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THE ORIGINS OF THE OBJECTIVE THEORY OF CONTRACT FORMATION AND INTERPRETATION

*Joseph M. Perillo**

INTRODUCTION

By giving effect to the parties' intentions, the law of contracts is based on respect for party autonomy. Nonetheless, the objective theory of contract formation and interpretation holds that the intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions. Three standard accounts of the origins of the objective theory of contract formation and interpretation state that a subjective theory was in effect in the early part of the nineteenth century and was replaced by an objective theory in the second half of that century in order to accommodate the needs of a national market and the needs of the commercial classes. Lawrence Friedman's account states that the theory was "developed by late nineteenth-century and early twentieth-century scholars."¹ This, says Friedman, represented a "shift in legal theory."² This theory fitted in with "the basic abstraction of contract law."³ In this period, Friedman states, the law was most concerned "with problems of reducing business risk and enhancing the predictable effect of transactions."⁴

Morton Horwitz's account is somewhat along the same lines. Horwitz inserts his discussion into his theme of the "transformation" of contract law from an eighteenth century communitarian font of fairness and justice to a nineteenth century mercantile vehicle for risk taking. This transformation resulted in objective standards of market values, and objective criteria for determining the existence and interpretation of contracts.⁵

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1. Lawrence M. Friedman, *Contract Law in America* 87 (1965).

2. *Id.*

3. *Id.*

4. *Id.*

5. See Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977). Simpson has demolished most aspects of Horwitz's transformation thesis as

Grant Gilmore's account holds that Christopher Columbus Langdell invented the generalized notion of contract in 1871,⁶ which was brilliantly reformulated by Oliver Wendell Holmes, Jr.,⁷ and then propagated by a diligent scrivener named Williston.⁸ Gilmore credits Holmes with the invention of the objective theory.⁹ Like Horwitz and Friedman, Gilmore attributes the creation of late nineteenth century classical contract doctrine to a response to the same stimuli that gave rise to laissez-faire economics.¹⁰ Gilmore, thus, in most respects agrees with Friedman's and Horwitz's accounts, but he places the transformation somewhat later than they do, and places the cause on three culprits in Harvard Yard.

All three of these accounts are seriously flawed.¹¹ A more accurate account of the origins of the objective theory is that objective approaches have predominated in the common law of contracts since time immemorial. The account is not seamless; there was a brief but almost inconsequential flirtation with subjective approaches in the mid-nineteenth century. The flirtation produced the rhetoric of a subjective approach but had little effect on the outcome of cases involving the formation or interpretation of contracts except in cases of the death or insanity of an offeror. Subjective approaches did, however, transform the availability of relief for mistake, duress, and other grounds of avoidance.

The flirtation with the subjective approach to the formation and interpretation of contracts came to a decisive end when the legislatures enacted laws allowing parties to testify on their own behalfs. The adoption of the objective theory was not the product of brainwashing of the profession by Holmes or any other individual, but

applied to contract law, but does not discuss the objective-subjective issues of formation and interpretation. A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. Chi. L. Rev. 533 (1979) [hereinafter Simpson, *Horwitz Thesis*].

6. Grant Gilmore, *The Death of Contract* 12 (1974). Langdell published the first contracts casebook in 1871. His text, *A Summary of the Law of Contracts*, was published in 1880. Gilmore's history is quite eccentric. The first book with "contract" in its title was John Joseph Powell, *Essay on the Law of Contract* (1790). There was a considerable number of books on the subject of contracts prior to Langdell's.

7. *Id.* at 14. Holmes' lectures were published in book form entitled *The Common Law* in 1881. *Id.* at 6.

8. *Id.* at 14.

9. *Id.* at 35.

10. Gilmore quotes Friedman as follows: "[i]n both theoretical models—that of the law of contracts and that of liberal economics—parties could be treated as individual economic units which in theory enjoyed complete mobility and freedom of decision. . . ." *Id.* at 7 (quoting Friedman, *supra* note 1, at 24-25). Part of this sentence is also quoted by Gilmore at 95.

11. Sometimes one meets with and is stunned by generalizations such as this: "[a] standard history of contract doctrine represents that, from the sixteenth to the early nineteenth century, contract formation depended upon a subjective 'meeting of the minds.'" Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997, 1042 (1985).

was the collective product of the legal profession, responding to the challenge created by the revolutionary change in the rules of evidence. It is not impossible that the profession was moved by some of the stimuli that produced a general acceptance in the nineteenth century of *laissez-faire* economics, but I have found no evidence to indicate a link between the reaffirmation of the objective theory and the economic determinism propounded by some historians. Holmes' role was to propagate an objective approach that the courts had already taken a dozen years before he published his objective theory.

I. SUBJECTIVE AND OBJECTIVE POSSIBILITIES IN CONTRACT FORMATION AND INTERPRETATION: AN OVERVIEW

There is no single subjective or objective theory. Rather, there are a variety of different vantage points from which the formation and interpretation of contracts could conceivably be judged. The legal system could look solely to the intention of the party who used the words or other signs in question, or solely to the understanding of the party to whom those words or signs were directed. Each of these vantage points is purely subjective; only the subject changes.

It is improbable that any economically developed society would fully adopt either of these vantage points. One party's intentions would be subordinated to the idiosyncratic meanings of the other. More importantly, if the legal system permits parties to testify as to their understandings or intentions, perjury as to their subjective states of mind would be extremely difficult to detect.

A third and more balanced subjective test is also conceivable—a mutual standard “which would allow only such meanings as conform to an intention common to both or all the parties, and would attach this meaning although it violates the usage of all other persons.”¹² This is the classic “meeting of the minds,” the “*aggregatio mentum*” or “*consensus ad idem*” of the mid-nineteenth century. It is an appealing formulation. The essence of contract is agreement and if the parties' common understanding can be discovered, does not justice allow, and indeed, dictate that this common understanding be given effect? This viewpoint prevailed in the mid-nineteenth century and the turning point away from it came in the 1870's. Its philosophical foundation was the theory that consensual obligation stemmed from the will of the promisor.¹³ Spokesmen for this theory

12. Restatement of Contracts § 227(3) (1932). Although the first Restatement stated this as a possible standard, it did not adopt it.

13. Referring to contract theory on the European continent, Gordley asserts that the theorists had jettisoned all aspects of medieval natural law theory except the foundation of contract in the will of the promisor. James Gordley, *Contract in Pre-Commercial Societies and in Western History*, in *Contracts in General*, VII International Encyclopedia of Comparative Law §§ 2-30-2-35 (1997).

included such continental legal scholars as Hugo Grotius,¹⁴ and Robert Joseph Pothier.¹⁵ Philosophers such as Immanuel Kant¹⁶ were spokesmen for the Will Theory and the theory is alive and well in France today.¹⁷ Although some observers indicate that in practice there is little difference in result in the application of the French subjective approach and the common law's objective approach, the difference in theory explains, among other things, why in France there is no definitive rule on whether an acceptance is effective on dispatch or on receipt. This is because, under the subjective approach, the meeting of the minds frequently is a question of fact.¹⁸ This also helps to explain many other differences between the French law of offer and acceptance and its common-law counterpart¹⁹ and the vastly different interpretive process.²⁰

Yet, the application of the standard of mutual understanding in common law systems was in reality quite limited, because neither party was permitted to testify to his own version of what he understood the common understanding to be nor to testify that his own understanding was different from that of the other party. Consequently, although much substantive law theory was rooted in subjectivity, the evidentiary proof of the existence of contractual intent or the meaning of a contractual term was limited to objective elements—what the parties wrote or signed, what the parties said to each other (as established by testimony of disinterested persons), certain exceptions to the hearsay rule (such as the shop-book rule),²¹ and circumstantial evidence, provided that this evidence, extrinsic to a writing, was not further pared down by the parol evidence rule.²²

14. See Hugo Grotius, *Rights of War and Peace* 192-204 (William Whewell trans., 1853) (1625).

15. See R. J. Pothier, *A Treatise on the Contract of Sale* 17-24 (L.S. Cushing trans., 1839) (1762).

16. See Immanuel Kant, *The Philosophy of Law* 102-05, 121-25 (W. Hastie, B.D. trans., 1887) (1796-97); see also *Symposium on Kantian Legal Theory*, 87 *Colum. L. Rev.* 419, 439-46 (autonomy), 495 (free will), 546-47 (promising and meeting of the minds), 563-68 (promise-keeping as a categorical imperative) (1987).

17. Barry Nicholas, *The French Law of Contract* 35, 47-49 (2d ed. 1992).

18. See Pierre Bonassies, *Report on French Law, in II Formation of Contracts* (Rudolf B. Schlesinger ed., 1968).

19. See Nicholas, *supra* note 17, at 61-76.

20. See *id.* at 47-49.

21. See Simon Greenleaf, *A Treatise on the Law of Evidence* 137-38 (1842).

22. Greenleaf stated the parol evidence rule as follows:

When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed or afterwards . . . is rejected.

Id. at 315.

This encapsulates more modern statements of the rule, except that today, evidence

Consequently, contract law, when viewed together with the law of evidence, was a mixture of subjective and objective elements with the objective elements dominating the decisions of almost all concrete cases.

Objective tests also vary. There is the viewpoint of general usage,²³ which, if rigidly adhered to, spawns the simplistic "plain meaning rule" or the complex architecture of Williston's objective theory of interpretation.²⁴ Such a highly objective vantage point may be rather remote from the perspectives of the parties and may produce an interpretation that conforms to the intention of neither party.²⁵ This perspective subordinates the parties' intentions to the intrinsic meaning of words.²⁶ Other, possibly less remote, vantage points may be that of the usage of a particular locality or trade. Even less remote objective vantage points are the perspectives of the reasonable person in the party who employed the words or signs and the vantage point of the reasonable person in the position of the addressee of the words or signs.

Objective approaches to words spoken or written by only one party are based on the reasonable expectations of the promisor, or the promisee. The latter perspective, focusing on the expectation of the promisor, articulated by Dr. Paley, had quite a following in the nineteenth century.²⁷ The perspective of the promisee was articulated by Adam Smith whose critique of the Will Theory, however, was not published until the twentieth century. He said, "[w]e may observe here that the obligation to perform a promise can not proceed from the will of the person to be obliged, as some authors imagine. For if that were the case a promise which one made without an intention to perform it would never be binding."²⁸ According to Smith, serious promises are binding "and the reason is plain: they produce the same

of statements made subsequent to adoption of the writing are not barred by the rule. John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 3.2 (4th ed. 1998).

23. See Restatement of Contracts § 227(1) (1932).

24. Williston's rules are sketched in Calamari & Perillo, *supra* note 22, § 3.11.

25. "When the language of the contract is clear, the court will presume that the parties intended what they expressed, even if the expression differs from the parties' intentions at the time they created the contract." *Nicholson Air Servs., Inc. v. Bd. of County Comm'rs*, 706 A.2d 124, 132 (Md. Ct. Spec. App. 1998); see Restatement of Contracts § 230 illus. 1 (1932).

