

WHAT PRICE CONTRACT?—AN ESSAY IN PERSPECTIVE

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CONTRACT comes to a lawyer as a term laden with connotations of doctrine and theory. Unilaterals and bilaterals, detriment, pre-existing duty, accord executory or accord and satisfaction, peculiar rules on notes and bills and warranties in insurance and substantial performance in construction deals, objective standard and the meeting of the minds, simple rules or rules laden with exceptions, writings and seals and the statute of frauds and the rule of integration, specific performance, unjust enrichment, declaration of trust and conditional device, undisclosed principals, corporation charters, successive assignees, situs of debts, attachment, inheritance and taxation—as one ranges through the various technical phases two things happen. First, to get any coherence in the grasp of detail one is tempted to mark off a field called, perhaps, “general contract theory.” And if one does this, he finds problems of gratuitous promises, of successive assignees, of beneficiaries, hiding silently out of sight in a “law” of trusts; problems of taxation, “liberty of contract,” inheritance, garnishment, dropping off into “constitutional law;” problems of anticipatory control of transactions dividing themselves queerly between this “general law of contract,” the field of evidence, and general odds and ends, such as limitations when the problem is whether the statute is or is not to be contracted against; and those remedies which give any “law” of contract ninety-five percent of its meaning wandering afield into damages, quasi-contracts, equity and pleading. All of this, wholly without reference to the happy way in which those cases which do not happen to fit whatever type of “general theory” manages to get set up (cases on the formation of the depositor’s agree-

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This paper was first prepared, in much more compact form and without the notes, for use in the *Encyclopedia of Social Sciences*. The editors wisely felt it desirable for the article “Contract” to contain more Roman and comparative law material, and more material on the history of doctrine, than I had included. Collaboration with Dean Pound then became advisable, in order to insure to the *Encyclopedia* the benefit of a wide background in those fields. But our own society offers its peculiar unity and character, and it seemed worth while to expand and explore the bearings of my initial paper in the hope of gaining in sharpness of focus what is thereby sacrificed in comprehensiveness. It is a peculiar pleasure to be able to offer the result, as a study of the common law, in a number dedicated to the author of *The Common Law*, to the thinker whose work is the major foundation on which the realistic trends in jurisprudence rest.

ment with his banker, for instance, or often on insurance, or on gratuitous undertakings cognizable in tort or recognized as agencies) drop quietly out of contemplation, unnoticed, unmissed, unmourned—and *unaccounted for*.

And second, even if the lawyer surmounts such obstacles as these to a true, full synthesis, he finds his mind riveted on law and legal obligation; he takes the court's decision for the fact of life; he assumes that what the court decides must in some obscure fashion represent what people do. Preoccupation with the niceties of doctrine almost compels such straight-jacketing of interest. Hence, if "a contract" is illegal and unenforceable, that is enough to know. If the first assignee prevails, why that is that. And the battle between objective, subjective, and objective-subjective theory¹ rages, but rages only over those border-line cases which semi-occasionally trouble courts of law, and almost never trouble people.

There is no fault to be found with systematizing so much as we can of the rules on promises, or on *assumpsit* and its descendants, or on obligations arising out of transaction. Such systematization offers much chance of gain. Indeed, if we can keep a systematization from setting itself up as *exclusively* valid as soon as it is made, and if we can keep ourselves awake to the situations concerned, awake to people and their doings as well as to the particular legal compartments we have found it interesting (or merely possible) to systematize, we even stand a chance of avoiding that loss—via rigidification of rule and of imagination—which is part of the price men commonly pay for a new systematization. Neither is there fault to be found with a thorough canvassing of legal technicality over a less ambitious field, in its harder, more brittle, less seductively systematized details; nor yet with those who prefer to stop when they have pursued such a canvass unto the uttermost case in the reports.

Yet I think that there is another area to be explored, and a grateful one; one from whose exploration—though it be but a first dash into the snow-fields—one returns with fresh eyes and fresh zest to the study of the heaped up cases and of the frail-seeming but sometimes steel-strong girders of doctrine. That area is the role of contract in the social order, the part that contract plays in the life of men. What price this curious legal institution—if *legal* institution it be? If not, what price this social institution, and what relation have its legal phases to its others, and to its meaning to society?

We have records, here and there, of explorations. Maine's

¹ Oliphant's position I understand to be that the objective expressions of a promisor set the first measure of his obligation, limited further, however, by the subjective understanding of the promisee.

famous dictum of "status to contract;"² Isaacs' hypothesis that status-to-contract-to-status runs in cycles or in pendular swinging;³ Demogue's presentation in terms of major contracts with tails, appendages, adhesions, of various details;⁴ Pound's development of "relation" as a status-like element constantly latent and now re-emergent in our order;⁵ Ehrlich's inquiry into agreement as a constitution-making device of sub-groups within the state, and into the relation of legal to non-legal ways and norms;⁶ Ely's attempt to place contract in relation to property;⁷ Commons' more successful study of rent-bargain, price-bargain, and wage-bargain, as foci and levers for the adjustment of an economic system to new strains, and as important controlling factors in new development outside the law;⁸ the econo-

² MAINE, *ANCIENT LAW* (Pollock's ed. 1930) 182. Maine, it will be remembered, very carefully uses "status" in this generalization "to signify these personal relations only" (those "derived from and to some extent still colored by the powers and privileges anciently residing in the family") and avoids "applying the term to such conditions as are the immediate or remote result of agreement." My usage here differs.

³ Isaacs, *The Standardizing of Contracts* (1917) 27 *YALE L. J.* 34.

⁴ DEMOGUE, *MODERN FRENCH LEGAL PHILOSOPHY* (1921) 472, 477. My phrasing is hardly fair to Demogue; it hits but one of his two phases of "adhesion," the other being the presentation to individuals of complete forms (railroad ticket, etc.) not subject to dicker, to take or leave.

⁵ Pound, *The End of Law as Developed in Juristic Thought* (1917) 30 *HARV. L. REV.* 201; *SPIRIT OF THE COMMON LAW* (1912) c. I. Isaacs' criticism *op. cit. supra* note 3 of Pound's position that "status to contract" has "no foundation in our legal history" is obviously sound. Yet the curious assertion is repeated, without notice of the criticism, four years later. *Ibid.* 28.

"Norm" is used in this paper to mean a rule or standard of Oughtness, not a statistical norm. "Normal" is used loosely.

⁶ EHRlich, *GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS* (1913), esp. c. II-V, XVII. This whole paper builds at every point on Ehrlich, as any such paper must. And on Veblen. And, as always, on Max Weber. *WIRTSCHAFT UND GESELLSCHAFT* (2d. ed. 1925).

⁷ ELY, *CONTRACT AND PROPERTY* (1914).

⁸ COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924) c. VI-VIII—a book whose insight is too little noted because it is too legal for the layman, too lay to satisfy a meticulous legal critique. I have derived further suggestion from many quarters: Messrs. Alvin Johnson and William Seagle of the *Encyclopedia of Social Sciences*; and my colleague Patterson, in comments on this paper; Morris Cohen, especially *Property and Sovereignty* (1927) 13 *CORN. L. Q.* 8.; Hale, especially *Coercion and Distribution in a Supposedly Non-Coercive State* (1923) 38 *POL. SCI. Q.* 470; Underhill Moore; Samuel Klaus; Wigmore, especially *The Pledge Idea* (1897) 10 *HARV. L. REV.* 321, 389; 11 *ibid.* 18; and 5 *EVIDENCE* (2d ed. 1923); AMES, *LECTURES ON LEGAL HISTORY* (1913) c. XII-XIV; POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* (1924) c. VI, *Liberty of Contract* (1909) 18 *YALE L. J.* 454; Lorenzen, *Causa and Consideration* (1919) 28 *ibid.* 621; Wright, *Opposition of Law to Business Usages* (1926) 26 *COL. L. REV.* 917. My own papers, *The Effect of Legal Institutions on Economics* (1925) 15 *AM. EC.*

mists at large, in their study of the effects of free contract and of specialization on the development of capitalism, on mobilization of capital, on the allocation of risks, and, finally, on the divorce of investment from control.⁹ So much, indeed, has been done that some hope offers of putting together a sketch of the whole. Chimerical such a sketch must be—compounded of parts strangers to each other, a dream-thing, and mayhap a monster; worse than chimerical in the gaping incompleteness of content and of form. Yet worth attempting. Rules, technicalities, systematizations gain meaning, gain opalescence, gain vibrancy, when their fragile beauty is seen—though imperfectly—against the rich background of the Great Society.

I. ORIGINS

“Contract” itself is an ambiguous concept, ambiguous particularly when more is concerned than unmixed legal doctrine. (1) The word is used especially to indicate business agreements-in-

REV. 665 and (1928) PROC. CONF. SOCIAL WORK 127 also bear on the problems raised.

⁹ Any study in descriptive economics sheds light on the work of the contract institution. One has only to run through some of the major heads in the credit field to appreciate the range of suggestion involved: public credit, and *e.g.*, the use of Liberty Bonds to remobilize industry and trade and as a means of hardly noticed but terrific taxation by inflation; bank credit, and the use of deposits, contract-created-currency, in place of money; commercial credit, with the interlocking problem of movement of goods; consumption credit, and the double questions, one, of handling the non-bankable loans of the non-merchant, and two, of the relation of installment buying to the social and economic structure; investment credit, with its ramifications: intangible and inflatable evidences of wealth, concentration of control with diffusion and dilution of investment, the shifting relation of banker and industrialist, the pressure of fixed charges upon production and marketing policy, the problems of central exchanges, and the rest. And the contrast of the modern picture with that sketched in such works as Tawney's introduction to the *Discourse on Usury* (1925) and especially Ehrenberg's *Zeitalter der Fugger* brings out with some vigor the extent to which refinement and adjustment of the legal machinery eases, speeds, complicates and magnifies the processes. Not that the difference is attributable to legal machinery alone. Legal machinery for issues of negotiable bonds, callable serially, with Jacob Fugger as underwriter instead of lender, would not alone have solved the Hapsburg financial problem; nor even the assembling of funds. But without such machinery and the tapping of innumerable private purses which with its help become available, even the Fuggers could not meet the imperial needs. The other side of the picture appears when one considers the American investment market before the war and the ensuing effects of the nationwide, high powered education which the war brought in the mechanics, meaning, and *habits* of bond-buying. Legal institution and the complexes of social institutions essential to its effectiveness must concur, to get results. Veblen, I think it was, who drove home that “capital” as merely capital goods is meaningless without the accompanying technology; whereas the technology is crippled, lacking the capital goods.

fact, as such, irrespective of their legal consequences—irrespective indeed of whether they have legal consequences. At times, on the fringes of discussion, this use may overlap into the non-business field. (2) Or the word is used to indicate agreements-in-fact *with* legal consequences. Not merely *pacta vestita* as distinct from *nuda pacta*, but barter and outright conveyance, and even—again on the fringes—any form of gift in which assent of the donee may be a matter of concern. This, roughly, was Ely's use. (3) Again, the word indicates the legal effects, if such there be, of *promises*—including those various incidents which, if I may twist Demogue's phrase, "adhere" to major promises of various kinds. This last, stricter concept Corbin has demonstrated to be singularly useful for the law; it will here be adopted. I shall endeavor to reserve "promise" for the promise-in-fact, "contract" for the legal effects of such a promise. (4) A fourth current meaning of the word, the writing embodying an agreement (commonly assumed to be one with legal consequences) may here be disregarded.

Whichever use of the term may be favored, what is clear is that for the present purpose discrimination among various concepts is needed. No discussion of the meaning of "contract" in society can be confined to a single one of the concepts suggested. Such a discussion must indicate and must have verbal means to indicate which of them, at any given point, is in question. But it must range over them all. Interaction between them is unceasing. The law of contract takes its beginning, for instance, in the notion that legal officials¹⁰ should enforce, or should at least draw into reckoning, certain of men's bargains or promises. (Quite primitively, one would have to class with bargain or promise that more primitive form of exchange-device, the non-refusable¹¹ gift, whether expected by virtue of the occasion or not, which imposes a felt obligation to reciprocate.) Law draws life, throughout, from the attitude of laymen toward changing types of bargain—or of simple promise. On the other hand, to some extent the shaping of agreements-in-fact turns on the type and extent of enforceability currently available at law.

Normality and Abnormality of Contract

The beginning is in a society in which bargains and promises

¹⁰ Or men when doing official acts. Specialized order—officials there need not be, but specialized *conduct-with-reference-to-order-and-disputes* there must be, before "law" can be differentiated from the general matrix of *ways*.

¹¹ Social duty to accept rather than social disability to refuse; yet the two will be hard to distinguish where evidence is scant or practice thoroughly ingrained; and one would not be surprised even to find a clear case of the latter.

are as rare as are some hundred other matters of our present daily life, from telephones, large cities, travel and quick transportation, to investment, credit, money and specialization for indirect exchange. In such conditions reliance on promises or even on bargains is in natural consequence unusual, unreasonable, an individual risk of the relier. By way of illustration rather than of proof consider those early trader-pirates who traded, robbed or fled with equal readiness according to the apparent balance of power of the instant. Or consider the scorn which Odysseus would share with Kim for one who gave truth to a stranger without compelling reason. Reliance on promises, like reliance on anything else, is in good part a function of usage and familiarity. Even more so is that perceived reasonableness of reliance which sets the first basis for official intervention.¹² Under such conditions the legal approach must be an exaggerated form of our early caveat emptor: ¹³ no enforcement until specific particular reason is shown. And it may have been the obviousness of such particular reason when disputes endangering the peace were compromised which led to the early importance in law of that type of agreement and which would equally induce enforcement of that type even where reliance might factually be unreasonable, one of the parties being a notorious liar.

The other end of the development lies in a credit economy in which bargains and promises are so much the normal course of dealing that reliance on them is a matter of tacit presupposition; ¹⁴ to which is to be added: in a society in which interven-

¹² I do not mean that any *theory* of reasonable reliance called forth official action. "It seems to me well to remember that men begin with no theory at all, and with no such generalization as contract. They begin with particular cases." HOLMES, COLLECTED LEGAL PAPERS (1921) 218. So Maine's view of Themis before rule. *Op. cit. supra* note 2, at 3ff. But behind the case or its solution lie practices, and expectations, and concepts as to what is properly to be expected and what of the expected is properly to be insisted upon. Compare 1 VINOGRADOFF, HISTORICAL JURISPRUDENCE (1920) c. X. This is the perceived reasonableness of reliance referred to. And it calls for much more than the mere fact of consent or agreement. "The liabilities incurred by way of contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from a tort are independent of any previous consent of the wrong-doer to bear the loss occasioned by his act." HOLMES, THE COMMON LAW (1881) 77. This may be a road into modern law, and even into understanding many eras of contract growth; it is no approach to origins, and none too good a one to formal contract.

