the conduct of international trade much on the model of Europe's Civil Codes, with accommodations made for certain Common Law concepts. The alternative narrative would also mention the English Bills and Exchange Act of 1882 and the English Sale of Goods Act of 1893, which were forerunners of America's Uniform Negotiable Instruments Act of 1896 and the Uniform Sales Act of 1906 that culminated in the Uniform Commercial Code of 1952 and 1962.

The offer-and-acceptance paradigm originated with the French writer Pothier (1772), and has since grown into a fixture of Anglo-American Contract Law. The doctrine of consideration, born in the shadows of time past, is as strong today as it was before Blackstone's day. The approach of looking at Contract Law in terms of promises arose in the early 1900s and remains central to Contract Law today. The use of detrimental reliance as a broad-based ground for enforcing promises, whether as an extension of traditional equitable principles or as a substitute for contractual consideration, took life when it appeared as Section 90 of the RESTATEMENT OF THE LAW OF CONTRACTS (1932). The contractual duty of good faith and fair dealing has expanded somewhat but is nowhere near to being a universal duty. Express and implied warranties, which developed before Contract Law arose in England, are essentially the same now as they have been for centuries. Conflict of Law rules in contract were radically changed by publication of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1981) to give courts more discretion on which law to apply, but it is unclear how often the actual outcome is different under the new approach as compared to the old approach.

In terms of the substantive law, there is not much uniquely modern about "modern" American Contract Law. Over the last 150 years, the law of leasing has replaced the law of bailments in the temporary use of property. Over the last 120 years, the law of financial instruments has remained stable except for the recent changes needed to facilitate the digital transfers of money. Over the last 60 years, the law of sales has evolved as the way of doing business has changed, but the fundamentals of transactions between merchants remain essentially unchanged.

But viewed from a higher altitude, over a period of 200+ years, real change has occurred. Contract Law emerged from real property law, slipped the constraints imposed by the rigid structure of the English Forms of Action, and became a separate body of law. New concepts were developed, and new names were given, and new principles were discerned, with which the whole and the parts of Contract Law could be described--to students, to lawyers, and to judges. In both England and America, legal treatises on Contract Law were labored over and offered for purchase by a few energetic and insightful legal minds. In America, brilliant law professors, with the time on their hands to think and to write, maintained a brisk exchange of law review articles on the concepts, names and principles of Contract Law. In England, the infrequent and sometimes unclear pronouncements of English courts were augmented by a small number of laws enacted by Parliament to govern commerce. In America, the large number of state court cases with conflicting outcomes justified by different rationales led to American treatises, critical analysis in law reviews, Restatements of the Law, and uniform state laws governing different aspects of business. From the perspective of 200+ years, this led to significant change. In America, this development of modern Contract Law attracted the efforts of many of America's brightest legal minds, and in this earnest

competition of ideas, there were, of course, winners and losers. But, in the process, a new modern mode of thinking emerged.

Despite the controversies and much spilled ink, formalism persists in Contract Law, proving that the basic rules of Contract Law are very stable and nearly impervious to lawyer-sponsored change. Time has vindicated Samuel Williston's sentiment, that "[a] system of law cannot be regarded as successful unless rights and duties can, in a great majority of instances, be foretold without litigation." Specificity in rights and duties, and stability of the law, with the resultant predictability of outcomes, is an enduring feature of Contract Law.

The most radical change in all of American Contract Law over the last 100 years is the elimination of prohibitions that kept married women from contracting freely. This change in the law of the rights of a significant part of the population was part of a larger trend to give women full rights of citizenship in all realms, a condition that is rare in history and limited in geographical scope, even today.

Referring back to the beginning of this Article, one of the modes of thinking we used to distinguish pre-Modern from Modern Contract Law, was the movement away from inherited labels to an analysis of the substance of the matter being considered. Of all the modes of thinking discussed, this may be the most important, since labels are a legacy from the past that both help and hinder the present. If we analyze what we are actually looking at, without trying to fit it into historically-developed categories, we enable ourselves to take control of our own future, and to let the law more freely change to address our current needs and desires. This mode of thinking, replacing labels with an analysis of the interests involved, may be the manner by which we transition from our "modern" view of Contract Law, and law generally, to the next stage, which may be post-Modern to us, but will be Modern to the next generation.

1. *Coles v. Perry*, 7 Tex. 109, 145 (Tex. 1851) (Caruthers, Special Judge) (“the court, construing and interpreting the writing by the terms in which it is couched, is to be guided by the rules and principles of the law of Spain and Mexico in force at the time of the execution of the writing.”)
2. Walter Pratt, *American Contract Law at the Turn of the Century*, 39 S. C. L. REV. 415, 416 (1988).
3. Ian R. MacNeel, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 94 NW. U. L. R. 854, 855 n. 2 (1978).
4. Jody S. Kraus, *From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory*, 94 VIRGINIA L. REV. 157, 179 (2008).
5. Professor Kraus has suggested that formalists like Langdell and Williston did not, as they were later accused of doing by Professor Grant Gilmore, deceive their readers by distorting the cases they relied upon to support their views. She suggests that instead they merely looked past the rationales given by the courts to underlying principles that could be identified and justified, regardless of what the appellate judges actually said in explaining their decisions. Jody S. Kraus, *From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory*, 94 VIRGINIA L. REV. 157, 160-64 (2008).
6. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19-22 (2006), edited by David Trubek and Alvaro Santos. In this chapter, Professor Kennedy identified three overlapping modes of legal thought that spread internationally: Classical Legal Thought, which extended from 1850 to 1900; Social Thought, which extended from 1900 to 1968; and Modern Thought, which extended from 1945 to 2000.
7. Gammell, 1 Laws of the Republic of Texas 157 (1838).
8. Tex. Laws 1840, An Act to adopt the Common Law of England § I, at 3, 2 GAMMEL, LAWS OF TEXAS 177 (1898), now Tex. Rev. Civ. Stat. Ann. art. I.
9. See Edward Lee Markham, Jr., *The Reception of the Common Law of England in Texas and the Judicial Attitude Toward That Reception, 1840 - 1859*, 29 TEX. L. REV. 904,909 (1951).
10. See Section IX.C.7, Orsinger, *175 Years of Texas Contract Law* (2015 ed.).
11. JOSEPH CHITTY, A PRACTICAL TREATISE ON BILLS OF EXCHANGE, PROMISSORY NOTES, AND BANKERS CHECKS 2 (1834).
12. Richard Austen-Baker & Qi Zhou, CONTRACT IN CONTEXT 28 (2015) (“Austen-Baker & Zhou”).
13. Austen-Baker & Zhou 28.
14. Joseph M. Parillo, *Robert J. Pothier’s Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267 (2004).
15. Joseph M. Parillo, *Robert J. Pothier’s Influence on the Common Law of Contracts*, 9-11, (2004).
16. Joseph M. Parillo, *Robert J. Pothier’s Influence on the Common Law of Contracts*, 2-9, (2004).
17. Joseph M. Parillo, *Robert J. Pothier’s Influence on the Common Law of Contracts*, 2-9, (2004) *Id.* at 15-16.
18. *Mabee v. McDonald*, 107 Tex. 139, 175 S.W. 676, 694 (Tex. 1915) (Hawkins, J.).