26. For one of many such statements, see *Rickman v. Carstairs*, 5 B. & Ad. 650, 662-63 (K.B. 1833) ("Unfortunately, however, they have used words which will not, we think, effectuate that intention. The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used."). But one finds an occasional enlightened case holding that words of art can be overcome by other language found in a written instrument. See, e.g., *Sherman's Lessee v. Dill*, 4 Yeates 295 (Pa. 1806).

27. Paley's influence on the interpretive process is discussed *infra* in Part IV.B.

28. Adam Smith, *Lectures on Jurisprudence* 93 (R.L. Meek, D.D. Raphael & P. G. Stein eds., 1978) (lectures of 1762-63).

degree of dependance and . . . dissatisfaction."²⁹

Alongside any subjective or objective approach, the parol evidence rule provides its own highly objective strictures. Under the parol evidence rule, courts must, subject to some qualifications and exceptions, exclude evidence of terms agreed upon between the parties prior to or contemporaneously with the adoption of a written contract. When this rule operates to exclude a term actually agreed upon by the parties, its operation is akin to the application of the standard of general usage in that it results in enforcement of a contract that is different from a contract objectively manifested by the parties to each other. Rather, the contract as enforced is the contract that hypothetical reasonably prudent persons similarly situated would have made.³⁰

II. OBJECTIVE APPROACHES PRIOR TO THE NINETEENTH CENTURY

A. *Pre-Nineteenth Century Approach to Formation*

Few doubt that, prior to the last decades of the eighteenth century, the common law of contract formation and interpretation was highly objective. In *Doctor and Student*, an early sixteenth-century text, the student of common law explains to the doctor of divinity that "the intent inward in the heart, man's law cannot judge,"³¹ and a promise is binding if there is a "charge by reason of the promise."³² The student professes to be surprised that the canon law might regard a promise uttered without an intention to carry it out as non-binding, "which cannot be, as me seemeth" because "the law canon [would] judge upon the inward intent of the heart." According to the student of the common law, only God's law judges inward things.³³ The law of God is something other than the law of reason or the law of man, although aspects of the law of reason and the law of man may be based on God's law. God metes out the punishment for violations of His law,³⁴

29. *Id.*

30. See Restatement of Contracts § 230 (1932) (illustrating the standard of interpretation for integrations).

31. Christopher Saint Germain, *Doctor and Student; or, Dialogues Between a Doctor of Divinity and a Student in the Laws of England 179* (Legal Classics Library 1988) (1530-41). Saint Germain's name sometimes is styled as "St. German."

32. *Id.* Examples, given by the student, of "charges" include "[a]nd if a man say to another, heal such a poor man of his disease, or, make an highway, and I will give thee thus much; and if he do it, I think an action lieth at the Common law." *Id.* at 179-80. These examples, in modern parlance, are promises for a bargained-for exchange, the core of the modern doctrine of consideration.

33. *Id.* at 179; cf. 3 Arthur L. Corbin, *Corbin on Contracts* § 597 n.5 (1960) ("In an ancient case, Y.B. 17 Edw. IV, 2, Brian, C.J., remarked, perhaps erroneously, that 'the devil himself knoweth not the thought of man.'").

34. "[T]hat no evil should be unpunished, it was necessary to have the law of God that should leave no evil unpunished." Saint Germain, *supra* note 31, at 10.

and the student of the common law is convinced that the determination of the inward state of mind of a contracting party must be left to God. The student's concern is evidentiary.

The student further illustrates the objective theory of contract formation in this passage: "if a man say to another, marry my daughter, and I will give thee twenty pounds; upon this promise an action lieth, if he marry his daughter. And in this case he cannot discharge the promise *though he thought not to be bound thereby*; for it is a good contract"³⁵

B. Interpretation

Two decades after *Doctor and Student* was published, Chief Justice Brook engaged in a detailed discussion of his objective theory of interpretation. The question was whether the legal meaning of the words of a grant should be given preference over the otherwise clear and obvious intention of the grantor. Brook, from the bench, declared: "[t]he party ought to direct his meaning according to the law, and not the law according to his meaning"³⁶ Brook supported his conclusion by stating that "if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance, and to destroy all learning and diligence."³⁷ Giving effect to the party's meaning instead of the meaning of the words would induce carelessness and give rise to uncertainty.³⁸ To his brethren on the bench Brook explains by referring to a simple precedent.³⁹ An abbot granted a croft⁴⁰ to the grantee in exchange for the grantee's deed renouncing his rights to a common. The renunciation was held to be void because the renunciation did not state to whom the renunciation ran. "[Y]et there the intent was plain, for he had common in the land of the abbot, and his meaning was to release it to the abbot"⁴¹ Despite the plain meaning of the deed, it was objectively void. Words have, according to this theory, their own intrinsic meaning; their expression—or in this case their absence—overrides the intention of the parties, even though the intended meaning can be deduced from the instrument itself.

The early common law was replete with cases where the courts knowingly thwarted the intent of the parties. As Judge Cardozo

35. *Id.* at 180 (emphasis supplied).

36. *Throckmerton v. Tracy*, 75 Eng. Rep. 222, 251 (K.B. 1816).

37. *Id.*

38. *See id.*

39. *See id.* (citing to H. 13 Ed. 3).

40. A croft is "[a] little close adjoining a dwelling house, and inclosed for pasture and tillage or any particular use. A small place fenced off in which to keep farm-cattle." *Black's Law Dictionary* 375 (6th ed. 1990).

41. *Throckmerton*, 75 Eng. Rep. at 251.

stated in 1917, "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."⁴² Cardozo may well have had cases such as that of the abbot and the croft in mind when he penned those words.

C. Other Pre-Nineteenth Century Objective Rules Protecting the Written Word

The common law rule was that a contract under seal could not be modified or discharged except by a sealed instrument.⁴³ Writings under seal could not be controverted or varied by written or oral evidence because sealed writings were of a higher nature than mere written evidence or testimony.⁴⁴ Payment without a sealed acquittance was held to be no defense and, as one court is reported to have said, "it is inconvenient in law that one should avoid a specialty by a nude matter of fact."⁴⁵ The writing overrode prior, contemporaneous, and subsequent expressions of intention.

Another objective rule concerned the alteration of a sealed instrument. Lord Coke in *Pigot's Case*⁴⁶ stated that "it was resolved, that [] when any deed is altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligee . . . the deed thereby becomes void."⁴⁷ If instead of a stranger, a mouse or rat should eat the seal of an obligor affixed to a covenant, the obligor whose seal had been eaten was discharged along with joint obligors whose seals were intact.⁴⁸ The physical document overrode the

42. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917).

43. See Wm. L. Clark, Jr., *Handbook of the Law of Contracts* § 262 (1894).

44. Francis Bacon wrote: "*Ambiguitas Patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deedes hollow . . ." Francis Bacon, *The Elements of the Common Laws of England* 91 (photo. reprint 1978) (1630).

45. Eric Mills Holmes, 3 *Corbin on Contracts* § 10.15 n.1 (Joseph M. Perillo ed., West Publ'g Co. 1996) (1950) (quoting Y.B. 1 Hen. 7, 14, 2). In some jurisdictions, the rule persisted well into the twentieth century. See *Cammack v. J. B. Slattery & Bro., Inc.* 148 N.E. 781 (N.Y. 1925). It may be alive somewhere. See Holmes, § 10.15 n.3 (stating that "[t]here are unreversed cases to the same effect in other states that have not abolished seals.").

46. 77 Eng. Rep. 1177 (K.B. 12 Jac.).

47. *Id.* at 1178.

48. Cited for this proposition is *Bayley v. Garford*, 82 Eng. Rep. 441 (C.P. 17 Car.I), although the court merely set the case for reargument. Nonetheless, subsequent cases treated it as binding precedent. In *Seaton v. Henson*, 83 Eng. Rep. 527 (K.B. 30 Car.II) also reported in 2 Show. 28, 89 Eng. Rep. 772, where the seal of one joint obligor was broken off, *Bayley v. Garford* was treated as the governing precedent. In *Nichols v. Haywood*, 73 Eng. Rep. 130 (K.B. 36 and 37 Hen. 8), the case was distinguished because the rodents feasted after issue was joined while the document was in the custody of the court clerk. See generally, Samuel Williston, *Discharge of Contracts by Alteration*, I, 18 Harv. L. Rev. 105 (1904), II, 18 Harv. L. Rev. 165 (1905) (describing other situations in which a contract was discharged).

intention of the parties. A bond under seal that was lost could not be proved by secondary evidence until 1789.⁴⁹

At one stage of English legal history, a stolen signet ring that was used to seal a covenant bound the owner of the ring.⁵⁰ Appearance overrode intention.

The various branches of the parol evidence rule also subordinated intention to the *appearance* of intention as reflected in a writing.⁵¹ The parol evidence rule was not needed to protect instruments under seal as such instruments were constitutive; the documents were themselves the contracts and were impervious to parol evidence. Unsealed contracts became more common in the later Middle Ages and during the Renaissance. To protect such writings, the parol evidence rule was created. "By the late seventeenth century, a modern parol evidence rule for contracts had taken shape."⁵²

Oral contracts were less constrained by rules of formality until the enactment of the Statute of Frauds in 1677.⁵³ The requirement of written evidence was then imposed on a considerable number of contracts, particularly contracts that were high on the economic scale.

III. THE TRANSITION FROM THE EIGHTEENTH TO THE NINETEENTH CENTURIES

Starting in the late eighteenth century, courts and text writers began to shift from looking solely to the inherent meaning of the words of the parties, to the intentions of the parties. Although they frequently employed subjective rhetoric and later commentators sometimes looked at the decisions of this era through a subjective lens, in this era the intention of the parties was gleaned solely by an analysis of the parties' words and other outward indicia of intention.

49. See A.W.B. Simpson, *A History of the Common Law of Contract* 95 (reprint 1987) (1975), *citing* *Read v. Brookman*, 3 T.R. 151, 100 Eng. Rep. 504 (K.B. 1789) [hereinafter Simpson, *Common Law of Contract*].

50. See John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 15 (3d ed. 1940).

51. Kevin M. Teeven, *A History of the Anglo-American Common Law of Contract* 110 n.240 (1990).

The parol evidence rule seems to have caught on by the early part of the eighteenth century since it appeared in Lilly's *Practical Register* 48 (1719), as quoted in 5 C. Viner, *A General Abridgment of Law and Equity* 515-516 (1742) (If an agreement made by parol to do anything be afterwards reduced into writing, action must be brought on the writing because of its greater certainty, citing a 1681 case.).