¹³ The classic expression is from *Chandelor v. Lopus*, Cro. Jac. 4 (1603): "For every one, in selling his wares, will affirm that his wares are good." *cf.* Hamilton's striking article *Caveat Emptor* (1930) 3 ENC. SOC. SCI. 280.

¹⁴ Contrast with the preceding note Holmes' neat phrasing of the present day attitude: "When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar

tion of legal officials when called upon is rather expected than otherwise.¹⁵ The legal approach then is, fundamentally: a bargain or promise is enforceable unless reason appears to the contrary. Our legal attitude toward misrepresentation and incapacity is a vastly truer reflection of our basic approach on the first point than are, for instance, the rules placing burden of pleading and proving consideration on the plaintiff.¹⁶ And on the second point, it is a fair observation that the untutored layman feels it a reproach to law that he is required even to consult a lawyer in order to discover if what he thinks his rights can be enforced in court. And at least in the field of contract the lawyers themselves have seemed for the past half-century well saturated with the idea that the office of the law is to enforce the agreements laymen make—when, as, and if the laymen make them. And this despite the qualifications which must be made where lawyer-like deference to tradition recognizes problems in pre-existing duty and the like, or where lawyer-like astuteness creates “constructive” conditions to cope with emergencies the parties did not and often could not have foreseen. It is hard in such a world to recapture the feel of early legal thinking toward the anomaly that agreements, or promises, should exist at all, or exist in such fashion as to call for official attention. Yet the attempt goes far toward appreciation of what difference contract makes today.

Primitive Form and Its Value

When observation first becomes possible we find the officials of primitive law limiting their aid in enforcement to single stereotyped classes of transaction recognizable by specific strictly formal or formulaic character. The type is indeed the form. The one form may be used for accomplishing results (*e.g.*, promise, conveyance, will) which modern eyes would view as wholly diverse transaction types. In this there is nothing strange. Men serve their needs with the institutional tools at hand. Where else are they to go? And any modern draftsman, using

circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in the case of consideration . . . or of fraud.” *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397 (1901). The quotation goes to causation, not to operation in law; yet the latter is presupposed as clearly as is the normality of relying.

¹⁵ Exaggerated but significant is the attitude of the court in *Smith v. Macdonald*, 37 Cal. App. 503, 174 Pac. 80 (1918), in which a stipulation that a promise should be void if legal steps are taken to enforce it is worked out as a valid and enforceable covenant not to sue—part of “the consideration” for the promise in suit—and so a defense.

¹⁶ Contrast those statutes making the signing of a promise adequate evidence of consideration. Compare the very prevalent criticism of the requirements of consideration in business promises.

the form book, or manipulating the doctrine or theory of a case to some new end, makes but a new move in the ancient game. Fascinating is the historical problem, in any given context, of which transaction was the first to shape the form, and of the sequence of borrowing or specialization.¹⁷ But that inquiry is not essential to the purpose here.

What is essential is to note that official aid on the contract side consists most commonly not in what we know as enforcement but rather in an official declaration—or merely official recognition, when the whole burden of proceeding is on the creditor and observance of a prescribed form of proceeding still does duty for the later judgment of right—that an obligation is owed and forfeit, and that the creditor is acting properly (one can almost say “officially”) when he seizes the debtor or the debtor’s assets. It may never be possible to establish whether in such cases the official, or a type of practice recognized peculiarly as having official character, sets the form, and law (i.e. *official practice*) controls lay practice, or whether lay practice sets the form for law to sanction. As so often, all probability speaks here for interaction, with lay (or undifferentiated) practice initially in the foreground, later (as official practice comes into recognition as such) moving into the background—though always present as a pressure toward official growth. The problem seems in any event to have been the determination of when that startling event, the forcible holding of a man (group) to a promise, was to occur; and it is vital to remember that law in its beginning is almost undifferentiated from other forms of social pressure. Formal acts of the known type¹⁸ then signify openly definitive intent to change the existing situation—and to be relied on. Early or late, and in whatever culture, and whatever the form in vogue, this feature is common to all. The copper and scales, the ceremonial handclasp (“Shake on it!”), a magical ceremony like the establishment of blood-brotherhood, the solemn invocation of supernatural sanction by oath¹⁹ or conditional curse, the promise or act before official witnesses, the delivery and acceptance of the unambiguous token (engagement ring,

¹⁷ Cf. MAINE, *op. cit. supra* note 2, at c. IX, and Pollock’s note R; HOLMES, *THE COMMON LAW*, c. VII. And Ehrlich speculates in the grand manner on such matters. *Op. cit. supra* note 8, at 86. A beautiful instance of the use of one form in accomplishing diverse results is dealt with by A. A. Schiller in his forthcoming article, *Coptic Law*.

¹⁸ Dreaming is futile on such points; yet the imagination presses toward picturing the first man to lend unmistakable assurance to his words by drawing on some form—or by creating it—before any form was known. One suspects cumulative accident, rather than invention.

¹⁹ Still in use, as Holmes reminds us, on the assumption of public office, or of a public function such as testifying or serving as juror. HOLMES, *THE COMMON LAW* 246.

pledge button, King's shilling and the nosegay in the hat) or the ambiguous token (earnest money), sealing and delivery, indenture or broken shard or crooked sixpence, the speaking of the binding words, the known words which had power ("I warrant;" "Spondesne? Spondeo;" "Open, *Sesame!*")—whether sanctions other than legal be invoked in addition or not, and whether or not the form accomplishes additional purposes (identification of person, transaction, and terms), the common purpose of the form is clear. The overt sign of utter intent to assume obligation has been given. The other party has reason to rely.²⁰ The consequence to be expected is both recognition by law officials, and—at least as soon as this has occurred—a strong tendency thereafter to limit the number of these recognized forms which will move either officials to act or laymen to feel justified in taking words as meaning obligation.

Legal v. Non-legal Obligation

Yet as an economy changes, as it grows more complex, as bargains become more frequent, as new types of bargain appear, the ritual forms theretofore established on older models must prove inadequate to cover all engagements-in-fact, inadequate to protect all reliance-in-fact. Engagement-in-fact and that social sense of duty to perform which we may roughly call non-legal obligation do not for that reason cease. On the contrary, they grow more distinct as an existent and important phase of life. But legal obligation comes, in the measure of the new developments outside the ancient forms, to diverge from non-legal. Such divergence is in one aspect familiar enough. There is the social or "moral" obligation recognized at law not at all, or only indirectly: obligation to pay a gambling debt treated as a debt peculiarly of honor precisely because no action at law will lie; obligation to live up to a gratuitous business promise; obligation to provide for a child or dependent which finds recognition at law only as supposed rules of law are twisted out of shape in the efforts of courts, despite the rules, to enforce any explicit promise in which the non-legal obligation is given form enough to be laid hold of.²¹ The other aspect of the divergence, the difference in *content* between the running, flexible obligation

²⁰ "To explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever came to frame a future tense." *Ibid.* 251. Right in essence. But it is interesting that both ancient Hebrew and modern German manage promises with a present tense. Insight does not always need exact verbal symbols, although symbols both further and limit insight. One might risk the suggestion: as law to life, so language to thought.

²¹ Cf. Note, *Family Agreements as Exceptions to Orthodox Third-Party Beneficiary Rules* (1931) 31 COL. L. REV. 117.

understood in fact by the parties and the rigid, stereotyped obligation which is all the law will recognize, has had vastly less attention. "Incidents of adhesion" take on an aspect sometimes sinister when they are affixed, in the teeth of intent, merely because the court arrives at the conclusion that "a sale," "an agency," "a partnership," or whatnot is *the* transaction-type the parties have seized upon.²² Again, that the rule of integration and the statute of frauds pay a price for what they achieve is evidenced sufficiently by the struggles of the courts to find exceptions for deserving cases. Such modern analogues or illustrations as these are adduced, despite the appearance of anachronism, in first instance because what is true under a law as flexible as our own is true *a fortiori* in an era of greater *a priori* rigidity;²³ but in the second instance because the process of legal rigidification and divergence of legal from non-legal obligation is perennial. Too much insistence on the illustrations of bygone centuries risks an unduly comforting suggestion that in this enlightened day we must have worked free of trouble.

But we have not thus worked free of trouble, and if the processes of society do not undergo some unforeseeable revolution there is no likelihood that we ever shall. Law *must* grow fixed, in most of its parts, and relative to most of the ways of society apart from law.²⁴ And the ancient problem must continue to recur. The feature of its recurrence which I wish to pound on here is that *to the extent of* such divergence between non-legal obligation and the legal obligation officially recognized on the same facts, the legal obligation ceases to function merely as an extra insurance that engagements will be performed. That role, in essence, it need not lose. But it acquires another. It comes to function also as a *source of risk*. If the other party appeals to law, then to the extent that the obligation is viewed by layman and by law-man differently, I shall either get less, or be held to more, than the customary understanding calls for. And I repeat, such a divergence, such an incursion of risk, is a constant tendency as soon as legal technique becomes specialized, as soon as officials begin looking for their solutions not directly

²² I may seem at this point to be inconsistent with what is said *infra*, especially note 63. There is no inconsistency. To affix incidents in the teeth of intent may be sinister. It may be wise. All depends on the judgment and sense of fact and need displayed. As Morris Cohen remarks of reasoning by analogy: it is always risky; you "simply" have to lay hold of the right analogy.

²³ I share the opinion that what one may term an informed as contrasted with a naive rigidity is in process of emergence in various parts of modern law. See *infra* concerning standardization. Demogue, *op. cit. supra* note 4, at c. XIII, is very suggestive.

²⁴ For some further discussion *cf.* Llewellyn, *Law and the Modern Mind: Legal Illusion* (1931) 31 COL. REV. 82, 87 ff; BRAMBLE BUSH (1930) 61 ff.

at the life before them, but indirectly at the deposits of their own or their predecessors' prior dealings with similar situations.²⁵ Surely no man can read commercial cases in our courts today, or follow the movement toward commercial arbitration, and blink the presence of the phenomenon. And surely it is obvious that as the law of contract thus constantly grows rigid upon its own premises and to itself ("certain and reckonable" or "out of date and over-formal"—the phrasing is immaterial) it offers the cautious and canny layman an advantage over his unschooled adversary. Hence the no less constant counter-tendency: the subjection of law to reformatory pressure from the newer uses and understandings in the world of dealings, or from perception of abuses arising out of the manipulation of legal technique.

The Forfeit Root and Security

Behind and beside the law, early or developed, there works not only the fact, thus far chiefly discussed, of credit, of trust, but also the opposite fact of distrust, of self-help. If oath or promise is the type of the first, forfeit and hostage are the type of the second; for all that we can see, the second roots as early and as deep. And it continues still. So in the modern use of conditions on promises, as when the continuance of life insurance is set free of any promise by the insured to pay and is instead merely conditioned upon regular payment of the premiums. So in the use of security devices, from the pawn to the corporate blanket mortgage. There is indeed little question that both law and form of early contract take origin as much or more in the giving of a forfeit as in the making of an unambiguous engagement (the word itself derives from the incurring of obligation *by* giving a "gage"). Often the two merge. I dare to doubt, however, the too-ready assumption by German legal historians²⁶ that at the outset the picture is regularly one of a *Schuld* or obligation perceived as such, accompanied by a somewhat inadequately adjusted *Haftung* or enforcement machinery. To me it seems that in a non-credit economy it must have been at least equally prevalent to regard the forfeit as a mere pressure: not "you must do what you have promised, on pain of forfeit," but: "you have given up a thing which you can get back only by doing a stated thing." At the outset such a pure forfeit arrangement involves no necessary duty-concept.²⁷ It

²⁵ This will not be read as involving any criticism of the tendency and indeed necessity of courts utilizing such deposits. Criticism will begin only when one finds them ceasing to refresh old indirect experience by new more direct experience.

²⁶ Which even Wigmore falls into, despite his sanely critical attitude and rechecking of original sources.

²⁷ It may, or it may not. It may indirectly, by way of the forfeit-

may exist as well with as without such a companion. Yet out of the forfeit, sooner or later, a duty idea will develop. "Duty" grows quite as well out of anticipation of unpleasant consequences of non-accomplishment as out of a sense of what action is by custom expected (and so "right, and so due") in the circumstances. Such seems to be the line of evolution in much religious duty—*e. g.*, the duties of ritual propitiation.²⁸ And quite significantly do our courts currently speak of any burdensome condition as a "duty."

However this may be, in system after system the primitive forfeit has been refined slowly into a security-device, and a notion that the real and primary center of attention is the obligation has worked its way into law. It would be a fascinating task to set against Wigmore's masterly presentation of the process in olden systems,²⁹ instances of the recurrence of the struggle, along the same type-lines, in more modern times. Without mentioning the familiar history of our own mortgage of real estate, it does pay to recall that first in the use of the absolute deed, again in the introduction of the deed of trust, and finally in the installment land contract the problem arose anew, to be solved anew—and in the main to be solved slowly, and with fresh groping, in each instance.³⁰ Nor did the solution for mortgages of realty carry with it an equally clear solution in the chattel field; and whereas the trust receipt has been concerned chiefly with avoidance of recording statutes and rules on bona fide purchase, the conditional sale of chattels from say 1860 to date has wandered tortuously under the accidental succession of fact pressure³¹ through a course which parallels amaz-

giver's feeling of responsibility for the hostages he has pledged—to them or to their kin or to himself. Cf. HOLMES, COMMON LAW 249 ff. It may appear different to the two parties. The Samnites after the Caudine Forks undoubtedly thought the Romans had assumed a *Schuld*. Livy's Regulus, despite having used express words of obligation, views that matter differently: "Who is so ignorant of the law of treaties as not to know" that the general can be repudiated (I take it, without ensuing obligation) if that general be delivered over? Regulus is a hero. One wonders then if the much decried *Punica fides* is to be defined as breach of faith *without* a technical excuse; or whether Regulus really saw no obligation—like the seller in *Chandelor v. Lopus*; or whether the difference depends on a hundred years; or on whose foot was pinched.