19.] One listing of publications on Commercial Law that were published in the Nineteenth Century contains more than 220 different books, and the listing is not complete. *Nineteenth Century Legal Treatises -Commercial Law - Author Index* <<http://microformguides.gale.com/Data/Download/1012006A.pdf>>[4-7-2015].

20. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

21. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

22. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

23. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

24. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30, and Book III, Chapter 9.

25. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

26. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

27. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

28. Blackstone's mention of "motive" may correlate to the "cause" of a contract under the Civil Law prevailing on Continental Europe.

29. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

30. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

31. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

32. WILLIAM BLACKSTONE, COMMENTARIES, Book II, Chapter 30.

33. WILLIAM BLACKSTONE, COMMENTARIES, Book III, Chapter 9.

34. WILLIAM BLACKSTONE, COMMENTARIES, Book III, Chapter 1.

35. Quoted in Warren Swain, THE LAW OF CONTRACT 1670-1870 147 (2015).

36. Swain, p. 147, citing Powell, ESSAY Vol. I, p. xliii ("Swain").

37. Powell, ESSAY, Vol. I, p. 9, quoted in Warren Swain, THE LAW OF CONTRACT 1670-1870, p. 147.

38. JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS ¶ 9 (American ed. 1802).

39. "Good" Consideration springs from the blood, or natural love or affection, as "when a man grants an estate to a near relation"; while "valuable" consideration is "money, or marriage, or the like." Joseph Chitty, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL; AND UPON THE USUAL DEFENSES TO ACTIONS THEREON 1 (3d ed. Tompson Chitty, ed. 1841), p. 29.

40. C.G. ADDISON, TREATISE ON THE LAW OF CONTRACTS AND PARTIES TO ACTIONS EX CONTRACTU (1847), quoted in Austen-Baker & Zhou, p. 41.

41. Austen-Baker & Zhou, p. 41.

42. Austen-Baker & Zhou, p. 41.

43. Judah Best, *Judah P. Benjamin: Part II: The Queen's Counsel*, p. 5
<http://www.supremecourthistory.org/wp-content/themes/supremecourthistory/inc/37_Judah_P_Benjamin_Pt2wfootnotes.pdf> [1-1-2013].
44. Benjamin wrote that a transfer of property is a sale only if done for money. An exchange of goods is a barter, not a sale. Transfers for labor done, for board and lodging, or any consideration other than case, is not a sale. Benjamin, *SALE OF PERSONAL PROPERTY* §2, p. 2. (1868)
45. See 1 Williston *THE LAW OF CONTRACT* § 6103c, n. 54 (1920).
46. The full title of Pollock's treatise was: "Principles of Contract at Law and in Equity: Being a Treatise on the General Principles concerning the Validity of Agreements, With a Special View to the Comparison of Law and Equity, and with References to the Indian Contract Act, and occasionally to Roman, American, and Continental Law.
47. Pollock died in London in 1937.
48. Sanford H.E. Freund, *Book Review of Pollock's Principles of Contracts* (3d Am. ed.), 40 *AMERICAN L. REV.* 639-640 (1906).
49. NEIL ANDREWS, *CONTRACT LAW*, Appendix, p. 674 (2011).
50. Richard Austen-Baker, & Qi Zhou, *CONTRACT IN CONTEXT* 28 (2015).
51. SIR WILLIAM REYNELL ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* p. xxxi (1879).
52. *THE CONTINUOUS LAW BOOK CATALOGUE: A COMPLETE INDEXED CATALOGUE OF LAW BOOKS* 11 (1900).
53. *THE CONTINUOUS LAW BOOK CATALOGUE: A COMPLETE INDEXED CATALOGUE OF LAW BOOKS* 11 (1900).
54. Anson is referring to the two factors, either of which made a contract enforceable, under English law that being (i) a seal and (ii) consideration.
55. SIR WILLIAM REYNELL ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* p. 10 (1879).
56. SIR WILLIAM REYNELL ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* p. 34 (14th ed. Arthur L. Corbin ed. 1919).
57. *New York State Court of Chancery*
<<http://www.courts.state.ny.us/history/legal-history-new-york/history-legal-bench-court-chancery.html>> [3-14-2013].
58. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *COLUM. L. REV.* 547, 572 (1993).
59. Joseph Dorfman, *Chancellor Kent and the Developing American Economy*, 61 *COLUM. L. REV.* 1290, 1317 n. 2 (1961).
60. CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 286 (1908) ("Charles Warren").
61. Charles Warren, p. 267.
62. *Joseph Story* <http://www.oyez.org/justices/joseph_story> [3-6-2013].
63. Charles Warren, p. 269.