Id.

52. *Id.* at 89.

53. See Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 *Fordham L. Rev.* 39 n.1 (1974).

A. *The Misunderstood Case of Cooke v. Oxley*

The case of *Cooke v. Oxley*,⁵⁴ decided in 1790, is often tendered as proof that a subjective theory of contracts prevailed in the late eighteenth century.⁵⁵ In fact, however, the case was about consideration and was totally unconcerned with issues of subjective or objective intention. In *Cooke*, the plaintiff alleged that the defendant proposed to sell the plaintiff 266 hogsheads of tobacco and gave him until 4:00 p.m. to agree or dissent from the proposal. The plaintiff further alleged that he gave notice of his agreement to defendant by 4:00 p.m. of that date. The King's Bench reversed a judgment for the plaintiff, after hearing plaintiff's counsel and stopping defendant's counsel before he commenced argument.

Today's reader is likely to read the case as establishing the proposition that the offeror's subjective change of mind, even if uncommunicated, is sufficient to revoke an offer. Such a reading is anti-historical. The case simply meant that no offer is binding unless immediately accepted because there is no consideration to make it binding. It was so understood by the legal profession for the next two decades and the case itself was argued and decided on the basis of consideration. The reporter stated that a rule had "been obtained to shew cause why the judgement should not be arrested, on the ground that there was no consideration for the defendant's promise."⁵⁶ In deciding the case, Lord Kenyon pointed out that the proposal "was all on one side; the other party was not bound; it was therefore nudum pactum,"⁵⁷ a term of art in consideration doctrine. In concurring, Justice Grose stated "there is no consideration for the promise"⁵⁸ and Justice Buller pointed out that there is no advantage to the defendant and no damage to the plaintiff in exchange for the promise made earlier the same day,⁵⁹ thus stating the core of modern consideration doctrine.

In terms of offer and acceptance, the case was an application of the principle laid down in the case of *Nichols v. Raynbred*.⁶⁰ In that 1615 case, it was held that a promise was sufficient consideration for a promise, but the report warned: "[n]ote here the promises must be at

54. 3 T.R. 653, 100 Eng. Rep. 785 (K.B. 1790).

55. See E. Allan Farnsworth, *Contracts* § 3.17 n.16 (3d ed. 1999) (labeling *Cooke v. Oxley* "a confusing relic of the subjective era"); John Edward Murray, Jr., *Murray on Contracts* § 41 n.34 (The Michie Co. 3d ed. 1990); 1 Samuel Williston, *The Law of Contracts* § 56 n.48 (1920). *But see* A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q. Rev. 247, 261 (1975).

56. 3 T.R. at 653, 100 Eng. Rep. at 786.

57. 3 T.R. at 654, 100 Eng. Rep. at 786.

58. 3 T.R. at 654, 100 Eng. Rep. at 786.

59. 3 T.R. at 654, 100 Eng. Rep. at 786.

60. Hobart 88, 80 Eng. Rep. 238 (K.B. 1615); *see also* *Kirkby v. Coles*, Cro. Eliz. 137, 78 Eng. Rep. 394 (Q. B. 31 Eliz.).

one instant, for else they will both be *nuda pacta*.”⁶¹ *Cooke v. Oxley* was so explained in 1804 by James Kent in one of his typically scholarly and conservative opinions for the New York Supreme Court.⁶² Kent wrote that:

[t]his is a case of mutual promises, where the one is intended to be the consideration for the other. It is a well settled rule that in such cases the promises must be stated to have been made at the same time. Otherwise the one antecedently made will be without consideration, and consequently, not sufficient to support the other.⁶³

Plaintiff argued that the maxim to the effect that the law ignores fractions of a day should be applied. Kent, however, stated that the maxim “is repugnant to the case of *Cooke v. Oxley*.”⁶⁴ He continued, stating, “[i]t is clear, therefore, from the last decision and from the reason of the thing, that mutual promises, where one is the consideration of the other, must be made not only on the same day, but at the same time; they must be concurrent engagements.”⁶⁵

The theory stating that offer and acceptance must be simultaneous seems incredible doctrine in mercantile jurisdictions such as 1790 England and 1804 New York.⁶⁶ Were contracts by correspondence legal impossibilities? The reports indicate that contracts were made by correspondence and litigation concerning them sometimes proceeded without reference to their initial validity,⁶⁷ perhaps because the doctrine of simultaneous offer and acceptance did not apply to offers to unilateral contracts,⁶⁸ or to contracts that had become unilateral by performance of one side of a bilateral agreement.⁶⁹

Yet, the argument that the offer and acceptance must be simultaneous was made frequently enough to cast doubt on the validity of contracts by correspondence. For example, in *Head & Amory v. Providence Insurance Co.*,⁷⁰ the plaintiff in Boston on

61. Hobart 88, 80 Eng. Rep. at 238.

62. See *Livingston v. Rogers*, 1 Cai. R. 584 (N.Y. Sup. Ct. 1804).

63. *Id.* at 584-85. Kent cited *Cooke v. Oxley* for this point. His citation was to the case as reported in 3 D. & E. 653.

64. *Id.* at 584.

65. *Id.* at 585.

66. That merchants may have learned to cope with the impractical rule of *Cooke v. Oxley* is suggested by *Humphries v. Carvalho*, 16 East 45, 104 Eng. Rep. 1006, 1007 (K.B. 1812). The court upheld a sale of 5 casks of ipecacuanha made on a Saturday with an option by the buyer to terminate on the following Monday. While for many purposes such a contract is functionally identical to an irrevocable offer, the contract differs from an offer as to such issues such as risk of loss.

67. *Ludlow v. Bowne*, 1 Johns. 1 (N.Y. 1806); *Read v. Gaillard*, 2 S.C. Eq. (2 Des.) 552 (1808).

68. See *Simpson*, Common Law of Contract, *supra* note 49, at 458-59. *Read*, 2 S.C. Eq. (2 Des.) 552, was such a case.

69. *Ludlow*, 1 Johns. at 1, was such a case.

70. 6 U.S. (2 Cranch) 127 (1804).

September 3, 1800 mailed an offer to its insurer in Providence to rescind a policy of insurance on a vessel believed to be in Havana in need of repair. On September 6, the defendant dispatched a letter assenting to the offer. Soon thereafter, it was learned that, prior to this correspondence, the vessel had sailed from Havana, and had been captured and condemned as a prize by a foreign power.

The issue before the court was the validity of the mutual rescission agreed to by correspondence. John Quincy Adams, for the defendant, ridiculed the notion of a contract by correspondence. He questioned the justice of the plaintiff being bound on the third and the defendant on the 6th.⁷¹ His co-counsel, Mason, cited *Cooke v. Oxley* as authority for Adams' oratory.⁷² Chief Justice Marshall, for the Court, was able to avoid the question by ruling for the plaintiff on the grounds that the defendant insurer's letter did not bear the signature and seal of an officer authorized by its by-laws to contract for the corporation.⁷³ Only with the 1818 decision in the case of *Adams v. Lindsell* did a common law court hold that a bilateral contract could be formed by correspondence, although Chancery had upheld such contracts.⁷⁴ As late as 1815, the New York Court followed *Cooke v. Oxley*.⁷⁵ As in the prior cases, the ruling was based solely on consideration analysis. Intention was not made to be the issue.

71. *Id.* at 148. In a Pennsylvania case, a trust deed for the benefit of creditors was executed on a Saturday, a sheriff's execution took place on Monday, and the trustee accepted the deed on Wednesday. The court held that the acceptance related back to Saturday. *Wilt v. Franklin*, 1 Binn. 502 (Pa. 1809). This was one possible answer to Adams' question.

72. *Head*, 6 U.S. (2 Cranch) at 160.

73. Marshall also avoided the same issue in *Lawrason v. Mason*, 7 U.S. (3 Cranch) 492, 494 (1806). Defendant's counsel argued for the application of *Cooke v. Oxley*, saying "[t]here was no consideration, and consequently no contract." *Id.* at 494 (quoting *Cooke v. Oxley*, 3 T.R. 653). However, the case may have been inapplicable because (1) the offer was to a unilateral contract, and (2) the case involved a letter of credit governed by the law merchant. The case was decided on unrelated grounds.

74. *See Kennedy v. Lee*, 3 Mer. 442, 36 Eng. Rep. 170 (Ch. 1817).

75. *See Keep v. Goodrich*, 12 Johns. 397, 397 (N.Y. Sup. Ct. 1815) (Spencer, J.). Massachusetts applied *Cooke v. Oxley* in 1822. Neither the court nor counsel made reference to *Adams v. Lindsell*. *M'Culloch v. The Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278 (1822). Although *Cooke v. Oxley* has been applied in some later cases, none of these applications seem to have involved the "mailbox rule." As late as 1887 we find this in an American textbook:

[T]o constitute a contract in fact, the two or more parties must concurrently assent to exactly the same thing at the same instant of time. So that, if one consents . . . at one time and the latter at another, by reason of which their wills do not at any instant completely coincide, they do not enter into a contract.

Joel Prentiss Bishop, *Commentaries on the Law of Contracts* § 313, at 119 (1887). Earlier, in 1844, W.W. Story had written that the offer and acceptance must be simultaneous, citing a variety of sources based on *Nichols v. Raynbred*. William Wentworth Story, *A Treatise on the Law of Contracts not under Seal* § 128, at 81 (reprint 1972) (1844). Elsewhere, however, his treatise recognized the rule of *Adams v. Lindsell*. *Id.* §§ 84, 86.

B. Was *Adams v. Lindsell* Based on a Subjective Theory?

The above discussion shows that *Cooke v. Oxley* was most definitely not based on a subjective theory. Curiously, some scholars who claim that *Cooke v. Oxley* was based on subjective thinking also claim that *Adams v. Lindsell*,⁷⁶ which overruled it, was also based on a subjective theory.⁷⁷ One cannot gather from the report of the case whether a subjective or objective theory nurtured the court's decision. The court seems to have had the pragmatic goal of finding a rationale to uphold the formation of contracts by correspondence.

The report of the case is terse. The court saw the issue in very practical terms. If an offer could not be accepted by mail, "no contract could ever be completed by the post."⁷⁸ Moreover, "if the defendants [offerors] were not bound by their offer when accepted by the plaintiffs till the answer [acceptance] was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum."⁷⁹ Clearly, at this point, no subjective or objective theory of contract formation had been propounded. The discussion is grounded in purely practical terms. The following sentence is said to have been the subjective theoretical underpinning of the holding: "The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter."⁸⁰ With

76. 106 Eng. Rep. 250 (K.B. 1818).

77. See Murray, *supra* note 55, at 148, which states that *Adams v. Lindsell* "was decided when the subjective theory of mutual assent was still prevalent." My point here is that the common law's flirtation with the subjective theory had not yet seriously begun.