²⁸ 2 SUMNER AND KELLER, SCIENCE OF SOCIETY (1927) c. XXXII ff.

²⁹ *The Pledge Idea*, *supra* note 8.

³⁰ Compare *e. g.*, Kidd, *Trust Deeds and Mortgages in California* (1915)

3 CALIF. L. REV. 381.

³¹ On the part played in case-law growth by the succession of fact-pressure, see LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930) c. III, esp. 219, 336 ff., 340 ff. Contrast 329, n. 1. For the historical sequence in conditional sales law, see Notes (1929) 29 COL. L. REV. 960, 1123. Exceedingly interesting is the modern German half-finished repetition of the process, in the *Sicherungsübereignung* as to chattels.

ingly the growing medieval Germanic law of land-gage. The conception of risk on the creditor, as being the "owner;" the conception that failure to pay on time wholly forfeits the security, with provision neither for foreclosure sale nor for accounting as to any excess in value over the debt;³² the power of creditor in possession to transfer free of debtor's rights;³³ the conception that resorting to the security destroys any right upon the debt³⁴—all these appear. The last indeed in super-medieval glory: in the more primitive law, so long as there was no *legal* debt, *i. e.*, no *Haftung* apart from the gage, resort to the gage as an exclusive remedy was plain enough; we moderns have managed an exclusiveness despite a better insight.³⁵

II. CONTRACT AS AN ADJUSTMENT DEVICE

In such a survey as this, however, interest centers less immediately upon what society (including the lawyer) has done to contract than on what contract may have done to society.³⁶ As to agreement-in-fact, an influence is obvious. Viewing a status-organized society as a whole, it is trite that bargain is a tool of change and of growing individual self-determination, as is also any property régime which by increasing individual control increases the scope of experiment, the differentiation of holdings, and the factual effectiveness of the bargains of the wealthy. It is trite, moreover, on the bargain side, that the bargain-effects just mentioned wax as bargains come to cover the future, and as they become in that aspect enforceable even though the other party breaks faith. It is a little less trite that the self-determination aspect varies not only with the *number* of bargains which are in fact available to a particular bargainer, but also and most vigorously with the degree to which he has the wherewithal to individualize the phases of the bargain to his desires—or, as the case may be, to sub-divide a single situation into a variety of specialized bargains to meet his needs. The power to shift one's status-in-block a single time (becoming a priest) or even often (marriage and divorce, enlistment for a term) gets one a vast first step along the road "from status to contract." But this first stage, however vast, remains one single stage. Per contra,

³² See, as to both conceptions, BOGERT, COMMENTARIES ON CONDITIONAL SALES (1924) 197, 182 ff.

³³ Cf. *Bank of California v. Danamiller*, 125 Wash. 255, 215 Pac. 321 (1923).

³⁴ BOGERT, *op. cit. supra* note 32, at 170 ff.

³⁵ Notes (1929) 29 COL. L. REV. 960, 1123, studies in the development of the doctrine of election.

³⁶ Contract is of course not outside of, but a part of, anything that can be denominated "society." The question is: what part does it play in the whole; and what effects flow from the part being played in that particular way.

and taking not a fixed but a mobile régime as the base-line, to the extent that the available bargains both expand their block-scope (employment to do an odd job *v.* employment as permanent purveyor of an intermittent service *v.* closed shop factory employment *v.* yellow dog open shop *v.* company town *v.* indentured plantation labor) and become standardized for whole groups and tend to become exclusively available, a régime of "contract" (bargain) moves a long step toward status, toward the regimentation of men into groups and classes, and toward stabilization of social relations.³⁷ A rough equality of bargaining power has been rightly stressed in this connection as having importance far beyond the "liberty of contract" of legal and constitutional theory; but the flexibility of the bargains which are in fact available needs no less stress.

Bargain is then the social and legal machinery appropriate to arranging affairs in any specialized economy which relies on exchange rather than tradition (the manor) or authority (the army, the U. S. S. R.) for apportionment of productive energy and of product. It is a machinery which like status, but in contrast to tort, makes it easy to insist on positive, affirmative action. *Contract* in the strict sense is the specifically legal machinery appropriate when such an economy moves into the phase of credit—meaning or connoting thereby future dealings in general; in which aspect the mutual reliance of two dealers on their respective promises comes of course into major importance. This machinery of contract applies in general to the market for land, goods, services, credit, or for any combination of these.³⁸ Or if one prefers to minimize the danger of reifying the abstraction he may put it: what we mean by contract is whatever the officials do about promises in these various fields³⁹—and cur-

³⁷ The question is not whether this is good or bad, but merely as to certain aspects of what happens. Standardized relationships favor security, simplify inter-group relationships, and may well offer machinery for producing more to distribute and for its more effective distribution. They may be needed as an adjustment to the technical phases of mass production and mass marketing. And indeed, to develop appreciation of the finer shades of individual difference inside a more firmly established general pattern may be a line toward a higher esthetic and humanistic culture than individualism favors. But none of this touches the text.

³⁸ Holmes as early as *The Common Law*, with what seems to one unfamiliar with the then literature extraordinary grasp and originality, both states and develops the risk point of view as basic to contract.

³⁹ It is interesting to watch Holmes' thought on this grow sharper as a heterodox insight bores its way into his working kit. In 1881 he writes (my italics): "The statement that the effect of a promise is the assumption of a risk of a future event does not mean that there is a second subsidiary promise to assume that risk, but that the assumption follows as a consequence directly enforced by the law, without the promisor's cooperation." THE COMMON LAW 302. "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the prom-

iously enough, there are similarities, some of them significant, to be found in what the officials do from time to time from field to field.

Is the Law of Contract Necessary?

All of which, however, begs the question of why there need be any *legal* machinery at all for the purposes mentioned, other than mere protection of the factual results of accomplished bargains, work, deliveries, and payments. The peace, and more dubiously the law of alienability and of ownership, at least as against persons entrusted with possession—what more is needed? As one puts such a question, one recalls first how seldom law touches *directly* any case in which a promise has been performed, or in which an inadequate performance has been received in satisfaction. Promise, performance and adjustment are in this sense primarily extra-legal. It needs no argument that if they did not normally occur without law's intervention, no régime of future dealings would be possible. The lawyer's idea of "contract," applied to these normal cases, where performance and informal business adjustments proceed to occur, is thus a conceptual projection of trouble and the legal spawn of trouble upon the untroubled in fact. Applied to such cases, the lawyer's idea of "contract" is unreal in genesis and misleading in implication—unless, which is the matter of inquiry, what the courts may do in the possible case of trouble is a needed

ised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to *break his contract* if he chooses." *Ibid.* 301. "If we look at the law as it would be regarded by one who had no scruples against doing anything which he could do without incurring legal consequences, it is obvious that the main consequence *attached by the law to a contract* is a greater or less possibility of having to pay money. The only question from the purely legal point of view is whether the promisor will be compelled to pay." *Ibid.* 317. "Contract" is envisaged here as something pre-existing. Also: "*The substance of the law* at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; *but its form and machinery*, and the degree to which it is able to work out desired results, depend very much upon its past." *Ibid.* 1-2. Now contrast this with the firm precision in 1897: "A legal duty so called is *nothing but* a prediction that *if a man does or omits certain things* he will be made to suffer *in this or that way* by judgment of the court; and so of a legal right." COLLECTED LEGAL PAPERS 169. "If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass." *Ibid.* 175. That this does not deny the importance of rules but merely clarifies their relation to purposes of law, and to lay action-patterns consonant with such purposes, I have tried to develop in (1928) PROC. CONF. SOCIAL WORK 129 ff., and *A Realistic Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431. I have found no trace of this analysis in the Holmes notes to the 12th edition of Kent (1873). But it is somewhat foreshadowed in *Codes and the Arrangement of the Law* (1870) 5 AM. L. REV. 1., the paternity of which has been acknowledged in personal communication.

factor, or at least a factor, in promise, or in performance, or in adjustment.

Neither will it do to treat the mere presence of legal machinery in any particular field as of itself demonstrating a *need* for it there. For such presence may merely be an instance of unneeded or even of parasitic⁴⁰ expansion of a going institution. Law early serves a prime function as offering means of dealing with some types of dispute not otherwise adjusted; I should indeed be tempted to argue that the differentiation of anything we can perceive as law begins with this.⁴¹ And even apart from the attribution of the results or their foundation to super-natural powers, even apart from the presence of felt Oughtness as to the content of decision, the last resort character of emerging law would seem to me enough to call forth the recurrent tendency we find in legal machinery to set itself up, *if* it be appealed to, as the *exclusive* means for dealing with any dispute. Law regularly purports, too, to speak for the group as a whole, and this of necessity bespeaks a constant pressure to

⁴⁰ In law—as in other institutional complexes—old patterns have been stretched to new uses partly because some one wanted to deal with a novel situation and found it easier to borrow and adapt a familiar pattern than to devise one more original. But, partly, the persons stretching may be specialists within the complex, seeking their own interest, and conferring no corresponding benefit to others (*e.g.*, the work-making as the legal “folio” shrank); and, partly, they may, though laymen as to the complex, be non-typical in their wants and needs—although successful in forcing the adaptation into the shelter of traditional hallowing. And finally there is a type of expansion tendency in terms not of felt need, but of felt rightness: expansion toward the logical limits of rationalizations, classifications, purposes, as they appear to the men, and especially to the technicians, of the time. In the measure that the current premises are in truth inadequate to reflect the factual condition of the art and its work, this logical development also spells what one may think of as parasitic expansion. Logical development is primarily in place as to rules of pure decision or pure convenience, where the only thing that matters is to have a rule. It is defensible and sometimes wise in fields where advance calculation is so important as often to outweigh sanity on particular facts. Occasionally, but chiefly in the two fields just noted, it is useful to simplify operations. Beyond this, “The life of the law has not been logic; it has been experience.” And even in the instances noted, “logical” development rather regularly involves arbitrary *creation* of premises to develop. Compare BRAMBLE BUSH, c. IV, V; to which need be added WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* (1929) 152 ff., and Adler, *Law and the Modern Mind: Legal Certainty* (1931) 31 COL. L. REV. 91.

⁴¹ And with the issuing and enforcement of directions by someone, with corresponding observance by others.—Neither regularities of practice in themselves, nor undifferentiated ought-feelings, nor undifferentiated pressures toward conformity or non-conformity, seem to me enough to make a concept of “law” very useful. If there be differences of taste as to the term, it is at least clear that I am talking about that portion of law which involves the interaction of the acts, ways, and specialized ideas of specialized officials with the acts, ways and ideas of laymen.

draw into law's orbit any other important institution; it is the stuff of other institutions which offers the subject matter of disputes. Finally, rarely until modern times⁴² has expansion of jurisdiction or business been unprofitable to the law-men concerned. The chief counter-tendency to this expansiveness is found in law's own formalism (compare the impediments to assignability of choses in action) and in the tradition-set character of the molds within which law-men must move if their action is to have standing as official.⁴³ Given, then, promises present, relied on, and broken, law will sooner or later wrestle with their breach; but it will do so whether or not society peculiarly requires the wrestling.

Yet as the specialization and credit, and particularly the industrial, aspects of an economy gain ground, it becomes hard to escape the positive case for utility of legal enforcement of promises. Credit or reliance on a purely customary or self-interest basis presupposes for effectiveness either permanence of dealings involving long-run mutual dependence,⁴⁴ or an ingrained traditional morality covering the point, or dealings within a face-to-face community (or its equivalent, a close-knit though wandering guild-like interest-group such as the early medieval merchants seem to have made up) in which severe group pressure on delinquent promisors is available. These types of sanction fail in a society mobile as to institutions, mobile as to residence, mobile as to occupation; they fail increasingly as the market expands spatially and in complexity. They fail, in a word, as

⁴² As to modern times, compare the investigation of the Women's Court in New York City, 1930-31; and *Tumey v. Ohio*, 273 U. S. 510, 47 Sup. Ct. 437 (1927).

⁴³ There is no more fascinating study than the conditioning of the specialist himself by such tradition. Compare the well known resentment at procedural simplification; the honest belief of many judges that common law courts "cannot" render conditional judgments, *cf.* (1931) 31 *COL. REV.* 124; or any other of the procedural limitations which favored the growth and isolation of equitable remedies. Or the equally honest belief that judges "cannot" make contracts for the parties. The concurring grounds of decision in *Lawrence v. Fox* make a peculiar exhibit, when set beside the insight shown in the quotation of H. Gray, J.: "The law operating upon the act of the parties *creates* the duty, *establishes* a privity, and implies the promise and obligation on which the action is founded." 20 *N. Y.* 268. (1859). Even here the "promise" is as fictional as the "agency" that seemed a necessary comfort to Johnson and Denio.

The eternally baffling problem is the kind and degree of interaction between this bound half of the judge's (or other specialist's) mentality and that portion which is either consciously or intuitively at work to *manipulate* traditional molds to meet felt needs. Especially illuminating are the exhibits collected by ISAX, *RECHTSNORM AND ENTSCHIEDUNG* (1929) 60 ff.; also FRANK, *LAW AND THE MODERN MIND* (1930) c. XII.

⁴⁴ A pretty illustration in MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926). Instructive also is WEBER, *op. cit. supra* note 6, at 398 ff.

to long-run, long-range, impersonal bargains, as also in cases where death, or transfer of rights, removes from the relation what may at the outset have been a personal aspect.