64. *Joseph Story*, <http://en.wikipedia.org/wiki/Joseph_Story> [3-5-13].
65. Charles Warren, p. 270.
66. Charles Warren, p. 272.
67. Charles Warren, p. 274.
68. *Joseph Story*, <http://en.wikipedia.org/wiki/Joseph_Story> [3-5-13].
69. STEVE SHEPPARD, *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 969 (Salem Press 1999).
70. STEVE SHEPPARD, *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 969 (Salem Press 1999).
71. University of Virginia, Special Collections, Biographical Article on Theophilus Parsons, Jr. <<http://lib.law.virginia.edu/specialcollections/zoom/2156>>. [3-14-2013].
72. Professor Parsons' complete preface to the first edition is set out, as it reflects his perception of how his treatise differed from any that preceeded it.
73. Roscoe Pound, *The Role of Will in the Law* 68 HARV L. REV. 1, 5 (1954).
74. 1 PARSONS, *THE LAW OF CONTRACTS* 353 (3d ed. 1857).
75. 1 PARSONS, *THE LAW OF CONTRACTS* 428 (3d ed. 1857).
76. BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906*, 5 (2009); Christopher Tomlins, *Book Review on Bruce A. Kimball, The Inception of Modern Professional Education: C.C. Langdell, 1826-1906*, 59 SOUTHWESTERN L. SCHOOL J OF LEGAL EDUCATION 657, 660 (2010).
77. *Harvard Law School, Deans Throughout History*, <http://oasis.lib.harvard.edu/oasis/deliver/findingAidDisplay?_collection=oasis&inoid=4926>. [3-14-2013].
78. Letter from Oliver Wendell Holmes, Jr., to John Lanthrop Motley (Dec. 22, 1871), quoted in CHARLES WARREN, *1 HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA*, 357 (1908).
79. 3 THE BRIEF OF PHI DELTA PHI (Oct. 1900- Oct. 1901), p. 79.
80. Bruce A. Kimball & Brian S. Shull, *The Ironical Exclusion of Women from Harvard Law School 1870-1900*, 58 J. OF LEGAL EDUC. 3, 7 (2008), where the authors wrote that "access to education depended on the personal relationships developed among gentlemen."
81. Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 529 (1973).
82. *C.C. Langdell Contracts Examinations* <<http://pds.lib.harvard.edu/pds/view/17936031?n=9&imagesize=1200&jp2Res=.25&printThumbnails=no>> [-3-14-2013].
83. Bruce A. Kimball, *Before the Paper Chase: Student Culture at Harvard Law School, 1895-1915*, 61 J. OF LEGAL EDUC. 31, 31 (2011).

84. Bruce A. Kimball, *Before the Paper Chase: Student Culture at Harvard Law School, 1895-1915*, 61 J. OF LEGAL EDUC. 31, 42 (2011). Professor Williston, who maintained ties to the practice of law, commented on one occasion that a law faculty should be composed of both professors with practical experience and those without. Proceeding of the Section of Legal Education, (August 28, 1912), REPORT OF THE 35TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, 713 (1912).

85. Langdell began class with the statement: “Mr. *Almy*, please state the case of *Scott v. Broadwood* (1846).” Bruce A. Kimball, “Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law”: the Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870-1883, 17 LAW & HIST. REV. 57, 102 (1999).

86. CHRISTOPHER C., A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS (1871); Scott D. Gerber, *Corbin and Fuller’s Cases on Contracts (1942?): The Casebook that Never Was*, 72 FORDHAM L. REV. 595, 626 (2003).

87. See Bruce A. Kimball, *Warn Students That I Entertain Heretical Opinions*, 25 LAW AND HISTORY REV. 1, 4 (2007)<<http://www.jstor.org/discover/10.2307/744185?uid=3739920&uid=2129&uid=2&uid=70&uid=4&uid=3739256&sid=21101926123207>> [3-7-2013]; Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HISTORY REVIEW No. 2 p. 39 (Summer 2007)<<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7788756>>. [3-7-13].

88. See Luke Nottage, *Tracing Trajectories in Contract Law Theory: Form in Anglo-New Zealand Law, Substance in Japan and the US*, Sydney Law School Research Paper, at 7 n. 10 (2007b, forthcoming) (“Nottage”), available on-line at: <<http://law.anu.edu.au/anjel/documents/ResearchPublications/ComparativeContractLawTheoryDevelopment.pdf>>.

89. A copy of C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (1880) is at <<http://archive.org/stream/summaryoflawofco00lang#page/n15/mode/2up>> [3-12-2013].

90. Williston, LIFE AND LAW 205 (1940), quoted in David G. Epstein, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 ARK. L. REV. 267, 271-72 n. 9 (2006) <<http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1687&context=law-faculty-publications>> [3-21-2015].

91. Oliver W. Holmes, Jr., 14 AM. L. REV. 33-34 (1880).

92. Grant Gilmore, THE AGES OF AMERICAN LAW 42 (1977).

93. Austen-Baker & Zhou, p. 36.

94. Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 602 (1997), quoted in David G. Epstein, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 ARK. L. REV. 267, 272 n. 11 (2006).

95. C.C. Langdell, A SUMMARY OF THE LAW OF CONTRACTS, (2nd ed. 1880), preface, p. iii.

96. Langdell, A SUMMARY OF THE LAW OF CONTRACTS, preface, p. v.

97. Langdell, A SUMMARY OF THE LAW OF CONTRACTS, p. v.

98. *Note*, 40 AM. L. REV. 409 (1906).

99. STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 973 & 1052 (Salem Press 1999).

100. STEVE SHEPPARD, *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 973 & 1052 (Salem Press 1999).

101. STEVE SHEPPARD, *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 969 (Salem Press 1999). Although Holmes was brought in to assist James Bradley Thayer to assist in the task of editing the twelfth edition at the instigation of Kent's grandson, Holmes took the project over and ended up rewriting much of the work between 1869 and 1873, and it was Holmes's name and not Thayer's on the title page and preface. G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993) 125. Holmes apparently thought poorly of the original work, saying in correspondence to Thayer that Kent had "no general ideas, except wrong ones." *Id.* at 125.

102. May 30, 1927 letter from Oliver Wendell Holmes, Jr. to Frederick Pollock
<<http://www.commonlaw.com/HP.html>> [2-24-2015].

103. January 19, 1928 letter from Oliver Wendell Holmes, Jr. to Frederick Pollock
<<http://www.commonlaw.com/HP.html>> [2-24-2015].

104. G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 150 (1993).

105. G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 274 (1993), citing *Hawkins v. Graham*, 149 Mass. 287 (1889) (Holmes, J.).

106. Professor Grant Gilmore called Holmes's "bargain theory" of consideration a "tool for narrowing the range of contractual liability." GRANT GILMORE, *THE DEATH OF CONTRACT* 21-22 (1974).

107. Oliver Wendell Holmes, Jr., *THE COMMON LAW* 230 (1881).

108. "Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference." Oliver Wendell Holmes, Jr., *the Path of the Law*, 10 HARV. L.REV. 457, 462 (1897).

109. Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982).

110. Note, *Holmes, Peirce & Legal Pragmatism*, 84 YALE L. J. 1123 (1975).

111. March 25, 1883 letter from Oliver Wendell Holmes, Jr. to Frederick Pollock
<<http://www.commonlaw.com/HP.html>> [2-24-2015].

112. June 13, 1927 letter from Frederick Pollock to Oliver Wendell Holmes, Jr.
<<http://www.commonlaw.com/HP.html>> [2-24-2015].