Another scholar wrote, "[t]his subjective theory of formation was firmly established by the end of the eighteenth century," citing *Adams v. Lindsell* and *Cooke v. Oxley*. Dalton, *supra* note 11, at 1042 n.150. Moreover, Teeven takes the position that *Cooke v. Oxley* was based on subjective thinking and that "the subjective standard was reinforced" by *Adams v. Lindsell*. Teeven, *supra* note 51, at 182.

78. *Adams*, 106 Eng. Rep. at 251.

79. *Id.*

80. *Id.* There are three possible sources for this language and the thought behind it: (1) Pothier says much the same thing. "[T]he will of the party, who makes a proposition in writing, should continue until his letter reaches the other party This will is presumed to continue, if nothing appears to the contrary" Pothier, *supra* note 15, at 18. But under Pothier's test no contract would have been formed in *Adams v. Lindsell* because the defendant's sale of the subject matter appeared to the contrary. (2) The thought is consistent with the common law past-benefit cases. For example *Beaucamp*, at Neggin's request, paid £10 to C. See *Beaucamp v. Neggin*, 78 Eng. Rep. 536, 536 (K.B. 1591). A year later, Neggin promised *Beaucamp* reimbursement. See *id.* In holding the promise to be enforceable, the court stated, "when the payment is laid to be at his request, the consideration doth continue." *Id.* Another such case is *Barker v. Halifax*, 78 Eng. Rep. 974 (1598) ("[T]hat an *assumpsit* in consideration that you had married my daughter, to give unto you £40 was good; for the affection and consideration always continues."). (3) Chancery said much the

this language the court indulged in the fiction of the continuance of the offeror's original intention while the letter of acceptance was being transported by post office employees, despite the contrary subjective intentions of the offerors. While the test would have been subjective if one accepted the fiction rather than the reality of simultaneous assent,⁸¹ it was an objective test in this respect: he offeree had objectively manifested assent by posting the letter of acceptance, notwithstanding the failure of communication to the offerors themselves. Strong objectivists such as Holmes⁸² and Williston⁸³ found the holding to be in accord with their basic objective theories, although Williston is somewhat half-hearted in his endorsement of the holding of the case. It is interesting to note that in France, the bastion of subjectivism, on similar facts a *Cour d'appel* has ruled that no contract was made because "there had been no moment at which the intention to offer and the intention to accept had co-existed."⁸⁴

The reasoning in the Chancery cases that had, prior to *Adams v. Lindsell*, enforced contracts by correspondence, bears examination. In *Kennedy v. Lee*, Lord Eldon stated that "it has been long since settled, as the doctrine of the Court, that such agreements, when clearly made out, will be established."⁸⁵ Eldon further stated that "the law of the Court [was] . . . that, if a person communicates his acceptance of an offer within a reasonable time after the offer being made . . . the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute."⁸⁶ Thus, the fiction of simultaneity neatly dodged the dictum of *Nicholas v. Raynbred*.⁸⁷ A fiction can hardly be said to be based on the will of the parties.

same thing in enforcing contracts by correspondence prior to *Adams v. Lindsell* in *Kennedy v. Lee*, quoted *infra* at text accompanying note 85. Chancery's statement is likely to have been based either on (1) or (2) above or some combination of the two.

81. The first Restatement of Contracts indicated that there were at least six vantage points from which the meaning of language could be viewed. See Restatement of Contracts § 227 (1932). These were (1) general usage, (2) limited usage—local or trade meanings, (3) a mutual standard, (4) an individual standard, (5) reasonable expectation—the intention the speaker or writer would expect the addressee to understand, and (6) reasonable understanding—the reasonable understanding of the addressee of the language. See *id.* cmt. a. Comment b to the section indicates that the third and fourth vantage points are subjective. See *id.* cmt. b. I am doubtful about categorizing the third vantage point as "subjective." For example, is a mutually agreed-upon secret code "subjective?"

82. See Oliver Wendell Holmes, Jr., *The Common Law* 305-06 (1881).

83. See 1 Williston, *supra* note 55, § 81, at 144.

84. Nicholas, *supra* note 17, at 68 (citing *Bordeaux* 17.1.1870, S. 1870.2.219).

85. 36 Eng. Rep. 170, 173 (Ch. 1817).

86. *Id.* at 175.

87. 80 Eng. Rep. 238 (K.B. 1615); see also *supra* text accompanying notes 60-61 (discussing *Nicholas v. Raynbred*).

Kennedy v. Lee, however, was not primarily a case about formation. The parties disagreed about the interpretation of their contract. On this point, Eldon, personified objectivity itself. The parties were in disagreement about the scope of the subject matter of their contract. After stating that the parties ought to point out to the court based on the face of the contract what the subject matter was, he continued:

I do not mean (because the cases which have been decided would not bear me out in going so far), that I am to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto* arises out of the terms of the correspondence.⁸⁸

He concludes this passage by stating that the letters must be construed as if they constituted a formal instrument.

Adams v. Lindsell, for a variety of reasons, acquired fame and much has been read into it. Subsequent glosses on the case describe the mailing of a letter of acceptance as a “meeting of the minds.”⁸⁹ Such a gloss was created during the common law’s flirtation with a subjective theory of contracts, but does not provide a basis for understanding the original rationale of the case.

C. *Stare Decisis in Early Nineteenth Century America*

The judges of the early American republic were firm adherents of the doctrine of *stare decisis*. This adherence is based on the same foundations as the objective approach to contracts. Pursuant to *stare decisis*, doing justice was not the job of the court if precedent demanded injustice. Typical is the case of *Hallett v. Wylie*.⁹⁰ The defendant tenant had leased a house for a term of four years. Seven months after commencement of the term, the house was consumed by fire. Judge Van Ness acknowledged that “[t]his is a hard case upon the defendant; and if the court could, consistently with settled and established principles, relieve him against the payment of the rent in question, we should most willingly do it.”⁹¹ The court made it clear that it viewed its function as applying the law, not making it.⁹² In a Massachusetts case, an agent had authority to borrow money on the credit of his principals, but no express authority to execute a sealed instrument. It was successfully argued that an instrument signed and sealed by the agent could not serve to bind the principal. The court remarked, “and although this objection is merely technical, I have not been able, with much labor, and a strong inclination, to get over it. A

88. *Kennedy*, 36 Eng. Rep. at 174.

89. *E.g.*, *Mactier’s Adm’r v. Frith*, 6 Wend. 103, 119 (N.Y. 1830).

90. 3 Johns. 44 (N.Y. 1808).

91. *Id.* at 46.

92. The court put this thought in Latin: “[w]e sit here ‘*jus dare*,’ not ‘*jus facere*.’”

desire to do justice ought not lead us astray from the rules of law"⁹³ Two years earlier, another judge of the same court stated, "[s]o far the law has provided; and we do not profess to be wiser than the law."⁹⁴

In a 1797 Maryland case, William Pinkney successfully argued for the appellant. Among the arguments he made, none of which would likely be made by a lawyer today, were the following. Pinkney told the court, "[a]bsurdity is no argument against [a rule] if it is law, nor its inconvenience."⁹⁵ He points out the lack of the courts' authority to rectify absurdities, stating "[a] man of plain sense would be shocked at the absurdity of one third of the old common law, which has been since changed by acts of parliament, or acts of assembly; yet it was law till it was altered."⁹⁶ He then explains his view of the philosophical foundations of law stating that:

[t]he law is an artificial system, which must not be judged of by the ordinary rules of reason. It is a technical science; any known system is better than none. It is of importance to society that the rules of justice should not be fluctuating; that they should be fixed, and settled, and permanent.⁹⁷

The desire for certainty, expressed by Pinkney, appears throughout the jurisprudence of the early republic.⁹⁸ Pinkney was no eccentric, but rather was a prominent diplomat who served as James Madison's Attorney-General, and then became an influential congressman.⁹⁹

93. *Banorsee v. Hovey*, 5 Mass. 11, 23 (1809). Although the courts did not have the power to direct verdicts, grant summary judgments or judgments n.o.v., they did not look with favor on jury nullification. In *Wilkie v. Roosevelt*, 3 Johns. Cas. 206 (N.Y. Sup. Ct. 1802), the jury twice found for the plaintiff despite the uncontroverted evidence that the plaintiff's loan to the defendant was usurious. The court ordered a third trial, saying, "[i]f the statute against usury is an unconscientious defense, or the law impolitic, it is the province of the Legislature to repeal it. But as long as it remains in force, it is the indispensable duty of a court and jury to carry it into effect." *Id.* at 208-09.

94. *Paul v. Frazier*, 3 Mass. 71, 73 (1807).

95. *Beane v. Middleton*, 4 H. & McH. 74, 78 (Md. 1797) (emphasis in original). Similarly, in *Paca's Lessee v. Forwood*, 2 H. & McH. 175, 179-81 (Md. 1787), a deed commenced with the words "this indenture" but was not indented. Plaintiff's successful argument was that "[t]hough indenting may be considered as a mere ceremony," it was necessary and therefore the deed was void, and "[a]ll writers agree, that indenting is a necessary circumstance to constitute a deed of bargain and sale." *Id.* at 178-79.

96. *Beane*, 4 H. & McH. at 78.

97. *Id.* at 79.

98. *See, e.g., Williams v. Hodgson*, 2 H. & J. 474, 483 (Md. 1809) ("[T]he chancellor's decree, however consonant to strict justice, ought to be reversed."); *Pitcher v. Livingston*, 4 Johns. 1, 13 (N.Y. Sup. Ct. 1809) ("It is the very nature of general rules, to sometimes operate harshly"); *Hall v. Shultz*, 4 Johns. 240, 244 (N.Y. Sup. Ct. 1809) ("[C]ourts of law cannot enforce moral duties, or relieve particular hardships, without a legal basis."); *Davy v. Hallett*, 3 Cai. R. 16 (N.Y. Sup. Ct. 1805) (certainty in measuring an insurance loss).

99. *See* 22 *Encyclopedia Americana* 117 (1984).

William Nelson's study of the post-revolutionary era in Massachusetts makes it clear that ideas similar to Pinkney's were also prevalent in that Commonwealth.¹⁰⁰

Despite the fear of perjury and other falsified evidence, the judges and lawyers of this era were respectful of the rules handed down by the English common law and equity. Thus, equitable estoppel, whereby a party relied on the express statement of another¹⁰¹ or on the other's silence,¹⁰² was an acceptable doctrine despite the possibility of perjury in its implementation.