Whatever the need for legal enforcement of contract in current dealings, then, its place in an *investment* structure is obvious. It is essential to any approach to a market for capital, to any machinery for mobilizing funds or diversifying investments. Equally essential with contract itself is the transferability—which is to say, the depersonalization—of contract rights. The older view of “privity” as essential to legal action on a contract was connected partly with semi-magical aspects of legal form; partly with a conception of contract as an essentially peculiar, unusual thing; partly with a conception that contractual transactions had no proper importance for non-participants. None of these conceptions fits with an investment market; it is significant that the first free transferability, that of bills of exchange, developed among merchants *apart from law proper*. It is further significant that merchants found no trouble with the concept of suit by a third party beneficiary—which still gives trouble to some courts—and that they shaved the freely transferable contract right down to certain standardized essentials. In business essence, although not so strictly in law, a very similar standardizing and simplifying process occurs in the investment market today. The investor looks for six or seven familiar standard features in a stock or bond, irrespective of the length of mortgage indenture or articles of incorporation—six or seven features familiar and simple enough to be summed up conveniently in Poor or Moody. For business purposes, too, a distinction in kind between bonds and stocks tends definitely to disappear. Both, in the same way, are thought of as property—as is also any prospectively profitable contract, whether unilateral or bilateral. Both, in much the same way again, are conceived as in the nature of promises: anticipated performance by “the corporation” (which is factually viewed as centered in the managing personnel, plus some assets, plus the established management policies) is the essence of the picture; and legal sanction in both cases looms very large. My eyes may be blinded, but to me men do not seem to regard as cutting to the essence (as distinct from questions of *degree* of security and priority in rank) that the legal sanction in the case of bonds goes to payment of certain sums at certain times; while in the case of stocks the legal obligation is built around rather than focussed on payment, built in terms of limiting dissipation of assets and checking manipulation rather than in terms of specified positive performance. And when, finally, even interests in realty are thrown into the bond-stock form, the role of contract and near-contract in the investment field becomes per-

vasive. Contract, not mere agreement-in-fact. Frequently enough no other sanction than the legal exists at all. Where other sanctions do exist (*e.g.*, desire for continued dealings, or for a business reputation) they show an unfortunate tendency to fail precisely where most needed, *i. e.*, when stress of loss (or gain: management manipulation of the market or merger of the debtor) is strong. Max Weber cogently remarks that expediency-founded ethics are less reliable factors in performance than are those founded in tradition. It results that even to some extent in short-run face-to-face dealings, and *a fortiori* and importantly in long-run ones, legal enforceability figures as an element of added security in credit matters; a partial insurance against the very case of need: when credit-judgment was misguided, or in case of death or assignment, or where supervening troubles disrupt either willingness or power to perform.

Risk, Remedy and Security Devices

It has been mentioned that this legal insurance is commonly accompanied by an element of legal risk. What the law official will enforce is what he sees as the legal obligation. An agreement that to a business man calls for shipment of goods as close as conveniently possible to those described, with (as of course) price adjustment for defective deliveries, and return only of unusables, and replacement of those—this agreement means to a court that the seller is to comply with the description precisely, or have no rights at all. What a buyer will curse at not getting, on a rising market, he can then reject with impunity if the market falls; yet this very risk of the market is one which the deal was intended to shift to him. So also agreements to renew indebtedness, relied on as of course by business men, are commonly unenforceable at law; while business understanding very commonly admits wide cancellations of legally enforceable contracts to buy. It is true that “business understanding” of what an agreement means, and indeed of whether an agreement exists, is by no means unambiguous, and not always adjustable. It is not alone wilful default, but honest difference of opinion, which lead to disputes, and which leave some proper room for law officials. Both ways and norms of business practice may be firm at the center, but they are hazy at the edge; they offer little sureness to guide in dealing with the outside and unusual case.⁴⁵ For all that, it demands insistence that when the law

⁴⁵ (1) As the base-line to measure non-legal obligation I take the practice of the time, place and trade, save so far as the parties are shown to have agreed on some variant. This amounts to double-barrelled objective interpretation of words and acts: an objective reading of the whole situation to get the base-line, an objective reading of words and acts for trace of a variant. This would correspond roughly to reading words at law first in the

light of trade usage, second in the light of the common meaning to the hearer and the course of dealing of the parties. Only that at law one begins with the words, not with the practice. (2) But legal and non-legal obligation differ strikingly on another and crucial point. The law always reaches for and commonly approximates some single definite manner and quantity of performance as the measure of the obligation. The measure is to be fixed and inflexible from the time of contracting. And what one party is entitled to demand is made to coincide precisely, if possible, to what the other party is entitled to tender. Options, if made express, are recognized. But they are anomalous. They are even embarrassing. To recognize them as implicit requires effort. Whereas non-legal obligation is in essence flexible within wide limits, and remains flexible even after the agreement has been made. It runs not in a line without width, but in a belt or range of permissible performances. What is due, what can be demanded, what can be offered, is anything within the belt-limits. There is in addition a range within which one party or the other or both can demand an alteration of terms, which will shift the whole belt of performance; this may run to delay, to shift in quantity or quality, even to outright cancellation. So that pending performance either party can take the initiative in fixing performance more narrowly. The seller, by tendering a delivery within the permissible limits (or by demanding a permissible alteration). The buyer, by specifying what he needs, precisely (or by demanding a permissible alteration). Before such narrowing, the range of proper performance is much wider than is commonly recognized at law. Even after such narrowing, say by the buyer, it may still be wider: for even timely specification leaves the seller such leeway as practical reason requires for a seller in the circumstances. That what we have been accustomed to think of as habit, or custom, or folk way, or practice, or institution is not a line-concept, but a belt concept, with an important range of variation, seems to me the most vital demonstration in the penetrating investigations of Underhill Moore into banking practice, the result of which are now appearing in this JOURNAL. But his results seem to me to show no less that there are two ranges in each case: an inside range of permissible (unobjectionable, unnoticed, not-adversely-reacted-to) variation, and an outside range of the non-permissible (objectionable, noticed, adversely-reacted-to) variation. (3) Practice is, however, rarely marked definitely enough to set a clear standard for judging unusual cases. And circumstances vary cases. It may be savings bank practice to hand out money on call, despite the 60 day clause. Is the clause therefore to be regarded as unavailable in case of run or money stringency? A given trade may recognize unlimited cancellation as of right, in the ordinary course. But in the ordinary course cancellations of different buyers do not pile up. Is the freedom to cancel to be regarded as holding equally in a cataclysmic market? One main business of law is to set, to *create*, norms for such cases of conflicting or uncertain expectation; equally so, whether it be the law of the state or the by-law of the group. But such norms can be created wisely only in the light of the standing practices to which the new norm will be added, or on which it places a limiting definition. Hence one huge value of the informed court-of-the-trade which knows and feels this background, *i. e.*, of the specialized as contrasted with the unspecialized arbitration tribunal. See 15 AM EC. REV. 674 ff. And if the state's court is called on for the purpose, it must either act in the light of those practices, and feel its way into their purposes and presuppositions, or else be arbitrary in its results. Application of fixed rules of contract-at-large has sense only when the case is so far removed from the run of affairs that the decision cannot be regarded as having prospect of shaping future deals;

official does take hold he is likely to begin with a wholly non-customary reading of the obligation and work from that bias.

And if the commercial and legal understandings of whether and what performance is due should fully coincide, the legal security of the obligee would still show holes. A contract is no equivalent of performance; rights are a poor substitute for goods. Holmes long ago noted that in the pinch the measure of what a contract means is its meaning to the evil-minded person. We know (but we so often gloss over) that the contract as such gives rights only against the promisor in general, and rights enforceable only out of his general assets; in the event of the obligor's bankruptcy, the right is reduced to ratable sharing with other general creditors. There are devices, illegitimate but effective, for concealing assets. There are startling statistics on extent and amount of dividends in failure.⁴⁶ The remedy at law, then, good in the one case of need—wilful breach—becomes dubious in the other case of need—economic distress or dishonest bankruptcy. The results leave it dark as to how far legal enforceability is in truth a factor in the *initial making* of future commitments and in the giving of short-term credit. They leave it even darker as to how far such influence as is exerted on either is to be regarded as healthy. On the simpler question, the whether or no of influence, severe caution is indicated. That commercial law may only touch the surface of a sufficiently prosperous economy is suggested, *e.g.*, by the development and the substantial persistence until 1910 in New York of as maladjusted a complex of rules on sales of goods as we have had. In a few cases, such as the letter of credit litigation in the decade following 1920, the inference is indeed unmistakable that the law has strengthened the business credit instrument and given it further soundness. Yet the example is inconclusive; it is picked from a field of peculiarly long-range and indirect con-

and then only when speed of judicial administration outweighs the chance of injustice to the litigants. And to conceive the application of such fixed rules to make for "certainty" is to confuse certainty to the lawyer in litigation with approximate certainty in life to the people for whom law exists. See Llewellyn, *Law and the Modern Mind: Legal Illusion* (1931) 31 COL. L. REV. 82, 87. (E. W. Patterson contributed much to the clarification of these suggestions.) As so often, Holmes marked the trail: "Business men who deal with elevators can hardly be supposed to have in view the legal machinery by which the result is worked out; but if as we suppose they have in view that result, it is the business of the law to carry out their intentions, if it can." *Grain Elevators* (1872) 6 AM L. REV. 450, 471.

⁴⁶ The N. Y. Times of Jan. 19, 1931, carries calculations by the National Association of Credit Men based on the Attorney General's report, to the effect that although in the fiscal year ending June 30, 1930, recoveries in bankruptcy averaged 8.63 cents per dollar as against 7.51 the year before, net losses went up 49 millions because the total debts in bankruptcy had risen from 817 to 866 millions.

tract, and from one where peculiar financial security is expressly bargained for. Nonetheless so much is sure: legal enforceability is sometimes a factor in inducing performance by a debtor; a salvage factor it always is—on bad risks, however, whose badness it may itself have contributed to begetting. Remove the legal sanction and men will give credit with more care.⁴⁷

It is at this point that the law of contract again makes contact with the law of security. From an economic angle, bargaining for "security" is an intensified case of the security provided by legal enforceability alone. For it looks to cover in part the exact risks mere contract rights leave open. The secured creditor obtains beyond his general claim a right to satisfaction out of specified assets of the debtor; he obtains moreover a right which can be partially protected against fraud.⁴⁸ The

⁴⁷ Speculation is unfortunately much easier than finding out, as well as less useful. The question runs in terms of relative quantities. Is there enough stiffening of performance-drive by the totality of legal pressures, *after* contract obligations have been assumed, to offset the effects (occurring *before* contract obligations have been assumed) which reliance on anticipated legal pressures may have in lessening credit-caution and credit-judgment? Both phases of possible legal effect are intangible, on present knowledge. The first is a step closer to tangibility than the second. My own guess is that in the main writers, both legal and other, tend to overestimate heavily the effects of law in either aspect; but that on the other hand any layman who ever gets to considering the effects of law in his own case is likely then to let the idea of it influence him for more than it really is worth. My guess is, too, that no general statement about "contract" or "credit" will in this matter be worth anything; even uninformed common sense shows huge differences to be probable between investment and commercial credit; similar differences within each field, etc., are certainly to be expected as well. And my guess is, further, that the real major effect of law will be found not so much in the cases in which law officials actually intervene, nor yet in those in which such intervention is consciously contemplated as a possibility, but rather in contributing to, strengthening, stiffening attitudes toward performance as what is to be expected and what "is done." If the contract-dodger *cannot* be bothered, if all he needs is a rhinoceros hide to thumb his nose at his creditor with impunity, more and more men will become contract-dodgers. Only saps will work, in an economy of indirect, non-face-to-face contacts. And as between individual enterprises, the competition of the contract-dodger will drive the contract-keeper into lowering his own standards of performance, on pain of destruction. This work of the law-machine at the margin, in helping keep the level of social practice and expectation up to where it is, as against slow canker, is probably the most vital single aspect of contract law. For in this aspect each hospital case is a case with significance for the hundreds or thousands of normal cases. Of course "contract-law" in this aspect includes importantly such phases of the criminal law as touch fraud, etc.; relative importance I cannot even guess at.—On the other hand, any fields in which drafting looms large are fields which suggest a more direct influence of law.

⁴⁸ This presupposes effectiveness of the security devices employed. Certain ones of them, moreover, such as the trust receipt and the "equitable pledge," lack the protection against fraud. They reach only for coverage

primitive form of security (pawn) requires transfer of possession to the creditor; the more developed forms (mortgage, pledge of bills of lading, *e.g.*) can transfer rights without disturbing the physical things concerned. But it needs note that sociologically, and wholly irrespective of legal doctrine (doctrine, *e.g.*, to the effect that *property* rights in specific things *have been* transferred), the law of security here merges with the law of contract; rights realizable only at a future time and unaccompanied by present enjoyment are own brothers of contract; their enforcement in case of delinquency is likely, too, to require legal process, or at least that regularized self-help in which the primitive form of action "at law" persists. The same holds of important portions of the law of trusts, and of relationships generally which are affected by agreement (agency, bailment, and, as has been indicated above, corporation) whether or not associated with phases of property. The extent to which such legal concepts do and can overlap in their function, according to historical conditioning, of which much is accidental, is illustrated by observing how little inherent necessity there is in our Anglo-American limitation of security rights to "property," *i.e.*, fixed interests in specified assets of the debtor. Our own system knew, and may know again, a time when certain classes of debts (specialties) took (as series A bonds might, in a blanket mortgage) general preference in the general assets of an individual, and approached "property" by that much. And whereas the German *Grundschild* (as, occasionally, our own "equitable lien") is almost purely a property concept, in that it gives security in land up to a fixed amount although there is no personal debt to secure, the English floating charge can be so set as to be not too far removed from a first claim on income and in insolvency, quite apart from immediate rights in any specified assets at all. The judgment note provides in some of our states a general lien on all lands of the debtor within the county, which, despite spatial limitations, is curiously unproperty-like before any land has been bought. Nonetheless, the idea of security being a "property" matter is firmly enough ingrained in our legal system to have results, and to force lawyers who are seeking security to keep the specific (and present) character of the assets subjectable in the forefront of their minds. Similarly, the mere contract creditor must reckon with the possible elimination from the general estate of an insolvent of all its vital assets, by way of security to others. Which would be too obvious for mention if it did not again raise the question of how far *mere* enforceability of contract at law plays a part in current future deals.

against honest insolvency.—"Partially protected," in the text, because theoretical rights against third parties presuppose finding the goods in fact, after wrongful disposal.

Future Deals, Property and the Spot Market

Irrespective of that question, it is clear that current future deals themselves, in their effect on the arrangement of economic affairs, lie half-way between mere reliance on the general spot market for either supplies or outlet, and property-wise assurance of either outlet or supply by vertical integration. This, as to goods, whether they be viewed as supplies or as merchandise. On the side of services the situation is quite similar, but rather more complex. Between "own unit" organization (property plus an ownership and management set-up framed in good part on contract, plus exclusive control of "agents" under a contract set-up, and of a standing force of labor) and the rather uncommon mere reliance on the general spot market (calling in the plumber or the doctor for immediate action in emergency) lie a short range letting out of individual jobs (contract to roof a house) and a standing-relation contractual letting out of particular types of service (insurance coverage, deposit account, legal or advertising counsel). Perhaps the same can be said as to the supply of and outlet for working funds; yet when one is again tempted to assume legal contract or even factual promises as an utterly essential feature in our economy, it challenges attention that so much of current financing proceeds on flexible and revocable "understandings" as to line and conditions of credit. And such flexibility is a marked trend in marketing of goods as well, wherever long-range buyer-seller *relations* come to seem more important than exact definition of the risks to be shifted by the particular dicker in terms of quantity, quality, or price. Output and requirement contracts, maximum and minimum contracts, contracts with quality, quantity and kinds to be specified from month to month, and sliding scale price arrangements—these are symptomatic of an economy stabilizing itself along new lines.