113. Roscoe Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 777, 812 (1938), where he characterized contemporary law as having five qualities different from 50 years before: (i) a new functional attitude asking not what the law is but how it operates; (ii) openness to the insights of other social sciences; (iii) studying law as part of the "whole process of social control"; (iv) considering the role of individual judgment and intuition in the judicial and administrative process; and (v) concern with the values that can be used to measure they way that legal principles are and should be applied.

114. *See Lochner v. New York*, 198 U.S. 45, 52 (1905) ("The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.").

115. COURTS AND LAWYERS OF INDIANA 268, (Leander J. Monks, ed.; 1916).
116. Page 114 <http://www.keithbobbitt.com/ourbobbittfamily/Pages_from_Bobbitt_book82.pdf>. [3-13-2013].
117. List of Indiana Supreme Court Justices, Wikipedia, <http://en.wikipedia.org/wiki/List_of_Indiana_Supreme_Court_Justices>. [3-14-2013].
118. See Proceedings of the Seventeenth Annual Meeting of the State Bar Association of Indiana 207-211 (1913).
119. This is also the rule stated in Section 2 of the Uniform Sales Act. <<http://www.drbilllong.com/HistSales/USAI.html>> [1-1-2013].
120. *Samuel Williston Explained* <http://everything.explained.at/Samuel_Williston> [2-7-2013].
121. Arthur L. Harding, *Williston's Fundamental Conceptions*, 3 MO. L. REV. 219 (1938).
122. Harvard Law School Deans Throughout History, <<http://www.law.harvard.edu/news/spotlight/classroom/related/hls-deans.html>>.
123. In editing the eighth edition of Parsons' THE LAW OF CONTRACTS, Williston "left the text practically untouched," and stated his author's notes separately from Parsons' original author's notes. Book Review, THE AMERICAN LAW REGISTER 92 (Jan. 1894). The eighth edition received an unfavorable review in 3 YALE L. J. 105 (1894), for failing to update the text originally written by Professor Parsons which, as a consequence, perpetuated many out-of-date references to the status of the law.
124. *Samuel Williston Explained* <http://everything.explained.at/Samuel_Williston> [2-7-2013].
125. THE CONTINUOUS LAW BOOK CATALOGUE: A COMPLETE INDEXED CATALOGUE OF LAW BOOKS p. 283 (1900).
126. A copy of the first edition of SAMUEL WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1903) is at <<http://archive.org/stream/cu31924018805568#page/n5/mode/2up>> [3-12-2013].
127. A copy of the first edition of SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT is at <<http://archive.org/stream/cu31924018845218#page/n9/mode/2up>> [3-12-2013].
128. Arthur L. Harding, *Williston's Fundamental Conceptions*, 3 MO. L. REV. 220 n. 6 (1938).
129. Arthur L. Harding, *Williston's Fundamental Conceptions*, 3 MO. L. REV. 220 n. 6 (1938).
130. Jules F. Landry, Frances L. Landry, SAMUEL WILLISTON, LIFE AND LAW 209 (1941), quoted in Allen D. Boyer, *Samuel Williston's Struggle With Depression*, 42 BUFF. L. REV. 1, 23 (1994).
131. See Mark Movsesian, *Rediscovering Williston*, 62 WASHINGTON & LEE L. REV. 207 (2005).
132. Jules F. Landry, Frances L. Landry, SAMUEL WILLISTON, LIFE AND LAW 209 (1941), quoted in Allen D. Boyer, *Samuel Williston's Struggle With Depression*, 42 BUFF. L. REV. 1, 23 (1994).
133. See Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration and Formation in Contract*, 39 Univ. of Cal., Davis L. Review 149 (2005).
134. There are many sources that say that Corbin was born in Cripple Creek, Colorado. This is mistaken. See Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 183 (1964). His son, Arthur Linton Corbin, Jr. was born in Cripple Creek.

135. Donald Bostwick & M.H. Hoeflich, *Arthur Corbin and the University of Kansas School of Law: Four Letters*, 54 KAN. L. REV. 1115, 1117 (2006).
136. Some details of Corbin's life as a student at Yale Law School are set out in Friedrich Kessler, *Arthur Linton Corbin*, 78 YALE L. J. 517 (1969).
137. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 184 (1964).
138. The two prizes were the Betts Prize and the Jewel Prize. Jerry E. Stephens, *Arthur Linton Corbin: A Giant in the Law With Tenth Circuit Roots*, p. 2 <http://www.10thcircuithistory.org/pdfs/general_interest/corbin_article.pdf> [3-16-2013].
139. Roger K. Newman, *The Yale Biographical Dictionary of American Law* (2009) p. 128.
140. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 185 (1964).
141. *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 YALE L.J. 311, 313 (1964).
142. Later editions of Corbin's 1921 case book were published in 1933 and 1947, and a supplement was published in 1953. Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Case book that Never Was*, 72 FORDHAM L. REV. 595, 626 (2003).
143. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 184 (1964).
144. Joseph M. Perillo, *Twelve Letters From Arthur L. Corbin to Robert Braucher*, 50 WASH. & LEE L. REV. 755 (1993).
145. *Yale Law School: Early Years, 1869-1916* <<http://www.law.yale.edu/cbl/3075.htm>> [1-26-2012].
146. *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 YALE L.J. 311, 320 (1964).
147. Arthur L. Corbin, *In Memoriam: Samuel Williston*, 76 HARV. L. REV. 1327 (1963).
148. *Yale Law School: Early Years, 1869-1916* <<http://www.law.yale.edu/cbl/3075.htm>> [1-26-2012].
149. Professor Corbin's original treatise was published with the title "A Comprehensive Treatise on the Rules of Contract Law." In a letter dated October 3, 1964, Corbin wrote: ". . . [P]lease insert the word 'Working' before *Rules of Contract Law*. It was on the Title Page of my original manuscript, but was deleted without my consent by the Publisher. No doubt, he thought that a Rule is a Rule is a Rule. Later, the Publisher added the word 'Working' to the Title Page at my request; and now the Company calls special attention in its advertising to the fact that my Rules are 'Working Rules.' The truth is that all rule of law [in] human society are no more than tentative working rules, based on human experience, necessarily changing in form and substance as human experience varies in the evolutionary process of life." *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 YALE L.J. 311, 311 n. 1 (1964).
150. GRANT GILMORE, *THE DEATH OF CONTRACT* 63-64 (Ronald K.L. Collins ed., rev. ed. 1995).
151. Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 48 YALE L. J. 426 (1939).
152. *Yale Law School: Early Years, 1869-1916* <<http://www.law.yale.edu/cbl/3075.htm>> [1-26-2012].
153. Llewellyn, Karl Nickerson, *West's Encyclopedia of American Law*, 2005 <<http://www.encyclopedia.com/doc/1G2-3437702748.html>>. [3-14-2013].
154. Knapp, Crystal & Prince, *PROBLEMS IN CONTRACT LAW – CASES AND MATERIALS* 11 (Aspen 2003).