Change did come, very slowly, though. According to Nelson's study, it was not until the 1820's that the courts became comfortable with the possibility of departing from precedent, although there had been prior departures.¹⁰³ Writing about legal change for a German publication, Justice Story in 1834 wrote about America's openness to civil law influences.¹⁰⁴ As to contracts, Story wrote:

The law with regard to personal or movable property, and contracts, (often called in the language of common law, *choses in action*) is in substance that of England. . . . except that the American law on these subjects is more expansive and comprehensive, and liberal, borrowing freely from the law of Continental Europe, and more disposed to avail itself of the best principles of commerce, which can be gathered from all foreign sources not excluding even the civil law.¹⁰⁵

D. Interpretation in the First Decades of the Nineteenth Century

Case law in the early new republic of the United States took starkly objective approaches to the enforcement of contracts. These approaches included the rule that parties and other interested persons were incompetent to testify. The parol evidence rule was enforced with vigor. The Statute of Frauds was extolled. The special rules attending sealed instruments that were imported from England remained intact.

In 1810, America's earliest law-treatise writer defended the rule excluding a party from testifying on the party's own behalf as follows: "[t]o admit a party to a contract to support it by his own testimony in an action brought upon it, would destroy all security for our

100. See William E. Nelson, *Americanization of the Common Law* 96 (1975).

101. See *Lewis v. Gray*, 1 Mass. 297 (1805).

102. See *Engle v. Burns*, 9 Va. (5 Call) 463 (1805); *Buckner v. Smith*, 1 Va. (1 Wash.) 296 (1794). The related doctrine of "apparent authority" was also honored. See *Hooe v. Oxley*, 1 Va. (1 Wash.) 19, 23 (1791).

103. See Nelson, *supra* note 100, at 171-72.

104. Story's article, entitled *American Law*, was published in Germany in a German translation. The original English-language text appears in Kurt H. Nadelmann, *Joseph Story's Sketch of American Law*, 3 Am. J. Comp. L. 3 (1954).

105. *Id.* at 22.

property"¹⁰⁶ While this quotation defends a rule of evidence, the rule is to a large extent the functional equivalent of the objective theory as expounded by Holmes and Williston and which found its way into the first Restatement of Contracts: if the parties could not testify, evidence of their subjective intention could not easily be placed into the record.

Another of the principal buttresses of an objective approach to contract law was and still is the parol evidence rule. In 1802, a plaintiff alleged that he had conveyed land to the defendant for a price and that the defendant orally had promised to pay proportionally more if a survey showed that the tract exceeded in acreage the amount estimated. This evidence was excluded. A contrary ruling, the Connecticut court stated, "would be the destruction of all written contracts."¹⁰⁷ Even the acknowledgment of a deed, botched by a judge who took the acknowledgment, could not be supplemented by parol evidence.¹⁰⁸ The "plain meaning rule," a close relative to the parol evidence rule, also appears in early reported cases.¹⁰⁹ Interestingly, the plain meaning rule was also stringently applied to the interpretation of statutes from the eighteenth to the mid-nineteenth centuries, and frequently, later.¹¹⁰ Interpretation was a hateful process to persons raised in the British Protestant tradition, as well as to the philosophers of the Enlightenment. Both traditions professed paramount attachment to the text rather than to the intention that lay behind the text.¹¹¹

Reformation is a remedy that sometimes allows the redrafting of a writing to conform to the intention of the parties, but Chancellor Desaussure of South Carolina would refuse to reform an instrument that created a trust of £1,000 for the settlor's brother's "lawfully

106. Zephaniah Swift, *A Digest of the Law of Evidence in Civil and Criminal Cases and a Treatise on Bills of Exchange* 99 (1810).

107. *Northrup v. Speary*, 1 Day 23, 27 (Conn. 1802); see also *Bull v. Talcot*, 2 Root 119 (Conn. 1794); *Bradley v. Blodget*, Kirby 22 (Conn. 1786).

108. See *Watson's Lessee v. Bailey*, 1 Binn. 470, 1808 WL 1490, at *4 (Pa. 1808) ("We may regret that the unskilfulness or negligence of the scrivener had led to this error; but we are bound to say *ita lex scripta est*, and the party must abide by consequences of his own acts.").

109. See *Cook v. Ambrose*, Add. 322 (Pa. C. 1797). Although modern texts and Restatements treat the question of using parol evidence to interpret a contract as a distinct question from the parol evidence rule concerning additional terms of a contract, this separation is a twentieth century event. See Greenleaf, *supra* note 21, at 315-54, where they are treated as aspects of the same doctrine.

110. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. Rev. 204, 215-16 (1980).

111. These propositions are proved in detail in H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985). For additional information on the survival of extreme textualism among Protestant Fundamentalists and the possible parallel survival among some legal analysts, see generally Vincent Crapanzano, *Serving the Word, Literalism in America from the Pulpit to the Bench* (2000).

begotten children.” Evidence was proffered that the settlor’s intention and instructions to the scrivener was to benefit only the children of his brother’s first marriage. The chancellor wrote: “[i]t would, indeed, be highly mischievous, and tend to the endangering all property . . . if such parol testimony should be admitted.”¹¹² The parol evidence rule is “founded in great wisdom and caution. It would tend greatly to introduce perjuries . . . to the great hazard of the titles of all property.”¹¹³ Earlier, the North Carolina court had warned of the “great danger . . . of controlling deeds by parol testimony.”¹¹⁴ If there was any gap (“chasm”) to be filled in an instrument, it “shall be supplied by the Court according to the intention of the parties, if possible to be collected from the instrument; if not, then from the rules of law, or the usages customary in such” transactions.¹¹⁵

The Statute of Frauds requires objective (written) evidence of certain important kinds of contracts. In 1798, Chancellor Hanson of Maryland, writing about the Statute, pledged, “[a]nd this court . . . will never destroy that safeguard which the legislature has provided for the protection of property, and the prevention of fraud and imposition.”¹¹⁶ Chancellor Rutledge of South Carolina expressed his belief in the intent as well as the letter of the statute and was gratified that judges of the present day were being stricter in its application.¹¹⁷

That the fear of perjury and fraudulent evidence as a tool for filching property was greater than any philosophical notion of the superiority of objective evidence is shown by another line of cases. Despite the parol evidence rule, extrinsic evidence was admissible to show the falsity of a date on a negotiable instrument¹¹⁸ or a deed.¹¹⁹ Why? Because “[i]t would be of the most dangerous consequence, to assert that the dates of deeds are conclusive; the greatest frauds might thus be committed.”¹²⁰ Indeed, one fact pattern in which evidence of subjective intention was sought and admitted was to uncover whether a conveyance was fraudulent.¹²¹ Clearly, this rule favoring the admissibility of this parol evidence is for the protection of the

112. *Holmes v. Simons*, 20 S.C. Eq. (3 Des.) 149, 152 (1810).

113. *Id.* at 153.

114. *Bradford v. Hill*, 2 N.C. (1 Hayw.) 22, 23 (1793) (counsel’s argument accepted by the court).

115. *Tabb v. Archer*, 13 Va. (3 Hen. & M.) 399, 417 (1809) (emphasis in original).

116. *Simmons v. Hill*, 4 H. & McH. 252, 258 (Md. 1798). Hanson was the first president of the United States under the Articles of Confederation.

117. See *Givens v. Calder*, 20 S.C. Eq. (2 Des.) 171, 189-90 (1803); see also *Sears v. Brink*, 3 Johns. 210, 215 (N.Y. 1808) (“It is necessary to the prevention of fraud and perjury, that the consideration which leads to the promise should be in writing, as the promise itself.”).

118. See *Bayley v. Taber*, 5 Mass. 286 (1809).

119. See *Geiss v. Odenheimer*, 4 Yeates 278 (Pa. 1806).

120. *Id.* at 279.

121. See *Widgery v. Haskell*, 5 Mass. 144 (1809).

inchoate property rights of creditors.¹²² Despite the aversion to parol evidence where a written instrument existed or was required, some of the traditional equitable doctrines allowing parol evidence were continued in this early period.¹²³ But other mitigating rules in place today, such as showing that a writing is subject to an oral condition, were rejected.¹²⁴

There may be other rationales for the favoring of objective, especially written, evidence of a contract other than the threat of property divestment by the medium of perjury. But clearly the first American law-treatise writer and American judges in the late eighteenth and early nineteenth centuries believed that the threat to property was dire.

E. Interpretation in the Mid-Nineteenth Century

Authorities generally state that the dominant theory of contract in the first half of the nineteenth century was a subjective theory. Such a conclusion is unjustified for the first two decades of the century, but has some plausibility for later decades. As evidence of the prevalence of the subjective approach, the works of William Wentworth Story and Chancellor James Kent are cited.¹²⁵

In examining the evidence, one is struck by the dissonance between the language used by Kent and Story and the illustrations that they give. The junior Story,¹²⁶ who wrote the first American law book devoted solely to contracts, stated that "the contract shall be so interpreted, as to give effect to the intention of the parties, as far as it is legal, and mutually understood."¹²⁷ He continues, in a tone that is totally consistent with a subjective theory, as follows: "[w]henver such intent can be distinctly ascertained, it will prevail, not only in cases where it is not fully and clearly expressed, but also, even where it contradicts the actual terms of the agreement."¹²⁸ This is strongly subjective writing such that one would not expect to see in the

122. For similar reasons, it could be shown that a grantee had subjective knowledge of a prior unrecorded deed. *See* *Ludlow v. Gill*, N. Chip. 63 (Vt. 1790).

123. Parol evidence was admissible to show that a deed absolute was a mortgage; *see* *Washburn v. Merrills*, 1 Day 139 (Conn. 1803); *Critcher v. Walker*, 5 N.C. (1 Mur.) 488 (1810) (found to be a conditional sale); *Gay v. Hunt*, 5 N.C. (1 Mur.) 141 (1806); *Wilcox's Heirs v. Morris*, 5 N.C. (1 Mur.) 116 (1806); *German v. Gabbald*, 3 Binn. 302 (Pa. 1811); *Lessee of Thomson v. White*, 1 Dall. 424 (Pa. 1789); and that a resulting trust should be imposed; *Ross v. Norvell*, 1 Va. (1 Wash.) 14 (1791) (that a conveyance of land was held on an oral trust).

124. *See* *Skinner v. Hendrick*, 1 Root 253 (Conn. 1791); *Ward v. Lewis*, 21 Mass. 518 (1827). *But see* *Field* for the use of *Oxley v. Biddle*, 2 Dall. 171 (Pa. 1792) (arguably going beyond the English precedents).

125. *See* Teeven, *supra* note 51, at 182.

126. William Wentworth Story was the son of his better known father, treatise writer and Supreme Court Justice, Joseph Story.