Contract and Government

But the power of contract is not pent within economic confines. At need the directly economic aspects can without too great harm be slighted, as the most familiar, as the easiest to see. Not so the others.

Much of the growth of law itself is surely traceable to bargain. Originally and still, arbitration of differences is by agreement. Out of a practice of arbitration, originally and still, official tribunals grow. Out of the results of arbitration, or of compromise, originally and still, come norms for future cases. Our jury trial of fact-disputes was introduced by this same process of agreement—though under vigorous urging of the Crown's of-

ficers.⁴⁹ Nor can one overlook the processes of constitution-making, or of legislation.⁵⁰ There is, too, "the social contract" as a vital concept in political theory and political life (by "vital," I mean a concept which has vigorously influenced men's actions). And if George Burton Adams' interpretation can be trusted, a sort of social contract, the feudal constitution-making dicker between King and vassal, was one of the living forces of English constitutional, legal, even social life.⁵¹ Moreover, quite apart from arbitration as a preliminary stage in inter-tribal,⁵² international or industrial government, there is the importance of treaties as a major base of international law, and of group-bargain as a basis of industrial (and commercial) relations. In the international field the relation even to the technical law of contract is intimate; interpretation relies peculiarly on private law analogy. The industrial aspect carries us into another sphere, not that of legal contract theory or technique, but that of the social and political effects of contract, and especially of contract as an instrument of unofficial government.

Group Self-Government and Contract

First, unofficial *self*-government. Official government, despite its bewildering modern complexity, reaches patently but a minor

⁴⁹ "Agreement" does not even today carry any necessary connotation of real willingness. Acquiescence in the lesser evil is all that need be understood. The problem of "reality of consent" is essentially one of determining what types of pressure or other stimuli are sufficiently out of line with our general presuppositions of dealing to open the expression of agreement to attack. "Economic duress" is still the order of the day save for particular exceptions (usury, equity of redemption, duress of goods). Both bona fide purchase for value after fraud, etc., and unwillingness to recognize economic duress, seem to me impregnated strongly with recognition that life and transactions must after all go on, upon whatever basis we have at the moment. The one stresses highly legitimate expectations; the other protects what may be conceived as illegitimate expectations; yet a solid common core they have. In less sophisticated law the same common core is again apparent, although coupled this time with the power of word-magic or form-magic. If you have sealed and delivered, you are bound. Unless you plead in words to the indictment, you simply cannot be tried. You can be put to the *peine forte et dure* (life must go on! ours, if not yours) but that produces neither trial nor conviction.—And compare the terrific social pressures used to break down the one dissenter in one of the Slavic group-householders, where unanimous—(verbal!)—consent was needed for new action. Truly "agreement" is an elusive concept. Yet it will not do to judge of the bulk importance of rather solid real consent by these marginal cases. See *infra*, in connection with System. And see especially 2 WEBER, *op. cit. supra* note 6, RECHTSSOZIOLOGIE §3.

⁵⁰ Weber mentions the budget.

⁵¹ ADAMS, ORIGIN OF THE ENGLISH CONSTITUTION (1920), esp. 167 ff. and notes. Social effects are to my mind a necessary inference from the author's position.

⁵² VINOGRADOFF, *op. cit. supra* note 12, at c. X.

fraction of the affairs of men in society. And on the side of law it expressly leaves most of what it does not touch⁵³ open to self-regulation—in good part, by “contract” (bargain, agreement, initiative and acquiescence). It is convenient, for purposes of description, to take over a distinction the European legal thinkers have marked much more sharply and consistently than is common with us: that between iron rules of public policy (*c.g.*: there must be consideration or a seal to make an agreement enforceable; agreements running counter to the criminal law are unenforceable) and the “yielding” rules which hold if, but only if, there is no expression to the contrary.⁵⁴ These latter rules

⁵³ As always in such discussion, I refer to “reaching” or “touching” with some discernible directness. Hale’s insistence (*op. cit. supra* note 8) on the really pervasive character of the indirect effects of putting governmental force at the disposal of the Haves as distinct from the Have-nots is never to be lost sight of. But it complements and does not contradict what is here argued: that the *ways* of working inside the field thus marked out are not touched by direct state government.

⁵⁴ Our own distinction seems to me less clearly marked, first, because “public policy” has been known to be mentioned in the process of “construction;” second, because both kinds of rules are often referred to indiscriminately as rules “of law” (*cf.* the sad confusion over whether “the common law” is subject to abrogation by “custom”—surely a confusion that this distinction, if taken, would clarify forever); third, because the second type of rule travels with us under a variety of names—rules of construction, rules of presumption, etc.—which cannot with safety be taken as wholly synonymous in any given context; and finally, because we have no unambiguous accepted term at all to designate the first kind of rule. In a word, we know the distinction, and it fits our law; we use it constantly, but we have not systematized its use. This makes a case for borrowing. And I think it should be added: nothing less than this does make a case for outright borrowing. It is high time that American legal thinking should arrive at a conscious and sociologically defensible working position in regard to European legal thought. We have flea-jumped back and forth between the extreme of deliberate ignorance and uninformed contempt or dismissal, and the opposite extreme of undigested indiscriminate gulping. There is little profit in either. It is almost universally true that our case-training and earthy *ad hoc* legal sense offer important addition to a continental theory. It is very commonly true that even a wholly sound continental theory calls for remodelling in the light of our own data before it is adequate for description of our law or of the processes of our law. It is also very commonly true that even an unsound continental theory holds stimulus for the understanding of our law. It is, then, distressing when our foremost and least tradition-ridden jurist takes over for purposes of conflicts questions a Roman concept of *obligatio* which lumps the post-wrong situation in tort indiscriminately with the quite distinguishable pre-wrong and post-wrong situations in contract. (This, very curiously, despite a better insight, earlier. *The Arrangement of the Law* (1872) 7 AM L. REV. 46, 6 on. 1 (paternity acknowledged by personal communication)). The home-grown color of his mind appears in its true creative power when he cuts through the same notion of obligation and through that of duty, as in the passages quoted *supra* note 39. Such an insight would be an achieve-

Isaacs has well described⁵⁵ as themselves making up an official standardized contract on a whole series of matters (pledge, sale, partnership, etc.) subject to alteration by the parties. They result in a curious and most useful combination of the values derivable from status and from contract. Status-values, in that a full set of obligation-incidents are available, worked out in advance, to cover the hundred points the parties have had neither time nor experience to consider. The pattern, almost complete, is given. One can "adopt" the whole, as a going whole. But contract-values, in that entrance on the state is voluntary,⁵⁶ and especially in that a huge range of particular modification and adaption is available—to any one with experience and skill to exploit the possibilities. When one adds the field not covered in advance by well-settled rules, but open to coverage by the parties, he finds available for use in self-government an impressive apparatus. There is the large, though limited, number of "contract" or relation patterns, well worked out. There are certain established conditions and limitations on the use of each pattern—yet the use of each is left highly flexible. There is, to be sure, an observable tendency to regard the basic accepted patterns as exclusively covering the whole field: if this is not "a sale" it must be "an agency;"⁵⁷ if not "a share of stock," it must be "a debt," or else be nothing⁵⁸ (compare the Roman nominate contracts in their prime). But there is a no less observable counter-tendency to enforce many novel types of bargain more or less as made.

Yet Ehrlich has soundly argued that *legal* contract is in this situation but a part of the picture. As contract to government, so mere agreement-in-fact to contract; so also usage to agreement-in-fact. In the self-government of sub-groups contract provides an original frame-work, a constitution, a source of ultimate sanction in dispute or break-down. From the articles of association we learn that there are to be two trustees or ten, that there is to be one secretary-treasurer or two offices to fill; and if there be a row over management policy, or dissidence in the church, the articles of association will for the crisis loom into importance. But for the running of affairs they say

ment anywhere; but we might hope in advance for a thinker who could do it, whereas the continent would have to take such a thinker as a surprise. Their strength lies along other lines.

⁵⁵ *Op. cit supra* note 3.

⁵⁶ Here, however, one must dissent vigorously from Holmes' incautious dictum: "As the relation of contractor and contractee is voluntary, the consequences attaching to that relation must be voluntary." *THE COMMON LAW* 302.

⁵⁷ *Cf. Klaus, Sale, Agency and Price Maintenance* (1928) 28 *Col. L. Rev.* 312, 441.

⁵⁸ *Cf. Note* (1928) 28 *Col. L. Rev.* 65 (Heymsfeld).

but little. The play of personality, the unrecorded adjustment from day to day, further factual agreement from time to time, informed by usage, and by initiative and acquiescence which do not even call for conscious agreeing—these are what fill the contract frame-work with a living content; these are what often so stretch and overlay it as to make the initial contract a wholly misleading guide to what occurs. Law and practice of corporations, factories, trade-unions, churches and households thus differ as do law and practice of the Constitution.

Government of Some by Others

Where the "self"-governmental bargain is driven between parties who are consciously in partial opposition (labor and employer; insured and insurer; as contrasted with formation of a family corporation or, perhaps, a cooperative) the legal aspects of the bargain take on peculiar importance. Trouble is in the offing. Law is more likely to be called upon. At the very least, appeal to the group-constitution is more likely. Where bargaining power, and legal skill and experience as well, are concentrated on one side of the type-transaction, even more so.

Standardized contracts in and of themselves partake of the general nature of machine-production. They materially ease and cheapen selling and distribution. They are easy to make, file, check and fill. To a régime of fungible goods is added one of fungible transactions—fungible not merely by virtue of simplicity (the over-the-counter sale of a loaf of bread) but despite complexity. Dealings with fungible transactions are cheaper, easier. One interpretation of a doubtful point in court or out gives clear light on a thousand further transactions. Finally, from the angle of the individual enterprise, they make the experience and planning power of the high executive available to cheaper help; and available forthwith, without waiting through a painful training period.⁵⁹

Where skill and power enter on one side only, however, the situation changes. Law, under the drafting skill of counsel, now turns out a form of contract which resolves all questions in advance in favor of one party to the bargain. It is a form of contract which, in the measure of the importance of the particular deal in the other party's life, amounts to the exercise of unofficial government of some by others, via private law. The current installment contract for a pleasure car, or the current forms of banker's collateral note are one-sided enough in all conscience. Yet it is only in odd cases that their lop-sidedness gives rise to

⁵⁹ This is not without its dangers to the standardizers. Forms can be used in error.

government. The "servient" party⁶⁰ has other holds for hand and foot. Residence lease and oil lease begin to grow more vital to the low contracting party. Factory employment, employment in a company town or on a sugar beet farm, or farm-lease in some share-cropping districts—these press to the point where contract may mean rather fierce control.

Such pressure toward control means pressure toward remedy. Yet the courts have been slow to see what was needed, or to find means to fill the need. Beneath the surface of the opinions one feels a persistent doubt—one feels it even while interference proceeds—as to the wisdom of any interference with men's bargains. Transactions must be certain. Where to draw the line? Especially does the observer feel a timidity in the courts about admitting any *power* to interfere, when no ready means appears of setting wise and definite limits to the interference. How different is the sure boldness with which an equity of redemption will be maintained despite all contract words (the outside edge to which the court's axe will chop is already clear!) from the tortuous approach to farm-machinery contracts,⁶¹ or even to the bond of the professional surety company. Hence in the main we have our interference case by case. And in the main it moves by way of "construing" the particular language in question not to have intended the result it did intend. Life insurance is perhaps the classic instance. This procedure saves the lesser bargainer for the moment, and salves the court's conscience both as to justice and as to policy. Yet a specious salving. Such "construction" kills security in transactions, if "security" means predictability of actions at law. No man is safe when language is to be read in the teeth of its intent. Nor is even the party who is being protected safe, this side of final judgment, in having got what he thinks he has bought (the "life insurance as a commodity" suggestion). For such "construction" often enough defeats itself. It begins by admitting power in the parties (in the dominant party) to make their dicker as they wish. Sooner or later that admission will be taken seriously; sooner or later men will be held to the very type of thing which prior courts have conceived as too outrageous to be admitted as intent.⁶² Meantime the greater bargainer, de-

⁶⁰ Wright, *op. cit. supra* note 8; and *cf.* Morris Cohen, *op. cit. supra* note 8.

⁶¹ Note (1928) 28 COL. L. REV. 466 (Heymsfeld).

⁶² I should have no criticism of this case-to-case procedure if it were directed at what seems to me to be the true issue: finding and marking out type-situations in which limits of permissible bargaining require to be laid down; or finding and marking out types of parties who require to be limited in their bargain-play with each other—and then spotting what the needed limitations are. With such an objective the case-to-case procedure can work to beautiful results, avoiding premature definition, accumulating ex-

feated once and again, recurs to the attack. After each case he⁶³

perience, yet meeting current needs. But in the newer lop-sided contracts the courts make little headway in the process *because they do not see the goal*. Contrast with this the successive struggles over establishment and preservation of an equity of redemption. Contrast—almost unique among the newer contract forms—the refreshing judicial attempts to discover limits below which the trustee of a corporate mortgage simply lacks power to contract out of responsibility. Cf. Posner, *Liability of the Trustee under the Corporate Indenture* (1928) 42 HARV. L. REV. 198; and cf. *In re Fulton Trust Co.*, N. Y. L. J., June 25, 1930 (N. Y. Surr. Ct., 1930). Against such soundly oriented groping set, e.g., the seed-warranty cases. Cf. 12 CALIF. L. REV. 523 (1924); also LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930) 260 ff. To me it seems clear that the essential purpose of the non-warranty clause is the avoidance of consequential damages measured by lost crops. Such a purpose is intelligible and legitimate; whether it offers the best machinery of risk-distribution is not now the question. But surely it is equally clear that the buyer is entitled to something and that what he is entitled to should at least resemble in appearance the seed ordered, and, finally, and at least on pain of price refund, that he is entitled to diligent efforts by the seller to see that what is delivered fits the description under which his order was given—if not filled. One might properly add a *res ipsa loquitur* rule as to breach of duty when alfalfa turns out to be turnip. The proper judicial aim seems to me to be here the fixing—as in the mortgage situations—of a basic minimum which the bargain carries merely by virtue of being a bargain of that type. But that would imply a limitation on contractual capacity, an idea that raises prickles on the scalp—wherever tradition has not already hallowed it. Hence the seed cases wander back and forth between the sudden imposition of consequential damages despite the clause, by virtue of some accident which closed the negotiation before the non-warranty took effect, and flat refusal of recovery, apparently of any sort, because the non-warranty bites in. Interesting is the English use of the distinction between warranty and condition to evade lop-sided drafting in such cases.