155. Luke Nottage, Tracing Trajectories in Contract Law Theory: Form in Anglo-New Zealand Law, Substance in Japan and the US, Sydney Law School Research Paper, at 9 n. 10 (2007).
156. “The so-called ‘Realists’ do not constitute a “school”: they differ too much with each other.” Walter Wheeler Cook, *Williston on Contracts (Revised Edition)*, 33 ILL. L. REV. 497 n. 2 (1938-1939).
157. Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 587 (2000) (“Maggs”).
158. Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 587 (2000) (“Maggs”).
159. ROBERT S. SUMMERS, LON L. FULLER 3 (Stanford University Press 1984).
160. ROBERT S. SUMMERS, LON L. FULLER 5 (Stanford University Press 1984).
161. ROBERT S. SUMMERS, LON L. FULLER 7 (Stanford University Press 1984).
162. ROBERT S. SUMMERS, LON L. FULLER 7 (Stanford University Press 1984).
163. Scott D. Gerber, *Corbin and Fuller’s Cases on Contracts (1942?): The Case book that Never Was*, 72 FORDHAM L. REV. 595, 624-25 (2003).
164. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012) <http://www.michiganlawreview.org/assets/pdfs/110/8/Shapiro_and_Pearse.pdf> [1-1-2013].
165. Grant Gilmore, *The Ages of American Law* 138 n. 28 (1977).
166. See Robert W. Gordon, *The Death of Contract*, 1974 WISC. L. REV. 1216 (1974) <http://digitalcommons.law.yale.edu/fss_papers/1376> [2-24-2013].
167. *Writings of Grant Gilmore*, 92 YALE L. J. 12 (1982).
168. *Writings of Grant Gilmore*, 92 YALE L. J. 12 (1982).
169. James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, 10 Lingua Features (2000) <<http://linguafranca.mirror.theinfo.org/0005/posner.html>> [2-18-2013].
170. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 300-02 (1881); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).
171. Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. AND MARY L. REV. 1379, 1379-80 (1995).
172. See Francis M. Burdick, *A Revival of Codification*, 10 COLUM. L. REV. 118, 119 (1910).
173. Story, *Progress of Jurisprudence*, 1 Am. Jurist & L. Mag. 1, 32 (1829), cited in Léon Julliot de La Morandière, 97 UNIV. OF PENN. L. REV. 1,1 n. 1 (1948).
174. Austen-Baker & Zhou, pp. 39-40.
175. Andrew P. Morriss, *Codification and Right Answers*, 74 Chicago-Kent L. Rev. 355, 361 (1999).
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179. Andrew P. Morriss, *Codification and Right Answers*, 74 Chicago-Kent L. Rev. 355, 361 (1999).
180. Andrew P. Morriss, *Codification and Right Answers*, 74 Chicago-Kent L. Rev. 355, 367 (1999).
181. Andrew P. Morriss, *Codification and Right Answers*, 74 Chicago-Kent L. Rev. 355, 365 n. 62 (1999).
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198. See Francis M. Burdick, *A Revival of Codification*, 10 COLUM. L. REV. 118, 123 (1910).
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200. See Francis M. Burdick, *A Revival of Codification*, 10 COLUM. L. REV. 118, 124 (1910).
201. See Francis M. Burdick, *A Revival of Codification*, 10 COLUM. L. REV. 118, 123-26 (1910).
202. See Francis M. Burdick, *A Revival of Codification*, 10 COLUM. L. REV. 118, 126 (1910).
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209. Anan Raymond, *Suretyship at "Law Merchant,"* 30 Harv. L. Rev. 141, 141 (1916).
210. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L. J. 1341, 1342 (1948).
211. Professor Llewellyn criticized the use of title as a determiner of rights, because in many transactions title could not be determined with certainty. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. REV. 159, 160 (1938). He said that the concept of title fit the economy of three hundred years ago, where the whole transaction was accomplished in one stroke, as where a buyer paid cash and walked off with a worn overcoat. Title was inadequate to address a sale on credit, the transport of goods to market by a factor, the shipment of goods on approval, etc. *Id.* at 171. The Official Comment to U.C.C. § 2.101 said that “[t]he legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.”
212. The seven statutes were the Uniform Negotiable Instruments Law of 1896; the Uniform Sales Act of 1906; The Uniform Warehouse Receipts Act of 1906; The Uniform Bill of Lading Act of 1909; the Uniform Stock Transfer Act of 1909; the Uniform Conditional Sales Act of 1918; and the Uniform Trust Receipts Act of 1933. Paul D. Carrington, *A Foreword to the Study of the Uniform Commercial Code*, 14 WYO. L.J. 17, 18 (1959).
213. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 357 n. 91 (1988) (“Gedid”).
214. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 358 (1988).
215. Grant Gilmore suggested that, by the time codification of commercial law occurs, even a new act is out-of-date. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L. J. 1341, 1342 (1948).

216. Professor Llewellyn later said that “[m]uch of the law, whether embodied in the original Uniform Commercial Acts or not, has become outmoded as the nature of business, of technology, and of financing has changed. Such law need to be brought up to date.” Memorandum of Karl N. Llewellyn to the New York Law Revision Commission (1954), *reprinted in* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973), cited in Gedid, at 357 n. 91.
217. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 239 (2009).
218. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 239 (2009).
219. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].
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221. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].
222. William A. Schnader, Wikipedia, <http://en.wikipedia.org/wiki/William_A._Schnader> [2-26-13].
223. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].
224. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].
225. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].
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227. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 240 n. 24 (2009); Krahmer & Gabriel, *Article 1 and Article 2A: Changes in the Uniform Commercial Code Regarding General Provisions of Sales and Leases*, 2 DEPAUL BUS. & COMMERCIAL L. J. 691 (2004).
228. Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 547 (2000).
229. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 240 (2009).
230. The New York Commission published a report in 1956, concluding that “the Uniform Commercial Code is not satisfactory in its present form and cannot be made satisfactory without comprehensive re-examination and revision.” Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 547 n. 48. (2000).
231. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 240 (2009).
232. John Krahmer & Henry Gabriel, *Article 1 and Article 2A: Changes in the Uniform Commercial Code Regarding General Provisions of Sales and Leases*, 2 DEPAUL BUS. & COMMERCIAL L. J. 691, 691 (2004).
233. Atty Gen Opinion M-55 <<https://www.oag.state.tx.us/opinions/opinions/44martin/op/1967/pdf/cm0055.pdf>> [1-1-2013].
234. Soia Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 168 n. 3 (1964) (“Despite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn’s philosophy of law and his sense of commercial wisdom and need is startling”).
235. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 355 (1988), citing 1 STATE OF NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 37 (1955).