127. W. W. Story, *supra* note 75, § 231, at 149.

128. *Id.*

common law writing of today. Yet, in proving these assertions, what evidence does Story provide? He cites, among others, *Bache v. Proctor*, a case involving a bond of £2,000 conditioned on a “fair, just and perfect account, in writing, of all sums received.”¹²⁹ Despite the absence of any language in the bond requiring that the money accounted for also be paid over, the court, per Lord Mansfield, held that the clear intention of the parties was that the money should be paid.¹³⁰ Justice Buller concurred, saying that “the palpable mistake of a word should not defeat the true intention of the parties.”¹³¹ Clearly, these judges and text-writer Story were thinking of the subjective intention of the parties, but derived that intention solely from the writing itself, because extrinsic evidence of intention was barred by the parol evidence rule, or the related plain meaning rule. Moreover, even if the case had come under one of the exceptions to the parol evidence rule, the plaintiff himself could not have testified to throw light on the meaning of the bond, because parties could not testify.¹³² The dissonance between subjective rhetoric and objective result was not due to hypocrisy or lack of intelligence. The results were as subjective as they could be in the framework of the evidentiary rules of the time.

Cases such as *Bache v. Proctor* represented a leap forward in the development of a rational mode of interpretation. Compare the case of the abbot, the croft and the commons described above,¹³³ where the court understood the parties’ intentions but refused to give effect to them because of the literal meaning of the words used. However, cases such as *Bache v. Proctor* from the late eighteenth and early nineteenth centuries¹³⁴ are entirely consistent with the objective test that has dominated contract interpretation since the late nineteenth

129. *Id.* § 231, at 150 (quoting *Bache v. Proctor*, 99 Eng. Rep. 247 (K.B. 1780)).

130. *See id.* (citing *Bache*, 99 Eng. Rep. at 247).

131. *Bache*, 9 Eng. Rep. at 247. An argument such as that successfully made in *Bache v. Proctor* was made in 1718 Maryland. In *Gresham v. Gassaway*, 1 H. & McH. 34 (Md. 1718), plaintiff’s counsel argued, “[t]he intent of a condition or covenant is always to be regarded, as where there was a condition to pay 50*l* without saying of what—it shall be intended to be money.” He collected, in an unsuccessful argument, other English cases where the court’s interpretation went beyond the literal meaning of the words used.

132. *See infra* text accompanying notes 173-179.

133. *See supra* text accompanying notes 40-41.

134. One case cited by Teeven, *supra* note 51, at 182, for a subjective approach in this period is *Bruce v. Pearson*, 3 Johns. 534 (N.Y. Sup. Ct. 1808). The defendant ordered goods from the plaintiff on specified credit terms. Plaintiff shipped only part of the order and stated more stringent credit terms. The goods did not arrive intact because of weather conditions. It was held that the plaintiff had the risk of loss. *See id.* at 536. In today’s parlance we would say that the offer had not been accepted; rather, a counter-offer had been made. The court said there was no agreement, no “*aggregatio mentium*.” *Id.* at 535. While this Latin phrase means “meeting of the minds,” a subjective concept, the case is perfectly consistent with objective thinking; the Latin phrase was a learned but unnecessary flourish.

century.¹³⁵ Holmes, one of the principal exponents of the objective theory described the ascertainment of the intent of the parties as follows:

[W]hen it is said that the intent of the parties or of a testator is the lodestar, etc., all that is meant is that in interpreting a particular sentence you may look at the general scheme, and the habit of language disclosed by the instrument, and may ascertain the facts under which the party acted, to qualify what might be the result of the particular words if they were taken alone.¹³⁶

This is exactly what was done by Lord Mansfield in *Bache v. Proctor*, and is the kind of quest for intent that Story seems to have had in mind. Another quotation on which Holmes, Story and Kent could probably agree, appears in another of Holmes' opinions: "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."¹³⁷

Chancellor Kent also wrote in subjective terms, stating that the interpretive quest is for the mutual intention of the parties which "will control even the literal terms of the contract, if they manifestly contravene the purpose; and many cases are given in the books, in which the plain intent has prevailed over the strict letter of the contract."¹³⁸

Yet, when one consults the cases decided by Kent in his judicial capacity, one sees a highly objective approach to the matters before him. He refused to allow parol evidence to show an intention not to include a particular bill of exchange in the terms of a general release.¹³⁹ In a case involving a non-negotiable promissory note for \$80, no time for payment appeared in the note. Testimony was excluded as to the agreed time of payment. In justification for the exclusion of this testimony, Kent explained:

The time of payment is part of the contract, and if no time is expressed the law adjudges that the money is payable immediately. . . . When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the

135. See, e.g., *Rodolitz v. Neptune Paper Prods.*, 239 N.E.2d 628, 630 (N.Y. 1968)

While the Appellate Division's conclusion as to the real intent of the parties may be correct, the rule is well settled that a court may not under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract. . . .

136. *Smith v. Abington Sav. Bank*, 50 N.E. 545, 546 (Mass. 1898).

137. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

138. James Kent, *Commentaries on American Law* 554-55 (12th ed. 1873) (1826) (citing, among others, *Bache v. Proctor*, 99 Eng. Rep. 247 (K.B. 1780)).

139. See *Pierson v. Hooker*, 3 Johns. 68 (N.Y. Sup. Ct. 1808).

contracting parties, and it is against established rule to vary the operation of the writing by parol proof.¹⁴⁰

So much for the subjective intention of the parties, or even the objective intentions manifested to each other. In another case,¹⁴¹ Thompson wrote the opinion of the court, but in oral argument, Kent showed his total agreement with Thompson. A ship was advertised to be copper-fastened and this representation was repeated, according to a witness, at the time of delivery of the bill of sale. In an action for breach of warranty, the advertisement was not allowed into evidence and the testimony of the witness excluded. Thompson wrote, “[i]t cannot be a safe or salutary rule to allow a contract to rest partly in writing, and partly in parol.”¹⁴²

Kent also took a highly objective approach to the Statute of Frauds. In one case he pointed out that many sale of goods cases have interpreted the Statute to be satisfied by delivery in the legal sense despite the statutory language that “the buyer must accept part of the goods sold, and *actually receive the same*.”¹⁴³ He takes issue with some of these cases, saying, “[t]he circumstances which are to be tantamount to an actual delivery, should be very strong and unequivocal, so as to take away all doubt as to the intent and understanding of the parties.”¹⁴⁴

In his approach to interpretation, Kent also subordinated the parties’ intentions to the weight of *stare decisis*.¹⁴⁵ Nonetheless, in some of Kent’s decisions, his objective test shifted from the notion of the intrinsic meaning of words to the ascertainment of the parties’ intent from their overall manifestations. In one notable case, Kent stated, “[t]he intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement.”¹⁴⁶ But in that case Kent did not go beyond the language of the written agreement and the taking of judicial notice of conveyancing practices before the ouster of the British.

140. *Thompson v. Ketcham*, 8 Johns. 189, 192 (N.Y. Sup. Ct. 1811).

141. *Mumford v. Mc’Pherson*, 1 Johns. 414 (N.Y. Sup. Ct. 1806).

142. *Id.* at 418; *accord*, *Smith v. Williams*, 5 N.C. (1 Mur.) 426 (1810) (extolling the superiority of written proof).

143. *Bailey v. Ogden*, 3 Johns. 399, 420 (N.Y. Sup. Ct. 1808).

144. *Id.* at 421.

145. The following passage from *Frost v. Raymond*, 2 Cai. R. 188, 195 (N.Y. Sup. Ct. 1804), illustrates *stare decisis* as an interpretive tool:

We are not able to assign a very solid reason for this distinction between the force and effect of the words “give” [which import a warranty] and “grant” [which does not import a warranty]. It arose from artificial reasons derived from the feudal law. The distinction is now become merely technical, but it is sufficient that it clearly exists, and we are certainly not at liberty to confound the words, or change their established operation.

146. *Jackson v. Myers*, 3 Johns. 388, 395 (N.Y. Sup. Ct. 1808).

A similar analysis can be made of the opinions of Chief Justice Marshall. In one case, he stated that “[c]ontracts are always to be construed with a view to the real intention of the parties.”¹⁴⁷ In the same term, however, he wrote the opinion in a case where a plaintiff had addressed a written offer to guaranty the credit of another to John and Joseph Naylor & Co.¹⁴⁸ There was no such firm, but the letter was received by the firm of John and Jeremiah Naylor & Co., for which it was in fact intended. The recipient accepted the offer by advancing the requested credit. In refusing to allow evidence of the actual intent of the offeror, Marshall referred to the “wise policy” that “will not permit a written contract to be explained by parol testimony.”¹⁴⁹

Insurance cases occupied much space in the reports of the early American republic. Considering their standardized nature, it is not surprising that *stare decisis* played a large role in interpreting their terms, and thus a highly objective viewpoint resulted. Indeed, the approach to insurance contracts was much like the approach to statutes.¹⁵⁰ Other standardized contracts received similar treatment.¹⁵¹

One historian asserts that Parsons, writing in 1855, “was the first American treatise writer to argue that an objective standard was needed in a market-oriented society in order to provide consistent,

147. *United States v. Gurney*, 8 U.S. (4 Cranch) 333, 343 (1808). This real intention was found solely from the written contract.

148. See *Grant v. Naylor*, 8 U.S. (4 Cranch) 224, 235 (1808). Marshall’s opinion was principally directed at preserving the integrity of the Statute of Frauds rather than the parol evidence rule. Not all such cases reached a similar conclusion. A court of equity might have reformed the document. In the early days, Pennsylvania had no separate courts of equity and equitable powers were bestowed on courts of general jurisdiction. Thus, in *Lynn v. Risberg*, 2 Dall. 180 (Pa. 1792), parol evidence was admissible to supply a blank name upon whom the party should draw, and in *Fox’s Lessee v. Palmer*, 2 Dall. 214 (Pa. 1793), a subscribing witness was permitted to testify to contradict a date in a deed. The latter decision might have been made by a court of law in other jurisdictions. See, e.g., *Oneale v. Lodge*, 3 H. & McH. 433 (Md. 1796) (parol evidence admissible to contradict recital in a deed that consideration had been paid).

149. *Grant*, 8 U.S. (4 Cranch) at 235.

150. See, e.g., *Rhineland v. Ins. Co. of Pa.*, 8 U.S. (4 Cranch) 29 (1807) (propriety of abandonment); *Lee v. Boardman*, 3 Mass. 238 (1807) (right to abandon); *Schmidt v. United Ins. Co.*, 1 Johns. 249 (N.Y. 1806) (same); *Williams v. Smith*, 2 Cai. R. 1 (N.Y. Sup. Ct. 1804) (describing what constitutes a blockade; effect of pestilential epidemic in Cadiz); *Leavenworth v. Delafield*, 1 Cai. R. 573 (N.Y. Sup. Ct. 1804) (delineating the rights of crew for wages during detention of ship); *Patrick v. Ludlow*, 3 Johns. Cas. 10 (N.Y. Sup. Ct. 1802) (meaning of “at or from”); *Morgan v. Ins. Co. of N. Am.*, 4 Dall. 455, 457 (Pa. 1806) (“No adjudged case in point has been cited on either side.”); *Hood’s Ex’rs v. Nesbit*, 2 Dall. 137 (Pa. 1792) (what constitutes deviation or barratry); *De Peau v. Russel*, 2 S.C.L. (1 Brev.) 441 (1804) (right to abandon). For rare cases in which the policy is actually quoted, see *Suydam v. Marine Ins. Co.*, 1 Johns. 181 (N.Y. 1806); *De Peau*, 2 S.C.L. (1 Brev.) at 441.