⁶³ Too late for remedy I note that this whole paper is thrown off center by failure to carry throughout the discussion an awareness of the *group-wise* (as contrasted with an individualistic) structure of society. What is needed is constant discrimination between (1) single individuals and what can commonly though not always be lumped with them, household units; and (2) groups, *i. e.*, numbers of individuals organized into some interlocking unity of action; and (3) classes, *i. e.*, numbers of individuals in like circumstances, with like interests, reacting in much the same way to like stimuli, but not organized (domestic consumers of sugar, *e. g.*, as distinct from a consumer's cooperative.) And as to groups, a distinction must be carried through (a) between fairly permanent group-building (a going business corporation) and semi-antagonistic corporation for the moment (the single bargain); and the steady-customer relation lies half way between; indeed, even the customer-to-be-expected is in one aspect part of the selling group—*cf.* legal recognition of goodwill); and (b) between the managing personnel of a group the working personnel, and the more inert group-public (*e. g.*, absentee stockholders). An effective and sustained integration of such a view of group-wise structure with the subject of the paper, and of both together with the property-system, is difficult not so much because it leads to any overwhelming complexity as because our knowledge in each field is traditionally cast in words whose whole suggestive force runs toward excluding other and no less familiar bodies of knowledge from simul-

can redraft and fight again. A single victory, if achieved, has good chance of being permanent. Legislative intervention, prohibiting certain clauses and prescribing others, may remedy this. If it survives. For it does not "construe," it prescribes, it limits contractual capacity, and so comes under attack for unconstitutionality along the same lines of thought and decision which have made recourse to the legislature necessary.⁶⁴ Where admitted, legislative action offers the great value (as in the insurance and labor instances) of possible limitation to definite matters in which regulation is shown by experience to be needed. A result less easy of accomplishment under the common law—as long as men drive on in the search, at all hazards, for broad and verbally simple rules. Even where both courts and legislation fail, competition may—as somewhat in the cases of life insurance and the oil lease—contribute toward readjustment of the bargain along more balanced lines. In general, however, the tendency when standardized contracts are used has seemed even in such highly competitive spheres as installment sales, residence leases, investments, and commercial banking to be rather the borrowing and accumulation of seller-protective instead of customer-protective clauses. A *fortiori* when, as in the labor field, competitive pressure on the bargain-drafter weakens.

Unenforceable Agreements

Any attempt by officials to take account of the social implications of agreements, to stir any other policy-flavor at all into the universal soup-stock of "give 'em what they've called for," cuts into the broader field of the use of law to enforce or buttress taboos on particular types of conduct. The widest *laissez-faire* will find some limits in the criminal law. Even in racketeering, distinctions are recognized between establishing and pirating the established. But surely there are few features of our system which bring out more sharply the need for getting on, on the one hand, and the feeling of normality, almost inevitability, of legal promise-enforcement, on the other, than the attitude of the civil courts toward agreements which run counter to the criminal law. If performed, the performance stands. *Par delictum* is a respectable rationalization in any scheme of things which puts the burden of inducing action on the plaintiff; it may also have been a cause. But surely the ground-tone of the letting alone is the same which runs through accord and parol satisfaction of sealed obligations, through the law of de facto officials, of payments under mistake of law, of bona fide purchase, of res judi-

taneous consideration. So, peculiarly, the vicious heritage of regularly viewing "parties" to a deal as single individuals.

⁶⁴Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454.

cata, and of vested rights. *We must get on.* We cannot be forever reopening.⁶⁵ On the other hand, the executory illegal agreement is unenforceable. *Par delictum*, or refusal of law officials to lend themselves to action counter to law's policy—neither reason nor rationalization bulks so large as the obvious sense that here a penalty on action is being inflicted by withdrawing what *as of course* could otherwise be had, what *as of course* men are conceived to desire, and count on, and be worried at not getting. All of which etches even more sharply when one comes to agreements unenforceable merely as counter to policy—to support a mistress, to induce another to break a contract, to restrain trade unreasonably at common law. And here it pays to distinguish whole-hog unenforceability from the approach discussed above, that in terms first, of adverse “construction” when the content of a clause seems socially unwanted, and second, in development of the same approach, the knocking out of single clauses in particular transaction-types: clauses barring suit for carrier's negligence and the like (and compare statutory limitations on wage-assignments). In these last the policy is equilibration of the bargain, not discouragement of the bargain-type. The road is via “If, then,” not via “No;” via limitation and not denial of capacity. One suspects, too, a psychological similarity with that positive approach to public policy which still plays its due part in our law: the seizing on an express promise to help toward enforceability of an obligation felt, but not yet felt strongly enough to stand alone. I have mentioned above the cases on natural objects of bounty. I am no historian; but I seem to find a similar situation at the opening of the 17th century, when antecedent requests not yet adequate for tacit contract or quasi-contract were being made “consideration.”⁶⁶—How much effect the flat “No” rulings have, in the large, is dubious indeed, except as inducing bribes, for instance, to insist on cash.⁶⁷ The

⁶⁵ Compare Holmes' illumination of limitations and prescription. COLLECTED LEGAL PAPERS 198 ff.

⁶⁶ Cf. *Sidenham and Worlington's Case*, 2 Leon. 224 (1585); *Bosden v. Thinne*, Yelv. 40 (1603); *Lampleigh v. Braithwait*, Moore K. B. 806, (1616). AMES, CASES ON SURETYSHIP (1901) 498, 533, shows indemnity and contribution recognized in 1687 by the custom of London—i.e., in established non-legal obligation; indemnity in Chancery in 1632; contribution strongly suggested in the Court of Requests in 1613, and certain in Chancery in 1629. In these cases, as in quantum meruit, it therefore shortly became unnecessary to worry about the promise as “having reference to the first request.” And it may be suggested that the introduction of the request idea at all was only a somewhat inept way of search, first for a rationalization, and second for a delimiting objective mark (*Hunt v. Bate* stood in the way) in regard to a development still groping for direction.

⁶⁷ The case of usury has been most discussed. See RADIN, THE LAWFUL PURSUIT OF GAIN (1930) c. II and citations.

bearing of the cases seems rather to be on the ideology of courts as to their office, and on some processes of case-law growth.

Conclusions on the Place of Contract

In the more clearly vital field of lop-sided standardized agreements, it is obvious, but needs eternal emphasis, that the life-meaning of the legal set-up is affected seriously by factors other than the remedies directly available at law. An insurer, though discharged at law, may reinstate the policy, may even pay, as a matter of business policy. A landlord or banker may never resort to his ironclad document save when for extraneous reasons the other party proves unworkable.⁶⁸ Meticulous insistence on every detail of a construction or even merchandizing contract can almost be guaranteed to force the contractor into default. The problem is therefore seldom one of a practice of tyranny (contrast the loan-shark). It is rather a problem of legal power which makes tyranny possible at arbitrary will—a terrific instance being the dispossession of the customary tenants by the highland Scottish clan heads, as legal owners.⁶⁹ On the other hand, the legal remedy directly available may not even suggest the extent of the legal power which derives from an ideology of "contract" in a given situation. The impairment of contract clause and the liberty of contract conception protect from governmental interference not only existing contractual advantages but mere expectation thereof, and protect them equally in cases, such as agreements with wage-earners, where the direct legal remedy may be illusory. So also (*e.g.*, as against attempts at organization of a shop) with the injunction against "inducing breach," which has in some courts carried over even into such cases of employment at will as in themselves no lawyer would admit to constitute "contract" at all.⁷⁰

To sum up, the major importance of legal contract is to provide a frame-work for well-nigh every type of group organiza-

⁶⁸ Ehrlich mentions the Prussian domain leases as thus administered, but the question would remain, whether, *e.g.*, political opinions might not show the man to be unworkable.

⁶⁹ Jeurwine's account, *THE FOUNDATIONS OF SOCIETY AND THE LAND* (1918) c: XXXVI, however tendentious, seems substantially trustworthy. The instance involves neither standardization nor contract, but the substitution of an individualistic concept of title for the status-relation of clan chief. Yet the application to any wide divergence of the legal from the non-legal situation on the same facts is clear.

⁷⁰ Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663; *cf.* FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930). For a contrasting example of contract ideology taken over cannily, open-eyed, and used for all it could offer, but without the user being at all misled by it, see Holmes' opinion in *Wisconsin & Michigan Ry. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107 (1903).

tion and for well-nigh every type of passing or permanent relation between individuals and groups, up to and including states—a frame-work highly adjustable, a frame-work which almost never accurately indicates real working relations, but which affords a rough indication around which such relations vary, an occasional guide in cases of doubt, and a norm of ultimate appeal when the relations cease in fact to work. The trend toward standardization, despite its values where power is balanced, raises doubts as to policy where its effects are lop-sided, because the norm of ultimate appeal is then so tremendously deflected to the one side. The direct legal sanctions are not the major measure of importance. Their effect as a threat is uncertain. In the credit field, they break down in the case of greatest need, unless strengthened by security. And indirect sanctions—at least in the case of “inducing breach”—or indirect effects by way of ideology and marginal operation, may lie close to the heart of the protection sought.

III. SOME TECHNICAL PHASES AND THEIR BEARING

Primitive contract law, whether because economic ideas are undeveloped or because legal machinery is clumsy, is affected strongly by elements of vengeance—which obviously presupposes the *Schuld* idea—and of high forfeit—which as has been indicated carries no such necessary presupposition. Seizing the debtor's body; even, very early, killing him; debt-slavery; penalties and forfeitures; “taking it out of his hide”—these have persisted into modern times. With prohibition of slavery and peonage, abolition of imprisonment for debt, refusal of courts to enforce penalties although expressly agreed upon, all buttressed by usury legislation and limitations on the transfer of wages and future property, modern law moves definitely onto the basis of reparation for breach as the main purpose of legal remedy. Specific reparation—which, it will be noted, presupposes that the defendant has the wherewithal to perform—we have limited largely to the case of land. In the case of irreplaceable personal services we seek a compromise with the peonage-prohibition by enjoining against a competing employment and against inducement. The normal remedy for breach—which means its normal meaning in law—remains for us damages. Our trouble is chiefly that our rules have so over-rigidified (especially on the amazingly naive assumption of a frictionless market) that the remedy is often inadequate, even when realized. The rules in Germany and the legal practice in England, allowing the plaintiff to go on the market and cover, and then to hold the defendant to compensation thus measured, offer a fairly adequate adjustment; one, too, which our courts permit parties to

achieve by a proper clause—provided they know of the need, and can think how to meet it. But in any event there will be a delay in reparation for which legal interest is no compensation to a business man. Even apart from insolvency of the obligor, therefore, the legal remedy continues to appear as in essence a last resort device, adequate only to assure the promisor that all *he* can gain by breach is delay. This can hardly be regarded as deterrence from breach. The heavy drive toward actual performance must thus be sought outside the law; though the law, *e. g.*, by way of an ideology of “duty” in general, and “legal duty” in particular, does undoubtedly contribute to such outside drives.

Such a view is reinforced by the customary performance in fact of legally nugatory or unenforceable promises—a practice ingrained as to some types (“firm” offers, oral modifications of formal writings), more frequently found than not as to certain others (promises to provide for dependents), and widespread as to many other types (repayment by a discounting endorser discharged by delay in protest, etc.) In no legal system are all promises enforceable; people and courts have too much sense. In all legal systems the effort is to find definite marks which shall at once include the promises which ought to be enforceable, exclude those which ought not to be, and signalize those which will be. On this third side particular forms and rules are likely to continue effective even when they have ceased to serve the two other purposes. And obviously, of wise inclusion and exclusion, one may be well done when the other is not. In the wide open spaces where seals were seals, and certainly after duress, fraud and the like had become cognizable in Chancery, the likelihood is strong that the seal made an excellent positive test for enforceability, and certainly at common law a clear one.⁷¹ The same holds of such other obligation forms as recognizance, or in Europe the formal recording of an obligatory writing by a notarial officer.⁷² But certainly as to the seal all assurance that the

⁷¹ Of the Roman nominate contracts the same holds. The truly formal contracts, standardized on form alone, correspond to our seal. The nominate contracts, standardized on type-situations (sale, loan with transfer of title, bailment) correspond rather to our relations giving rise to actions: debt after delivery of goods, or money, detinue or case out of bailment, assumpsit out of agency, warranty in conjunction with sale, etc. When the relation is heavily standardized, express promise, tacit promise, and obligation constructive in tort, “contract,” or equity are exceedingly difficult to differentiate. Which is not surprising: the categories named presuppose in part a discreetness in the facts which is non-existent.—Holmes urges that the charter, writing, is used before the seal, with us, and not as a matter of pure form, but as a matter of good proof. *THE COMMON LAW* 271. The seal then strengthens the proof; in due course to muscle its way in as an exclusive criterion.