236. *Id.*

237. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 344 (1988).

238. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 361 (1988).

239. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 361 (1988).

240. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 362 (1988).

241. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 362 (1988).

242. Karl Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167 (1946).

243. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 437, 457 (1930).

244. Gregory E. Maggs, *Karl Llewellyn's Fading Impact on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 560 (2000) (“Maggs, *Fading Impact*”).

245. According to Professor Maggs, rules generally “define the permitted and prohibited conduct with precision, leaving the courts to determine only what happened.” Standards require courts to determine not only what happened but also what the law should allow in the situation. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 553 (2000).

246. Maggs, *Fading Impact* 542-43.

247. See Section XIII.F.3.e for a discussion of the “battle of the forms.”

248. Maggs, *Fading Impact* 554.

249. Maggs, *Fading Impact* 555-56.

250. Maggs, *Fading Impact* 559.

251. Maggs, *Fading Impact* 561.

252. Maggs, *Fading Impact* 561.

253. Maggs, *Fading Impact* 587.

254. Maggs, *Fading Impact* 566 & 568.

255. Maggs, *Fading Impact* 567.

256. Maggs, *Fading Impact* 573, citing 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 3 (3d prac. ed. 1988).

257. Maggs, *Fading Impact* 573, citing Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285-86 (1966).

258.

<<http://uniformlaws.org/Act.aspx?title=UCC%20Article%208,%20Investment%20Securities%20%281994%29>> [3-4-2015].`

259. <<http://uniformlaws.org/Act.aspx?title=UCC%20Article%204A,%20Funds%20Transfers%20%281989%29>> [3-4-2015].

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<<http://uniformlaws.org/Act.aspx?title=UCC%20Article%202A,%20Leases%20%281987%29%20%281990%29>> [3-4-2015].

261. <<http://uniformlaws.org/Act.aspx?title=UCC%20Article%204A,%20Funds%20Transfers%20%281989%29>> [3-4-2015].

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263.

<<http://uniformlaws.org/Act.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20%281990%29>> [3-4-2014].

264. <<http://uniformlaws.org/Act.aspx?title=UCC%20Article%205,%20Letters%20of%20Credit%20%281995%29>> [3-4-2015].

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<<http://uniformlaws.org/Act.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20and%20Article%204,%20Bank%20Deposits%20%282002%29>> [3-4-2015].

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<<http://uniformlaws.org/Act.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20%282003%29>> [3-4-2015].

267. <<http://uniformlaws.org/Act.aspx?title=UCC%20Article%209%20Amendments%20%282010%29>> [3-4-2015].

268. <<http://uniformlaws.org/ActSummary.aspx?title=UCC%20Article%204A%20Amendments%20%282012%29>> [3-4-2015].

269. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 UNIV. OF COLO. L. REV. 541 (2000) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033090> [3-14-013].

270. Maggs, *Fading Impact* 556. Maggs cites to new Article 4A on funds transfers, where the official comment says: "A deliberate decision was . . . made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles."

271. Maggs, *Fading Impact* 529.

272. Maggs, *Fading Impact* 569-70.

273. Maggs, *Fading Impact* 570.

274. “Significantly, Article 4A does not allow the customer making a payment by funds transfer to recover consequential damages from the bank if the transaction is miscarried, unless the customer and bank have entered into a written agreement allowing for this remedy.²⁸ The prohibition against the recovery of damages for aborted funds transfers is based upon policy grounds. Article 4A takes the position that to hold the bank liable for millions of dollars in damages for a transaction that costs a few dollars is unreasonable. Placing liability on the bank for consequential damages would increase the cost and decrease the speed of the transaction. Additionally, the Code presumes that the customer is in the best position to avoid the loss.” NEW JERSEY LAW REVISION COMMISSION, REPORT AND RECOMMENDATIONS RELATING TO ARTICLE 4A OF THE UNIFORM COMMERCIAL CODE p. 7. <<http://www.lawrev.state.nj.us/rpts/ucc4a.pdf>> [3-14-2013].

275. Maggs, *Fading Impact* 571.

276. <<http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCC%20Article%201>> [3-4-2015].

277.
<http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%201,%20General%20Provisions%20%282001%29> [4-14-2015].

278. <<http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCC%20Article%201>> [3-4-2015].

279.
<<http://uniformlaws.org/ActSummary.aspx?title=UCC%20Article%201,%20General%20Provisions%20%282001%29>> [3-4-2015].

280.
<<http://uniformlaws.org/ActSummary.aspx?title=UCC%20Article%201,%20General%20Provisions%20%282001%29>> [3-4-2015].

281.
<http://uniformlaws.org/Act.aspx?title=UCC%20Article%201,%20General%20Provisions%20%282001%29> [4-14-2015].

282.
<<http://uniformlaws.org/Act.aspx?title=UCC%20Article%202,Sales%20and%20Article%202A,%20Leases%20%282003%29>> [3-4-2015].

283. CISG, Art. (2)a.

284. CISG Art. 2.

285. CISG, Arts. 3 & 4.

286. <http://cisgw3.law.pace.edu/cisg/CISG-AC-op3.html#1> [3-21-2013].

287. Note, *The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods*, 28 HOFSTRA L. REV. 799 (2000).

288. Professor Corbin called them “learned doctors.” Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 187 (1964).

289. *ALI Overview* <<http://www.ali.org/index.cfm?fuseaction=about.overview>> [2-13-2012].

290. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508 (1998) <<http://docs.law.gwu.edu/facweb/gmaggs/pubs/ipse.htm>> [3-14-2013].

291. Lawrence M. Friedman wrote that Restatements “took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones.... The restatements were almost virgin of any notion that rules had social or economic consequences” LAWRENCE M. FRIENDMAN, *CONTRACT LAW IN AMERICA* 582 (1965), quoted in Tucker, *Book Review*, 86 HARV. L. REV. 1625, 1631 (1973).

292. Arthur L. Harding, *Williston’s Fundamental Conceptions*, 3 MO. L. REV. 220 n. 15 (1938).

293. Scott D. Gerber, *Corbin and Fuller’s Cases on Contracts (1942?): The Case book that Never Was*, 72 FORDHAM L. REV. 595, 625 (2003).

294. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 517 (1998).

295. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 517 (1998).

296. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 521 (1998).

297. William Burnett Harvey, *Discretionary Justice Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 666, 666 (1982).

298. Edmund M. Morgan was a Harvard undergraduate and Law School graduate who taught law at the University of Minnesota from 1912 until 1917, then Yale Law School, and from 1925 until 1950, at Harvard Law School. He was acting dean of Harvard Law School in 1936-7 and again in 1942-45. Morgan was an assistant to the U.S. Army’s Judge Advocate General from 1917-1919, attaining the rank of Lieutenant Colonel. In the early 1950s, Morgan chaired the committee that drafted the Uniform Military Code of Justice.

299. Edmund M. Morgan, *INTRODUCTION TO THE STUDY OF LAW* 35 (1926).

300. Cited in Joseph Chitty, *A PRACTICE TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTIONS THEREON* 12 (3d ed. Tompson Chitty, ed. 1841).

301. JOHN JOSEPH POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* ¶ vii (American ed. 1802).

302. Ch. I, art. 1.

303. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT*. 9 (8th ed. 1895).

304. SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 1 (1920)

305. JOSEPH CHITTY, *A PRACTICAL TREATISE ON BILLS OF EXCHANGE, PROMISSORY NOTES, AND BANKERS CHECKS* 29 (1834).

306. Kent, *VOL. II COMMENTARIES ON AMERICAN LAW* 363 (1827).

307. WILLISTON, *THE LAW OF CONTRACTS* §12 (1920).

308. Kent, *VOL. II COMMENTARIES ON AMERICAN LAW* 363 (1827).

309. Kent, Vol. II COMMENTARIES ON AMERICAN LAW 364 (1827).
310. BENJAMIN, SALE OF PERSONAL PROPERTY § 3, p. 3 (Bennett ed. 1888).
311. BENJAMIN, SALE OF PERSONAL PROPERTY § 3, p. 3 (Bennett ed. 1888). American Note to §§ 1-4, p. 3.
312. WILLISTON, THE LAW OF CONTRACTS § 3 (1920).
313. Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1167 (2012).
314. *Id.* Ch. I, art. 3.
315. 1 WILLISTON, 1 THE LAW OF CONTRACTS § 11 n. 42 (1920).
316. WILLISTON, THE LAW OF CONTRACTS § 13 (1920).
317. 1 WILLISTON, THE LAW OF CONTRACTS § 13 (1920).
318. 1 WILLISTON, THE LAW OF CONTRACTS § 13 n. 42 (1920).
319. WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 25 n. 5 (Arthur L. Corbin ed., 3d ed. 1919).
320. David G. Epstein, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 ARK. L. REV. 267, 279 n. 58 (2006).
321. Robert Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302, 304 (1964).
322. JOSEPH CHITTY, A PRACTICE TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTIONS THEREON 15 (3d ed. Tompson Chitty, ed. 1841).
323. JOSEPH CHITTY, A PRACTICE TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTIONS THEREON 17 (3d ed. Tompson Chitty, ed. 1841).
324. HOLMES, THE COMMON LAW, Lecture IX. Void and voidable (1881).
325. 2 Blackstone 446.
326. BENJAMIN, SALE OF PERSONAL PROPERTY § 1, p. 1 (Bennett ed. 1888).
327. BENJAMIN, SALE OF PERSONAL PROPERTY § 2, p. 2 (Bennett ed. 1888).
328. See Section III.B.1.b of this Article
329. 1 WILLISTON, THE LAW OF CONTRACTS § 3.
330. EDMUND M. MORGAN, INTRODUCTION TO THE STUDY OF LAW 35 (1926).
331. JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS ¶ vii (American ed. 1802).
332. PARSONS, THE LAW OF CONTRACTS 8 (3d ed. 1857).
333. 1 WILLISTON, THE LAW OF CONTRACTS § 18 (1920).
334. *Id.* § 18.

335. Williston rejected Anson's listing of genuineness of consent as a separate element, saying that was already included in the requirement of mutual assent. 1 WILLISTON, THE LAW OF CONTRACTS § 20 (1920).
336. *Id.* § 18.
337. 1 WILLISTON, THE LAW OF CONTRACTS § 19 (1920).
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339. PARSONS, THE LAW OF CONTRACTS 9-1 (3d ed. 1857).
340. Draft New York Civil Code (1862) art. 536.
341. Julie M. Phillipe, *French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective*, 12 TULSA J. OF COMP. & INT'L LAW 357 (2005).
342. Brian A Blum, *Assent and Accountability in Contract: An Analysis of Objective Standards in Contemporary Contract Adjudication*, 59 ST. JOHN'S L. REV. 1, 21 n. 58 (2013).
343. 1 WILLISTON, THE LAW OF CONTRACTS § 94 (1920).
344. Williston, *Mutual Assent in the Formation of Contracts*, 14 ILLINOIS L. REV. 85 (1919).
345. R.J. POTHIER, CONTRAÎTÉ DE VENTE, Parti 1 Article 3 (1772), quoted in JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTIONS THEREON 14-15 (3d ed. Thompson Chitty, ed. 1841).
346. Cheshire, Fifort & Furmston, LAW OF CONTRACTS 15 (15th ed., 2006).
347. DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 222 (1999).
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349. JOSEPH CHITTY, A PRACTICE TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTIONS THEREON 14 (3d ed. Thompson Chitty, ed. 1841).
350. *See*, Patrik J. Kelley, *Holmes, Langdell and Formalism*, 15 Ratio Juris 26, 33 (2002) (discussing Holmes rejection of offer, acceptance and consideration with promise and consideration).
351. 1 WILLISTON, THE LAW OF CONTRACTS § 64 (1920).
352. Arthur L. Corbin, *Offer and Acceptance and Some of the Resulting Legal Remedies*, 26 YALE L. J. 169, 199 (1917).
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355. § 62.
356. 1 Williston § 83.
357. SUMMARY at 22, ¶ 17 (1880).