151. See generally *Putnam v. Wood*, 3 Mass. 481 (1807) (contract of affreightment); *Avery v. Inhabitants of Tyringham*, 3 Mass. 160 (1807) (contract employing a minister).

uniform principles in interpreting contracts so that men of business knew the effect of words used in contracts."¹⁵² Parsons, who makes no mention of "men of business" in this context, does strongly support the application of inherent meaning of words. Indeed, Parsons was a reactionary, not an innovator. In this respect, he falls back to the medieval tradition rather than to a more modern notion of objective intention as reasonably understood by one or both contracting parties. The flavor of his entire discussion is perhaps accessible in this quotation:

The first point is, to ascertain what the parties themselves meant and understood. But however important this inquiry may be, it is often insufficient to decide the whole question. The rule of law is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law, will permit. In other words, courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language, or to the rules of law.¹⁵³

Parsons' formulation was not much different from that of Zephaniah Swift, who wrote in 1795, as follows:

The intent of the parties, is to be gathered from the external signs and actions. For no man may put a construction upon his words contrary to the common understanding. Therefore he who has an obligation in his favour, has a right to compel him, from whom it is due, to perform it in that sense, which corresponds to the ordinary interpretation of the signs made use of.¹⁵⁴

152. Teeven, *supra* note 51, at 183 (citing 2 T. Parsons, *Law of Contracts*, at 3-9 (1855)).

153. Parsons, *supra* note 152, at 6. A similar "plain meaning" approach was taken by a contemporaneous writer, who, however, avoided coming to grips with the problem of the interpretive vantage point. John William Smith, *The Law of Contracts* 24-41 (photo. reprint 1992) (1853). A revealing comment on the plain meaning versus real intention approach was made in *Belmont v. Coman*, 22 N.Y. 438 (1860). "It is one of the matters of fact, found at the trial, that the parties thus understood each other. This is no reason for a misinterpretation of the written language they used; but I am glad to believe, that they did not disappoint their own intentions." *Id.* at 441. An interesting instance where the proven common intentions of the parties were subordinated to the inherent meaning of language was *Spencer v. Millisack*, 2 N.W. 606 (Iowa 1879). "The court found as a fact that it is generally understood among merchants that wholesale price means the price paid by the buyer to the wholesale merchant, without carriage." *Id.* at 608. When the parties came together to calculate the amount owed they added five percent for carriage. "The question now is whether this understanding [about the additional charge for carriage] shall prevail over the real meaning of the contract, as imparted by its terms, and as generally understood by merchants." *Id.* "In a suit upon the contract its real and not its supposed meaning must prevail." *Id.* at 609. Thus, the parties' actual agreement was disregarded. This reasoning also ignores Iowa's enactment of Paley's rule. See *infra* text accompanying note 242.

154. 1 Swift, *supra* note 106, at 377. He would allow exceptions for "the most

IV. INTERPRETATION OF AMBIGUOUS COMMUNICATIONS IN THE EIGHTEENTH AND EARLY NINETEENTH CENTURIES

In the eighteenth and early nineteenth centuries, juries had broad discretion in interpreting oral expressions. Written expressions were for the judge to interpret, unless ambiguity appeared, opening the door to parol evidence. In such a case, the jury had broad discretion in interpreting the meaning of the expressions of the parties. The little guidance the courts seem to have given juries leaned toward objectivity. Gradually, led by the writings of a moral philosopher, the courts adopted an approach to interpretation that looked to the reasonable understandings of the parties.

A. *Unilateral Communications*

Because a contract is often made by a process of offer and acceptance, it is frequently necessary to interpret the alleged offer apart from the words of acceptance. Similarly, it is sometimes necessary to examine the alleged acceptance to determine whether the words amount to an acceptance. In addition to offers and acceptances, contracts frequently involve other communications such as invitations for offers made prior to contracting and notices after contracting. What test was employed to interpret unilateral communications? We do not have much information on this for the eighteenth and early nineteenth centuries. Juries were more or less free to devise their own methods for making these determinations when the words were susceptible to more than one interpretation. As one observer notes, "[t]he trial judge could comment on the facts, ask a jury to explain a verdict, argue with the jury, admonish a jury that erred, and order a jury to re-deliberate."¹⁵⁵ Another states that "there was very little law of contract at all before the last [nineteenth] century, because there was no machinery for producing it and most of the questions were left to juries as questions of fact."¹⁵⁶ Other

decisive reason." *Id.*

155. Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *Fordham L. Rev.* 407, 418 (1999).

156. J. H. Baker, *Book Review*, 43 *Mod. L. Rev.* 467, 469 (1980). Consider this charge to the jury given by a judge who was not a lawyer:

You have heard, gentlemen of the jury, what has been said in this case by the lawyers—the rascals! But, no, I will not abuse them. It is their business to make a good case for their clients. They are paid for it, and they have done in this case well enough. But you and I, gentlemen, have something else to consider. They talk of law. Why, gentlemen, it is not law that we want, but justice. They would govern us by the common law of England. Trust me, gentlemen, common-sense is a much safer guide for us—the common-sense of Raymond, Epping, Exeter, and the other towns which have sent us here to try this case between two of our neighbors. A clear head and an honest heart are worth more than all the law of the lawyers. There was one good thing said at the bar. It was from Shakespeare, an English player, I believe. No matter; it is good enough almost to be in the Bible. It is this: "Be just,

historians agree on the primacy of the jury prior to the nineteenth century in deciding contract issues.¹⁵⁷

For example, in a 1793 Pennsylvania case,¹⁵⁸ the issue was whether the defendant had warranted to the seller that the buyer would pay, or as the defendant's attorney put it, expressed "merely his opinion and belief that [the buyer] was, as he really is, an honest man."¹⁵⁹ The court charged the jury that the words:

may bear either sense, and you must judge how they were understood by the parties. If this be only a representation, and if it be fair and honest as to his belief and without concealment of truth or interest, he is not liable. If this be a warranty, he is liable, however honest, full and disinterested it may be.¹⁶⁰

The court provided no guidance on the process of interpretation of the words or their legal effect.

On the other hand, in a 1795 Pennsylvania case¹⁶¹ the court gave guidance along the lines of an objective test, closer to the medieval idea of objectivity than to the modern. In this case, Armstrong was disgusted with the performance of his valuable horse and told McGhee that he would sell the horse to him for £5. McGhee agreed and took the horse home. Afterwards, Armstrong told McGhee that the offer had been made in jest. When McGhee refused to return the

and fear not." That, gentlemen, is law enough in this case, and law enough in any case. "Be just, and fear not." It is our business to do justice between the parties. Not by any quirk of the law out of Coke or Blackstone, books that I never read and never will, but by common-sense and common honesty, as between man and man. That is our business, and the curse of God is upon us if we neglect, or evade, or turn from it. And now, Mr. Sheriff, take out the jury; and you, Mr. Foreman, do not keep us waiting with idle talk, of which there has been too much already, about matters which have nothing to do with the case. Give us an honest verdict, of which, as plain common-sense men, you need not be ashamed.

This charge, given in the late eighteenth or early nineteenth century, appears in the argument of defense counsel in *King v. Hopkins*, 57 N.H. 334, 337 (1876). He gives, as his source, a biography of William Plumer, a governor of New Hampshire. *See id.* at 336.

157. *See Simpson, Horwitz Thesis, supra* note 5, at 600; James Oldham, *Reinterpretation of 18th Century English Contract Theory: The View from Lord Mansfield's Trial Notes*, 76 *Geo. L. J.* 1949, 1959-60 (1988).

158. *See Barker v. Sutherland*, 1 *Add.* 123 (Pa. 1793).

159. *Id.* at 123-24. It is unclear from the report whether the alleged warranty was a guaranty of payment or a warranty that the buyer was owed a sum of money by the War Office. Because of the court's reference to the lack of a Statute of Frauds in Pennsylvania, it was seen that the alleged warranty was a guaranty of payment.

160. *Id.* at 124. Similarly, the issue in one case was whether an oral agreement to trade horses for steers and a note was a sale or an executory contract. The jury was charged to find "according to the true intention of the parties." *Kimball v. Cunningham*, 4 *Mass.* 502, 503 (1808).

161. *See Armstrong v. McGhee*, 1 *Add.* 261 (Pa. 1795).

horse, Armstrong brought an action in replevin.¹⁶² The judge gave the jury the following charge:

Did both parties understand it as a binding contract? Though Armstrong did not, and though McGee knew that he did not, if he gave no signs to Armstrong that he did not understand it as a binding contract, why did Armstrong trust him? And if he trusted him, why should he come here now to save himself from the consequences of such gross folly? . . . This contract, as far assigns and all the formal parts of a contract can go, is complete . . . If McGee gave Armstrong ground to believe that he considered this contract—which, to all appearance, is a complete one—as a mere sham or jest, conveying no right, he must take it as he then gave signs that he understood it, and remain a mere trustee to Armstrong, and bound to deliver up the horse when required.¹⁶³

If we attempt to formulate a rule of law based on this case, it would read something like this: if the parties exchange words of offer and acceptance, and one party clearly evinces a joking state of mind, a contract is nevertheless formed unless the other party also gives external signs of sharing the joking state of mind. A statement of the modern objective test as applied to this case would, instead, be that if one party is clearly joking and the other party is or should be aware of the joking state of mind, no contract is formed.¹⁶⁴

B. *Dr. Paley's Rule of Interpretation for Unilateral and Bilateral Expressions*

Archdeacon William Paley of the Church of England has had a significant impact on the rules of interpretation. He posited, in 1785, an objective test that was adopted by Kent for his *Commentaries*, as well as by others.¹⁶⁵ It has been applied many times in this country to oral and written exchanges,¹⁶⁶ even into the twentieth century.¹⁶⁷ The test applies what the First Restatement called a standard of "reasonable understanding."¹⁶⁸ The vantage point is the *promisor's*

162. *See id.*

163. *Id.* at 262.

164. *See Calamari & Perillo, supra* note 22, § 2.3.