⁷² One still hopes for some one to undertake a study of the degeneration of our office of notary, historically, comparatively, and functionally, and with

positive test is a wise one vanishes when printed forms containing "[L.S.]" are simply executed on the dotted line. And even if one should be tempted to take enforcement of a signed *writing* as a base-line of policy, the signed *printing* would raise immediate question. More troublesome, however, than the mere problem of enforceability (and an extreme instance of the divergence of legal and non-legal measurement of obligation) is the persistence of archaic and arbitrary incidents in promises effective purely through their ancient form.⁷³ So the rule against alteration by a transaction of less high dignity—*i.e.*, less ancient pedigree—or the complications attending unsealed authority to execute an instrument under seal. In one instance the archaic rule has been linked through an almost fantastic concatenation to a purpose distinctly modern. (1) A warranty deed is in some states technically essential to assure a purchaser full status, and in many more is the customary method of conveyance. (2) An undisclosed principal, by another technicality, can commonly be held on deals in which he is not named. (3) Real estate operators often want secrecy to make their coups, and want rights on a purchase contract both without incorporation and without responsibility; and when the law-day on the resale has passed want profits in pocket safe from attack. (4) By enlisting the seal both on agreement to buy and on their deed when selling, and thrusting forward a strawman in both transactions, they turn an archaism to the most modern of ends, and have their will.⁷⁴ Judgments on the policies involved must be left to those who know the law and practice of real estate,

reference not only to contract, but to property and procedure. Such a study would open up, and require to be done in the light of, the whole question of prescribed forms and of recording system; but we shall understand neither completely until we know what notaries are abroad, and what their workings mean; what they have been in our system; and how they became what they now are.

⁷³ This obviously need not hold of all formal promises. It is rather a function of the archaic state of the law when particular formal promises were taking shape. It presupposes, too, that informal promises have since grown into recognition. Otherwise "the" contract-type would come under vigorous pressure for renovation, which is unlikely when the pressure is deflected into producing a satisfactory informal type of obligation.—Hence if Mr. Williston's Written Obligations Act should now be introduced, one would expect it to run relatively free of troubles which afflict seals in this respect. It would on the other hand, make the problems of lop-sided bargaining even more acute.

⁷⁴ Compare *Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374 (1925), against the background of *Briggs v. Partridge*, 64 N. Y. 357 (1876) (itself a case where lines of budding growth were faced, and checked), *Harris v. Shorall*, 230 N. Y. 343, 130 N. E. 572 (1921) and *Lagumis v. Gerard*, 116 Misc. 471, 190 N. Y. Supp. 207 (Sup. Ct. 1921). And compare CARDOZO, *PARADOXES OF LEGAL SCIENCE* (1928) 70.

with a suggestion that Veblen⁷⁵ as well as the United Realtors deserves a hearing. The need here is merely to observe that neither antiquity nor apparent out-of-lineness with present trends in law at large gives any certainty that a particular seeming anomaly is today either burdensome or useless. Only practice holds the material for an answer to such a question. To which the further observation joins, that if the rule in question should prove really vital to real estate development, that would yet seem of itself little reason for retaining it as a rule on "sealed obligations" at large; the reason, however good, would cease when the transaction ceased to involve land.

Informal Promises

But more important to a commercial economy than the stiltedness of formality is the question of informal promises. It is commonly said that their enforcement is essential to a business world; the statement sounds too simple to be probable, unless by "informal" is meant simply "not involving elaborate ritual." The Romans did come to admit suits on book accounts. The Greeks developed actions on written promises (*synallagma*). Modern Continental law admits a suit—in general—on any promise with a proper *causa*; and *causa* seems to mean, very roughly, any justification in policy which warrants recognition by a court.⁷⁶ All of this indicates that it would be hard for any business system to develop or to get on if legal enforcement were conditioned on the ceremony with the copper and the scales, or on procuring the three official old men to watch and witness the hand clasp, or—save such transactions as are more elephantine, perhaps, *e.g.*, those involving realty—on official recording of agreements made. But when we see the great exchanges devising means for exchanging written and signed memoranda of sales of grain and stocks—and, so far as an outsider can determine, profiting by the necessity—the notion that speed requires utter informality loses cogency. Indeed there would be no apparent loss in efficiency if all the memorandum slips used on exchanges had to carry in the lower right-hand corner a printed "seal," and if the business stationery now used for confirming oral deals between merchants were similarly ornamented. And the practice of immediate confirmation has sufficiently developed to make a case for the position that limiting enforceability to signed promises would do no violence to the *business* side of our economy—at least, as to the *initiation* of contract. Surface indications are that the effects as between solvent contractors might rather be healthy than otherwise. There would be some

⁷⁵ *E.g.*, ABSENTEE OWNERSHIP (1923) c. VII.

⁷⁶ *Cf.* Lorenzen, *op. cit. supra* note 8.

reduction in telephone dealings with persons lacking established reputation. There would be troubles, even in the case of established reputation and honesty, where death or insolvency of the one obligor supervened. Yet neither inconvenience would be so material as not to offer some hope of being outweighed by the gain in adequacy and unambiguity of proof. As a conclusion, then: a business economy demands a means of quick, not one of "informal" contracting.

Consideration

But with us the machinery evolved fits both descriptions;⁷⁷ the much discussed requirement, and sufficiency, of a consideration. In purpose consideration surely approximates closely the rough description given above of *causa*: any sufficient justification for court-enforcement. In broad effects, that purpose is accomplished. In detail, however, the machinery is embarrassed by a number of rules not too well designed to meet the purpose, yet sufficiently crystallized to make continuous trouble in such cases as involve them.

Neither causes nor processes of the development of the consideration concept are at all clear in detail. We do not know how the Germanic system of awarding what one may speak of as the advantage of proof to the apparently sounder side came to degenerate into the debt-defendant's power as of right to swear himself out of judgment. We do not know whether the fear of stout swearers or the growth of commercial transactions was the more vital factor in developing *assumpsit*; we know little if anything of the details of the latter pressure on the courts from, say,

⁷⁷ I quarrel but little with Holmes' welcome insight: "Consideration is a form as much as a seal. The only difference is, that one form is of modern introduction, and has a foundation in good sense, or at least falls in with our common habits of thought, so that we do not notice it, whereas the other is a survival from an older condition of the law, and is less manifestly sensible, or less familiar." *THE COMMON LAW* 273. Nor with his development of the position: "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 the 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. *COLLECTED LEGAL PAPERS* 178. Contracts are indeed occasionally formal in this second sense, and in a business economy doubtless need to be. Consideration can be conceived as a form, in every instance, and is quite plainly such, in many. Yet less extreme language gives a truer picture. "Form" is a more useful concept in the present connection when it is limited to some such meaning as either (a) one particular necessary way of doing the thing, for legal effect, among several ways (all known to practice) of doing the same thing if law be not considered; or (b) a way of doing which must be *added* to what would be done anyhow.

1570 to 1620.⁷⁸ We do not know in any clarity the process by which the case-misfeasance-tort root and the *quid-pro-quo* root out of debt were built together. What is clear, is the emergence of a current definition in terms of benefit to the promisor or detriment to the promisee as the agreed equivalent and inducing cause of the promise; a definition which purports both to show what is adequate and what is necessary to a successful action in *assumpsit* or its heirs. The current formulation has the merit of covering most cases, even if it does not cover all. Indeed it is obvious that as soon as the arbitrary but utterly necessary logical jump is made, of making mutual promises serve to support each other, the great bulk of business promises are comfortably cared for.

Four troublesome classes of cases remain. There are business promises such as "firm offers," understood to be good for a fixed time, but revoked before. They are frequent; they are and should be relied on. As to them our consideration doctrine is badly out of joint. Closely related in orthodox doctrine, less so in practice, is the second class: promises which call for acceptance by extended action (such as laying twenty miles of track), revoked while the work is in process. A third and hugely important class is that of either additional or modifying business promises made after an original deal has been agreed upon. Law and logic go astray whenever such dealings are regarded as truly comparable to new agreements. They are not. No business man regards them so. They are going-transaction adjustments, as different from agreement-formation as are corporate organization and corporate management; and the line of legal dealing with them which runs over waiver and estoppel is based on sound intuition. The fourth main trouble-making class has only a doctrinal connection with business; it lies chiefly in the field of family affairs; it includes the promise made and relied on, but which did not bargain for reliance, and in the case of promises to provide it laps over into the third party beneficiary problem. As to all of these classes but the first, a distinct but very uneven tendency is observable in the courts to strain by one dodge or another toward enforcement. That tendency is healthy. It may be expected to increase. It has already had some effects on orthodox doctrine,⁷⁹ and may be expected to have more. Meanwhile the first class mentioned goes largely untouched.

When one attempts to estimate the net value of the considera-

For otherwise form so fits into common habits as not to require attention from any but philosophers and ethnographers.

⁷⁸ Goebel suggests to me that the failure of the Church courts to do an effective job with *laesio fidei* adds mightily to the suction which draws *assumpsit* forth.

⁷⁹ *E.g.*, RESTATEMENT OF CONTRACTS (Am. L. Inst. 1927) §§ 45, 90, 135.

tion requirement the first step is to repeat that it does fit most normal cases in life, that it gives trouble only on the fringes. As a test of what promises *not* to enforce, it must be regarded as somewhat formalistic. The existence of bargain equivalency does indeed commonly evidence positively that the promise was deliberate—considered—meant. Such equivalency gives also fair ground for believing that *some* promise was in fact made; and thereby much reduces the danger from possible perjury, and even from misunderstanding. The giving of a bargain equivalent, be it by promise or by action, is furthermore an excellent objective indication not only of the creation of expectation in the promisee, but of the reasonableness of there being expectation, and of its being related to the promise. (And the size of the equivalent may help to “interpret” the expectation.) Yet it will be observed that the handing over of a signed promise in writing (which is *not* enough for enforcement) would go far in most circumstances⁸⁰ to assure the same values; no lawyer, *c.g.*, can fail to be struck by the closeness with which exemptions from the requirement of writing under the statute of frauds are related to the presence of unambiguous consideration which is *substantially equivalent in fact* to the promise claimed.⁸¹ Nor is it apparent why in many cases deliberateness, due assurance that the promise was made and relied on, and properly so, might not all

⁸⁰ Not in all. We have as yet but the barest inklings of the policy considerations involved in printed forms, or in the signing by the one party of a document prepared by the other in advance.

The problem introduces again that most misunderstood of cases, *Pillans v. Van Mierop*, 3 Burr. 1663 (1765). There consideration is discussed as an assurance of deliberateness, and by Mansfield as a matter of evidence (*i.e.*, assurance that a promise has been made?): “for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration.” Mansfield did also inquire in argument “if any case could be found, where the undertaking holden to be a nudum pactum was in writing.” Yet all the opinions, and Mansfield’s in particular, stress not writing in general, but writing in mercantile transactions, and the absence of a requirement of consideration among merchants. And all stress that this particular case was one of an engagement to honor bills. If the narrow issue decision in that case needs vindication, it should be fairly well evidenced by the modern decisions on letters of credit; allowing for changed conditions of finance the parallel is amazing. The mercantile promise position at large is unnecessary, though Mansfield probably meant it, and probably as matters then stood, did well to. But where is there warrant for the common assertion that Lord Mansfield tried to make all written promises, or all promises deliberately made, good? I find myself in accord with Lord Denman’s remarks: “I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down.” *Eastwood v. Keynon*, 11 A. & E. 438 (1840). And with Buller’s on another issue: “Lord Mansfield did not decide commercial cases so.”

⁸¹ LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930) 916 ff.

be evidenced by circumstances apart from either writing or consideration. The problem is acute only within the family. Outside, a writing might well be made a condition to "reasonableness" of any reliance; though very possibly, as with the statute of frauds on sales an exception might be needed for pretty transactions. All in all, then, as a test for non-enforcement, our consideration requirement must be regarded as not yet wholly just to our needs.

As a positive test, a test for what promises to enforce, the same must be said. For here the requirement of the positive law runs in terms not of *factual* equivalency, but of *formal* equivalency under the bargain as stated. A consideration which in fact is largely, even wholly formal, may be enough; release of injury-claim for a dollar. This is well enough when the promise is one whose enforcement is in itself socially desirable: a charitable subscription, a promise to provide for a child on marriage, an option to buy land. And it is enforcement in such cases which has given foothold for the draftsmen in cases of a—socially—different character. But when the courts in such cases recognize in general language the adequacy of thoroughly formal consideration, they obscure the problem discussed above, as to government by contract; the same problem so clearly seen by the courts in usury and mortgage cases, and by the legislature in regulation of employment: that of discrepancy in bargaining power and semi-duress in fact. Though obscured, that problem recurs. It is therefore not surprising that the last quarter century has seen—in business cases—the incursion into the doctrine of consideration of a further doctrine of so-called "mutuality" whereby particular promises are matched off against each other, and some equivalency in fact (*e.g.*, to buy if the other party has agreed to sell) frequently insisted on, even when formally adequate consideration is present.⁸² It is to be expected that this tendency will continue: and it is not unlikely that it will develop, as in the past, peculiarly to relieve the weaker bargainer. The lop-sidedness of bargain-result is thus taken as the mark of lop-sidedness of bargain-making. But the motivation being apparently not wholly conscious, the result has been (as so often during case-law growth) confusion in doctrine and uncertainty in outcome; and—natural enough in a business economy—a relief of smaller business men which finds little counterpart in the case of the laborer.

⁸² I speak, be it noted, of mutuality *at law*, and in terms of apparently reasonable equivalency of performances promised, and neither of mutual promises as consideration, nor of illusory promises, nor of mutuality as a consideration to specific performance. Although all of these last, and especially the finding, or refusal to find, tacit counter-promises in aid or defeat of an action, are a phase of the same tendency. *Cf.* Note (April 1931) 31 COL. L. REV.

Conditions

Closely related to the values and presuppositions of the consideration doctrine are other phases of contract law, notably the doctrines of implied conditions. Indeed, so far as conditions are constructed not out of what the parties promised, but out of the nature of the case, one may feel this branch to be more deeply impregnated with the equivalency-idea than is the other. Yet with a difference. For whereas the broad issue—"enforceability or not"—may hope to trace some discernible lines on the features of society, such narrower questions, as to the conditions courts will create, tend to show a deal more of the influence of men's ways on the law than of law on the ways of men.⁸³

One begins at all events, as so often, with Holmes: "You always can imply a condition in a contract. But why do you imply it?"⁸⁴ And with regard to concurrent conditions and failure of consideration it seems obvious that the why is a conception of equivalency of substance rather than merely of form—though within such formal limits as the parties themselves have set if they have bargained a little for a much.⁸⁵ So far one is doubtless still in the field of reading tacit agreement. If the parties did not actually think thus, they at least had generalized and hardly mistakable attitudes which needed but the pointing of attention and the sharpening of wits to reach these same results. Until courts acquire a willingness to take in commercial understanding (merchantability and the like) we do have a problem here; otherwise not. The more perplexing question lies rather in what seem to be "express" conditions, where doubt arises as to whether the common reading prescribed by commercial sense for the type of case has not been overridden by deliberate negation of the parties. Express—hence deliberate—and hence to be given effect; a tricky conclusion, and one which, as is suggested above, courts are wisely far from always indulging, although neither they nor any writer have yet found the means to tell *when* they will, or *when* they should.