358. Maurice I. Wormser, *The True Conception of Unilateral Contracts* 26 YALE L. J. 136, 137 (1916).
359. David G. Epstein, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 ARK. L. REV. 267, 280 (2006).
360. David G. Epstein, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 ARK. L. REV. 267, 281 (2006).
361. David G. Epstein, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 ARK. L. REV. 267, 282 (2006).
362. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure* 112 YALE L. J. 829 (2003).
363. THEOPHILUS PARSONS, THE LAW OF CONTRACTS 357 (3d ed. 1857).
364. OLIVER WENDELL HOLMES, ESSENTIAL HOLMES p. 230 (Richard Posner ed. 1992)
365. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 230 (1881).
366. THEOPHILUS PARSONS, THE LAW OF CONTRACTS 357-58 (3d ed. 1857).
367. James Barr Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1899).
368. WILLISTON, THE LAW OF CONTRACTS § 103c (1920), citing *Thorp v. Thorp*, 13 Mod. 465 (1701).
369. *Receiver for Citizen's Nat'l Assurance Co. v. Hatley*, 852 S.W.2d 68, 71 (Tex. App.--Austin 1993, no writ).
370. *Buddy "L", Inc. v. General Trailer Co.*, 672 S.W.2d 541, 547 (Tex. App.--Dallas 1984, writ ref'd n.r.e.).
371. *Lassiter v. Boxwell Bros., Inc.*, 362 S.W.2d 884 (Tex. Civ. App.--Amarillo 1962, no writ).
372. 13 Tex.Jur.2d § 46, p. 178, and cases there cited therein.
373. <<http://www.commonlaw.com/HP.html>> [4-14-2015].
374. Craig Leonard Jackson, *Traditional Contract Theory: Old and New Attacks and Old and New Defenses*, 22 NEW ENGLAND L. REV. 101, 115 (1998).
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376. Catharine MacMillan, MISTAKES IN CONTRACT LAW 69 (2010).
377. Stephanie R. Hoffer, *Misrepresentation: The Restatement's Second Mistake*, 2014 UNIV. OF ILL. L. REV. 115, 124 (2014).
378. *Discussion of the Tentative Draft Contracts Restatement No. 2*, 4 A.L.I. PROC. App. at 89 (1926) (remarks of Prof. Williston, reporter), quoted in Gerald Griffin Reidy, *Definite and Substantial Reliance: Remedying Injustice Under Section 90*, 67 FORDHAM L. REV. 1217, 1222 n. 31 (1998).
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380. William Burnett Harvey, *Discretionary Justice Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 666, 667 n. 5 (1982).
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388. Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 603 (1944).
389. 2 PARSONS, THE LAW OF CONTRACTS 515 (5th ed. 1866).
390. Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 564 (2006).
391. See Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 565 (2006).
392. Robert S. Summers, *The General Duty of Good Faith – Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 810 (1982).
393. See
394. Samuel Williston, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 195 (1909).
395. Samuel Williston, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 195 (1909).
396. Tex. Bus. & Com. Code § 2.313, cmt. 4.
397. S. J. Robert I. Burns (ed.), LAS SIETE PARTIDAS, VOLUME 4: FAMILY, COMMERCE, AND THE SEA, p. 1042, n. 1. Law XXXIX, however, deals with express warranties by the seller, and holds the seller to an implied warranty only upon proof that the seller knew the goods were damaged and kept quiet.
398. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 373 (1827).
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400. WILLARD T. BARBOUR, THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY 122-23 (1914).
401. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions* <http://www.law.uchicago.edu/files/files/133.lb_cotton.pdf> [4-11-2015].
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403. The night before he signed the Fair Labor Standards Act in 1938, President Franklin D. Roosevelt told his radio audience: “Do not let any calamity-howling executive with an income of \$1,000 a day, ...tell you...that a wage of \$11 a week is going to have a disastrous effect on all American industry.” *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage* <<http://www.dol.gov/dol/aboutdol/history/flsa1938.htm>> [4-4-2015].

404. D. Edward Greer, *A Legal Anachronism: The Married Woman's Separate Acknowledgment to Deeds*, 1 TEX. L. REV. 407, 409 & 413 (1923).

405. Benjamin, Law of Sales § 31, p. 29 (Bennett ed. 1888).

406. Jo Freeman, editor, *The Revolution For Women In Law and Public Policy*, in WOMEN: A FEMINIST PERSPECTIVE pp. 365-404 (5th ed., 1995).

407. Benjamin, Law of Sales § 36, p. 31 (Bennett ed. 1888).

408. “[T]he husband/wife unity argument as grounds for the doctrine [of interspousal immunity] was severely impeded by the adoption of what were known as Married Women Acts. These legislative acts occurred principally in the latter half of the nineteenth century and early twentieth century. See, e.g., 1877 Conn.Pub.Acts c. 114; Ga.Code Ann. § 7142 (1913); 1949 Kan.Sess.Laws 23-20 (1868); Mass.Gen.L. ch. 209 §§ 1-13 (1845); Mo.Rev.Stat. §§ 1735 & 8304 (1909); Mont. Code Ann. §§ 1439-1441 (1887); 1893 Pa. Laws 345 § 3; and 1913 Tex.Gen.Laws ch. 32, p. 61. These acts, while varying from state to state, generally gave wives the rights to own, acquire and dispose of property; to contract; and, to sue in respect to their property and contracts. Most importantly, many of the statutes specifically abolished the doctrine of the oneness of husband and wife.” *Price v. Price*, 732 S.W.2d 316, 317 (Tex. 1987) (Kilgarlin, J.).

409. Jo Freeman, editor, *The Revolution For Women In Law and Public Policy*, in WOMEN: A FEMINIST PERSPECTIVE pp. 365-404 (5th ed., 1995).

410. *Casenote, Husband and Wife - Wife May Dispose of Her Interest in the Community Property After Abandonment by the Husband*, 1 TEX L. REV. 236 (1923).

411. *Id.*

412. *Id.*

413. *Casenote*, 1 TEX. L. REV. at 236.

414. Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMPORARY PROBLEMS 83 n. 73 (1993). (“McKnight, *Reluctant Change*”).

415. *Id.*

416. The case is discussed in *Note*, 11 TEX. L. REV. 81 (1932). *Accord, Leffin v. Jeffers*, 52 S.W.2d 81 (Tex. Comm. App. 1932).

417. McKnight, *Reluctant Change* at 83 n. 85.

418. McKnight, *Reluctant Change* at 71, 83.

419. McKnight, *Reluctant Change* at 83 n. 76.

420. McKnight, *Reluctant Change* at 83.

421. McKnight, *Reluctant Change* at 86 n. 100.

422. JAMES KENT, 2 COMMENTARIES 454, 458 (1827).

423. JAMES KENT, 2 COMMENTARIES 462 (1827).

424. LEAKE, AN ELEMENATARY DIGEST OF THE LAW OF CONTRACTS 219 (1878).

425. Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1256 (1997).