Vastly different, as has often been pointed out, is the situation

⁸³ I let this statement stand with great hesitation. As to doctrines of conditions *in general* it seems fairly safe. But as to the effects of decisions on conditions in many particular types of contract, especially in those subject to drafting work, it seems absurd. Weber overemphasizes these last.

⁸⁴ COLLECTED LEGAL PAPERS 181.

⁸⁵ HOLMES, THE COMMON LAW 336 (as indeed all through his discussion of contract-scope) insists on failure of description, *i.e.*, of getting the thing promised, as an element distinct from failure of equivalency. So far as *true* interpretation is the goal, the technical measurement of the promises made is a sounder, because more definite, guide than any equivalency idea. The latter is useful, however, in both seeing *why* courts depart either from literal into true interpretation (*e.g.*, constructive concurrent conditions) or especially from true interpretation into the wielding of the axe.

when we approach constructive conditions bottomed on the unforeseen. Not agreement, but fairness, is then the goal of inquiry. This holds of impossibility, and of frustration; it holds of mistake (whether urged to excuse or to ground a new promise of extra compensation). In all of these the question runs to the effect of unforeseen events or discoveries which destroy some presupposition of the deal. The effort is in essence to mark out a range and an apportionment of risks assumed; or more accurately, of risks to be imposed. But I do not think it far-fetched to urge that in that marking out, equivalency-ideas, though far from being the exclusive factor, have played a major role.⁸⁶

One could ascribe remedies for fraud and misrepresentation unhesitatingly to the same equivalency-complex (I use the term with its anthropological, not with its Freudian connotation) if doctrines, and apparently effects, similar to ours were not found in systems ignorant of consideration. Yet the hesitation need be but momentary. Where equivalence is expected, where it is bargained for, any developed system may be expected to condition legal pressure to perform on receipt of the return agreed. If effective fraud or misrepresentation goes to a presupposition of the deal, it will be a presupposition on which the objecting party's return depended. Duress, too, fits the picture well enough: a man has been made to promise without the return we assume he would have wanted. Yet I suspect the approach in that case to travel a more rugged road, allied to the concept of the Peace.

*Prophylactic Form*⁸⁷

But just as no system of promise-enforcement can do its work without taking account of the fact that existence of forms commonly sufficient to enforcement may be produced by illicit means, so no system may ignore the value of forms as records and

⁸⁶ Holmes' statement of the issue, though clothed too largely in terms of parties' intent, is still classic: "The immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee." *THE COMMON LAW* 300. "The price paid in mercantile contracts generally excludes the construction that exceptional risks were intended to be assumed." *Ibid.* 303. "The most important element of decision is not any technical, or even any general principle of contracts, but a consideration of the nature of the particular transaction as a practical matter." *Ibid.* 337. What Holmes means by this is the most vigorous manipulation of doctrine to achieve the results needed by practical business. Compare his study *Grain Elevators* (1872) 6 *AM L. REV.* 455, paternity acknowledged, 2 *KENT COMMENTARIES* (12th ed. by Holmes 1873) *492, note 1, at end.

For development of related views see Corbin, *Conditions in the Law of Contract* (1919) 28 *YALE L. J.* 729; Patterson, *Judicial Freedom of Implying Conditions in Contracts*, in the forthcoming Gény Memorial volume.

⁸⁷ See especially 5 *WIGMORE, EVIDENCE* (2d ed. 1923).

vouchers that a deal has actually been made, or their importance as permanent and reckonable evidence of what was agreed upon in that deal. Contracts are transactions, not mere events; and, as deliberate transactions, are capable of prophylactic regulation; since they are transactions relied upon, men have an interest in predictable security as to their legal effects. Hence for a variety of transactions, and by no means an ill chosen assortment, the statute of frauds requires for enforceability a memorandum of the essential terms, signed by the borrower.

That statute is an amazing product. In it de Leon might have found his secret of perpetual youth. After two centuries and a half the statute stands, in essence better adapted to our needs than when it first was passed.⁸⁸ By 1676 literacy (which need imply no great consistency in spelling) may well have been expected in England of such classes as would be concerned in the transactions covered by the statute's terms. Certainly, however, we had our period here in which that would hardly hold—we counted our men of affairs, in plenty, who signed by mark. But schooling has done its work. The idea, which must in good part derive from the statute, that contracts at large will do well to be in writing, is fairly well abroad in the land. "His word is as good as his bond" contains a biting innuendo preaching caution. Meantime the modern developments of business—large units, requiring internal written records if files are to be kept straight, and officers informed, and departments coordinated, and the work of shifting personnel kept track of; the practice of confirming oral deals in writing, the use of typewriters, of forms—all these confirm the policy of the statute; all these reduce the price in disappointments exacted for its benefits. The chief difficulty lies now in the very common informal verbal understandings *modifying* performance under a writing once made; a problem as yet inadequately solved. On the other hand, the parol evidence rule, in Wigmore's incisive phrasing the rule of integration, comes in to limit the enforceable agreement to what is incorporated in a writing, if an apparently complete writing is once made. Especially, this rule is said to eliminate any prior or contemporaneous modifying terms. As to agreements drawn under advice of counsel, the general wisdom of this is obvious; and the policy fits equally with that great bulk of agreements which are made wholly by correspondence. But in other cases—as with informal verbal modifications under the statute of frauds—the court is faced with the counter policy of recognizing the frequency with which vital terms of oral negotiations are in fact omitted from (or not reduced to) a formal writing. The course of actual decision has, in consequence, no remotest approach to

⁸⁸ *Supra* note 85.

the predictability the rule is supposed to achieve; a point which can hardly be too strongly stressed. Yet the net effect of the two rules together, as they work into lay practice, and viewed simply in their effects outside of litigation, is almost certainly wholesome; both in encouraging permanent trustworthy record of agreements, and in inducing care in the making of that record.

System in Contract Law

What now of the apotheosis of technique in contract law: system? In our unsystematic legal crazy-quilt contract stands unique. It is the one field in which a grand-scale orderly synthesis has been attempted, and with fair success achieved. And this has been lauded as our great legal accomplishment of the past century.⁸⁹ To the modern Romanist the achievement must indeed appear as but partial. He sees our very object of synthesis as itself a single element in a still grander scheme: transactions. To a few American scholars, on the other hand, the reproach seems in the nature of a compliment. They doubt the wisdom of generalizations in our law on anything like the scale attempted by a single systematization of all contract. They challenge the applicability of the current generalizations to various important bodies of cases.⁹⁰ Their view is needed, if one is to understand such developments as the emergence of a peculiar requirement of "mutuality" in certain contracts, discussed above; or the twisting of rules to support marriage settlements and gifts to children; or the division of a reward among partial acceptors who did not act in concert; or the growth of irrevocability of offers for certain unilateral contracts where the offeree is definite, and performance takes time, and especially where accomplishment seems certain; or the occasional irrevocability of guaranties by death—and so on. Their view is needed, if one is to see or to state with accuracy what courts are holding. On the other hand, the vitality of the generalizing tendency is indubitable. It may be noted not only in the scholarly work of the last seventy years, culminating in the Restatement of the Law of Contracts. It may be noted as well in the decisions—*e.g.*, in the extensive submergence, in the field of sales, of the old-time peculiar notions of warranty in the general concepts of promise and condition.⁹² So also in the stiffening of many courts, even in the

⁸⁹ Compare also the quiet pride of Holmes' remark, in regard to consideration: "Only of late years has it been reduced to the universal expression of detriment to the promisee." COLLECTED LEGAL PAPERS 218. And again, in 1881, "The doctrine of contract . . . has been so ably discussed that there is less room here than elsewhere for essentially new analysis." THE COMMON LAW 247. Whereupon essentially new analysis is given.

⁹⁰ So perhaps most strikingly Underhill Moore and Oliphant.

⁹¹ Astounding is the clarity and prophetic vision of Holmes' analysis of

teeth of pressure from the facts, against allowing an action when the accepted formulae as to consideration remain unsatisfied, or in the strict "offer-and-acceptance and so only" approach to problems of formation which—however many the exceptions⁹²—is a common one whenever a court addresses explicit attention to the problem.

What effect the generalizing tendency has on contract-makers, is hard to say. It facilitates the teaching of "business law," but (apart from rudimentary notions of consideration and of writing) without so far as I can discover material effect on ways of action. Rather does it promise effects on laymen chiefly by way of its effects on doctrine; not in itself and immediately, but mediately and by way of its effects on what law-men do. To be sure, a general theory of contract must almost certainly come ultimately to assert a less absolute dominion over "the entire field" than has been the case in this heyday of its hope;⁹³ it will

warranty. 2 KENT, *op. cit. supra* note 85, at *478, note 1, but esp. *480, note 1. It is to be remembered that he had not yet seen *Hawkins v. Pemberton* (1872), *Day v. Pool* (1873), *Gaylord v. Allen* (1873), much less *Morse v. Moore* (1891). The law was uncertain, confused, full of fuddled groping. He leaves it with a clearer statement than one will find today. He sees sample as a definition of quality. His statement as to merchantability is as good as that of the Sales Act, both his analysis and his phrasing as to fitness for purpose are better than the Act—though the omission of a qualification as to dealer and grower was, on the then cases, an inaccuracy. He explains buyer's recovery of the price after completed transfer of title as necessarily based on the defect going to the essence, and suggests that any warranty indicates a quality which the parties thought to be of the essence. Omitted from express consideration is only the problem of acceptance as barring damages; even there the modern answer is presaged. But above all and throughout, he not only keeps sharp the distinction between contract to sell and sale, but *begins each part of the analysis with the contract, as a problem of contract, and moves only thence to the present sale*; and bridges between them by way of purported present sale of absent goods identified by description, and via contract to sell identified present goods. On doctrine, as on jurisprudence, the prophet spoke. On doctrine, as on jurisprudence, he went for decades unheard. On the last point his approach still makes few converts after sixty years. It is a curious feeling, as I work through the many recently expressed doubts on the feasibility or wisdom of centering sales law on the contract, to realize that all unknowing the battle is being fought over a field the old master had surveyed when he was younger than we, and is being fought on the lines he then laid out—Holmes had not however, at that time drawn all the implications. Note the failure to discuss with any fullness the problem of "appropriation" in relation to the contract for sale; and especially the statement in *Codes, and the Arrangement of the Law, supra* note 39 at 4: "Some subjects have acquired a unity in practice that it might be un-

⁹² Cf. *Larson v. Inland Seed Co.*, 143 Wash. 557, 255 Pac. 919 (1927).

⁹³ Is the hope fading? "The law of contracts . . . after starting with some degree of unity now tends from its very size to fall apart." WILLISTON, *CONTRACTS* (1921) iii.

surely grow content to recognize considerable local self-government where that is demanded by particular fact-situations;⁹⁴ it will surely come to see the demands for such self-government as no less normal than their absence. Yet as a body of doctrine available and pressing for constant application and development *wherever no compelling reason to the contrary appears*, no man can doubt the high utility of system. The quarrel will be rather along the lines suggested by the Romanist, though on a less conceptualized foundation. Why stop at what we know today as "contract"? The beginnings of the picture of expansion Pound has sketched.⁹⁵ But all obligation-out-of-transaction will need canvas alongside obligation-out-of-express-promise before a synthesis will show the framework in the interstices of which the variations of fact-pattern and tradition-molded remedy are playing.

Meantime it pays to note that here, as always, doctrinal synthesis tends to distort all vision of the underlying reality. For doctrinal synthesis is and must always be in conceptual terms, in classes, in supposed uniformities, inclusive, exclusive. The battle ground of such synthesis is and must always be the marginal and even pathological case which "tests" the sweeping generalization.⁹⁶ Thus the replacement of a will theory on the Continent, or the substantial replacement with us of "meeting of the minds" by a theory of objective manifestations apparently indicating promise, and reasonably relied on by the other party—this is indeed a great advance. It covers more cases. The more which it covers are difficult and delicate and delightful—and few. The change of theory emphasizes, too, and properly, the high importance of reasonable expectation in contract, as in life and law at large. Yet the very advance has obscured the sociological vitality of the older insight. Is it not clear that if in all but amazing cases manifestation did not roughly coincide with intent, we should have neither reasonable reliance in fact

⁹⁴ Compare the last quotation from Holmes, *supra* note 86.

⁹⁵ *PHILOSOPHY OF LAW* (1925), *e. g.*, 272. And see Maitland.

⁹⁶ Thus Holmes' insistence on the "formal" character of any contract, *supra* note 85—his mind on those less common cases where intent and expression differ materially. Indeed, in regard to remedy, his thrusting aside of specific performance (*THE COMMON LAW* 300 ff.) which does not comfortably fit his scheme, approaches quibbling. But in general he stands almost unique in his ability to systematize without being blinded by his system, and losing hold neither of the presence of historical survival, nor the pressure of needs. *E. g.*, *ibid.* 146, a general principle of torts is announced: "apart from the extremes just mentioned . . . a key to the whole subject, so far as tradition has not swerved the law from a consistent theory." Again, *ibid.*, 135, his general object is to show "that the tendency of the law everywhere is to transcend moral and reach external standards;" but two pages later a sociological insight is *added* to the analytical: "The moral starting point of liability in general should never be forgotten."

nor any law of contract to make an "objective" theory of peculiar cases necessary?

In Summa

One turns from contemplation of the work of contract as from the experience of Greek tragedy. Life struggling against form, or through form to its will—"pity and terror—." Law means so pitifully little to life. Life is so terrifyingly dependent on the law.

Marginal cases, hospital cases, most of our cases well may be. Much doctrine, however sweetly spun, serves chiefly to grow grey with dust against the rafters. Overwhelming is the certainty that any synthesis which is to match with the meaning of the law in life must expand beyond the futile limits set by present legal theory to include great blocks of what we know as property, and equity, and remedies, to cover as well the most significant parts of business associations, and who knows what besides. Overwhelming is the realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-production, mass-relationships. Overwhelming in no less measure is the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies.

Against these conclusions stand others. The *ad hoc* approach of case-law courts is sane, it cuts close to need, it lives, it grows. And the work of law and lawyers in the contract field, however little of the whole it constitutes, has vital meaning. It is both hinge and key of readjustment. And how, without it, shall the great gate swing open?