165. "The true principle of sound ethics is, to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so understand and accept it." 2 James Kent, *Commentaries on American Law* 557 (Oliver Wendell Holmes, ed., Fred B. Rothman & Co. 12th ed. 1989) (1873). The rule was urged (without citation) in oral argument before the U.S. Supreme Court. *Hazard's Adm'r v. New England Marine Ins. Co.*, 33 U.S. 557, 567 (1834). The insured in New York by letter to Boston underwriters described his ship as "coppered." Some evidence indicated this had a different meaning in Boston than in New York.

166. The rule is supported by Wigmore. 9 Wigmore, *supra* note 50, § 2466.

167. *See, e.g., Weinstein v. Scheer*, 120 A. 679, 680 (N.J. 1923); *United States Rubber Co. v. Silverstein*, 128 N.E. 123, 124 (N.Y. 1920) (Cardozo, J.).

168. *Restatement of Contracts* § 227 (1932).

reasonable understanding of how the promise was understood by the promisee. Paley stated “[w]here the terms of promise admit of more senses than one, the promise is to be performed ‘in that sense in which the promisor apprehended, at the time that the promisee received it.’”¹⁶⁹ He gives the example of Tamerlane’s promise to the besieged garrison at Sebastia. Tamerlane told the garrison that “if they would surrender, *no blood should be shed*.”¹⁷⁰ They surrendered and Tamerlane had them buried alive. Paley explains that Tamerlane “fulfilled the promise in one sense, and in the sense too in which he intended it at the time; but not the sense in which the garrison of Sebastia actually received it, nor in the sense in which [Tamerlane] himself knew that the garrison received it.”¹⁷¹ It was in this last sense that Tamerlane in conscience was bound to perform.¹⁷²

Paley’s test is partly subjective. Insofar as it focuses on the promisor’s understanding, it takes into account the state of mind of the particular promisor. Nonetheless, at the time Paley formulated this rule, and for more than half a century thereafter, parties were forbidden to testify; the promisor’s state of mind could be proved only by objective evidence. Inasmuch as parties can testify today, Wigmore, who expressed approval of Paley’s test, further objectifies Paley’s law by adding the idea of the “reasonable” understanding of the promisor. This makes the test almost indistinguishable from the objective test put forward by Williston, which chooses the reasonable understanding of the addressee of the communication.¹⁷³ Despite the subjective element in Paley’s test, there is much truth in the assertion that the “direct ancestry [of the objective] theory goes back to Paley . . . a theological utilitarian, a contemporary of Adam Smith.”¹⁷⁴ But it is probably more accurate to state that Paley’s objective test of the intention of the parties supplanted, but only in part, the earlier

169. William Paley, *Moral and Political Philosophy*, in *The Works of William Paley*, D.D. 27, 48 (J. J. Woodward 1841). Although the core of the rule appears in the original in quotations, it is uncertain what source, if any, Paley was quoting. Much the same line of thinking had been expressed by David Hume, *A Treatise of Human Nature* 523-26 (Selby Bigge ed., 1888) (1739-40). Paley seems also to have been influenced by Hutcheson. See 4 Francis Hutcheson, *A Short Introduction to Moral Philosophy*, (1747) in *Collected Works of Frances Hutcheson* 177-202, (Georg Olms Verlag 1990). Paley’s thinking may have been derivative, but Paley’s writings were known to every educated English-speaking person in the first half of the nineteenth century. Paley’s “work was enormously popular; fifteen editions appeared in Paley’s lifetime (d. 1805).” Simpson, *Horvitz Thesis*, *supra* note 5, at 590 n.348.

170. Paley, *supra* note 169, at 48. Paley used a variant of Tamerlane’s name, Temures.

171. *Id.*

172. *See id.*

173. 1 Williston, *supra* note 55, § 21, at 23.

174. Edwin W. Patterson, *Equitable Relief for Unilateral Mistake*, 28 Colum. L. Rev. 859, 878 n.56 (1928); see *Ricketts v. Pennsylvania R.R. Co.*, 153 F.2d 757, 761 n.2 (2d Cir. 1946) (Frank, J., concurring).

objective approach which looked to the inherent meaning of words, rather than the intention of the parties objectively manifested.

There were a number of applications of Paley's rule prior to the removal of the bar of party testimony. An insurance case decided in 1843 involved the interpretation of a cryptic letter.¹⁷⁵ A fire insurance policy contained a condition that if any additional insurance were obtained, the insured should use reasonable diligence to notify the insurer; if the additional insurance was not "acknowledged and approved" by the insurer in writing, the policy would cease. The insured notified the insurer in writing that additional insurance had been obtained and received a succinct reply signed by the secretary of the insurance company stating, "[w]e have received your notice of additional insurance."¹⁷⁶ When the insured property was consumed by fire, the company denied coverage, claiming it had not approved the additional insurance. The court, said, "[l]et us apply Dr. Paley's rule in relation to the performance of contracts." Applying the rule, the court said, "[t]hey must have intended that the plaintiff should understand from the answer that every thing had been done which was necessary to the continuance of the policy, and consequently that they approved, as well as acknowledged the further insurance."¹⁷⁷

The first reported case that I have found of the application of Dr. Paley's rule where party testimony was given was in 1861.¹⁷⁸ The parties were negotiating for the sale of land. The vendor stated to the vendee that he would execute a deed of the same kind under which he took title, calling it a "warranty deed." In fact it was a deed that contained only a warranty against grantor's acts. The vendee understood the vendor's term "warranty deed" to mean a deed with a general warranty, and the vendor knew that the vendee had that understanding. The vendee rejected a tender of a deed containing only a warranty against grantor's acts and brought suit. The court, applying Paley's vantage point of the promisor's understanding of the promisee's state of mind, held for the vendee.¹⁷⁹

175. See *Potter v. Ontario & Livingston Mut. Ins. Co.*, 5 Hill 147 (N.Y. Sup. Ct. 1843).

176. *Id.* at 149.

177. *Id.* This approach was followed in *Hoffman v. Aetna Fire Ins. Co.*, 32 N.Y. 405, 413 (1865) ("It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more sense than one, it is to be interpreted in the sense in which [the promisor] had reason to suppose it was understood by the promisee."). See also *Gunnison v. Bancroft*, 11 Vt. 490, 493 (1839). The first reported application in England seems to have been *Mowatt v. Lord Londesborough*, 118 Eng. Rep. 1156, 1167 (K.B. 1854).

178. See *Barlow v. Scott*, 24 N.Y. 40 (1861). Although Paley is not cited, Paley's test was employed. See also *White v. Hoyt*, 73 N.Y. 505, 515 (1878) (applying the same test by employing the testimony of one of the defendants against the defendants).

179. *Barlow*, 24 N.Y. at 42-44.

C. Flaws in Paley's Objective Test

In formulating his rule of interpretation, Archdeacon Paley ignored the understanding of the promisee except as it was perceived by the promisor. Paley was mostly concerned with nailing the crafty promisor who formulated a promise in terms that he knew the promisee would misunderstand.¹⁸⁰ John Austin pointed out that Paley's formulation was flawed in two ways. First, if the promisee understood the promisor's real meaning, but the promisor was unaware of the promisee's understanding, the promisee could reap a benefit that the promisee did not expect. Second, if the "promisor underrates the expectation of the promisee he disappoints an expectation."¹⁸¹

Paley's view has generally been superseded by objective approaches that pay greater attention to the vantage point of the promisee. Most of these approaches were born after the rule rejecting party testimony had been overturned by statute. An earlier view favoring the promisee in some contexts was to the effect that "whether given words were used in an enlarged or a restricted sense . . . that construction should be adopted which is most *beneficial* to the promisee."¹⁸²

Dr. Paley's major contribution to the interpretive process was to provide a philosophical foundation for the shift from pinpointing the inherent meaning of words to a search for the understanding of a party to the contract.

V. PARTIES AS WITNESSES

From the late 1500s parties were not allowed to be witnesses in their own cases.¹⁸³ Somewhat later, interested non-parties were also

180. Paley, however, ends his discussion of the interpretive process with a mention of the "infirmity" of promisors caused by "confusion, or hesitation, or obscurity" causing them to "encourage expectations" that "they never dreamed of." Paley, *supra* note 169, at 49.

181. John Austin, 1 Lectures on Jurisprudence Lecture XXI 442 n.90 (5th ed. 1885). Adam Smith in his lectures at Glasgow University had also stressed the expectations of the promisee as the basis of contract. See generally Smith, *supra* note 28. A student's notes of these lectures was not published until the twentieth century. Thus, it is doubtful whether his thinking on the subject had any effect on the common law.

182. *Hoffman*, 32 N.Y. at 413 (citing to authorities as far back as the seventeenth century).

183. See 2 Wigmore, *supra* note 50, § 575. The rules were more complicated in courts of equity. The defendant's answer was deemed evidence that had to be rebutted by two witnesses or one witness and circumstantial evidence. But the defendant's statements in an affirmative defense are not evidence. 2 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America §§ 1528-1530 (11th ed. 1873); *Denton v. M'Kenzie*, 1 S.C. Eq. (1 Des.) 289 (1792); *Thornton v. Gordon*, 41 Va. 719 (1844). To some extent parties' interrogatories could be considered by the equity court. See Greenleaf, *supra* note 21, § 329. If the plaintiff deposed the defendant, the defendant's denial was conclusive. See *Pollard v. Lyman*, 1

excluded from the witness stand.¹⁸⁴ (Ironically, however, in actions of debt and detinue, defendants were entitled to trial by wager of law; their sworn denial of liability supported by sworn compurgators was decisive.)¹⁸⁵ As explained to Indiana school children three centuries later, the rule barring a party from testifying "is founded on the motive his interest is supposed to inspire, to state what is false or to pervert or suppress the truth."¹⁸⁶ At the end of the nineteenth century, Jeremy Bentham wrote his ferocious attacks on the English legal system in general, and the disqualification of parties and interested third persons in particular. As one historian of the law has observed:

In some respects his "Judicial Evidence" . . . is the most important of all his censorial writings on English law. In this work he exposed the absurdity and perniciousness of many of the established technical rules of evidence. "In certain cases," he says, "jurisprudence may be defined, the art of being methodically ignorant of what everybody knows."¹⁸⁷

Among Bentham's specific targets were the rules dealing with the incompetence of parties and others who had a pecuniary interest in the lawsuit. Wigmore, among others, grants Bentham a major share of the credit for the reforms of evidence in the mid-nineteenth century.¹⁸⁸ In England, a series of acts from 1843 to 1851 lifted the disqualification as witnesses of parties and interested third persons.¹⁸⁹ Similar reforms were generated in the United States; first in Michigan¹⁹⁰ and Connecticut,¹⁹¹ then in the Field Code of Civil Procedure enacted in New York and soon elsewhere.¹⁹²

Day 156 (Conn. 1803).

184. See 2 Wigmore, *supra* note 50, § 575.

185. See Teeven *supra* note 51, at 9-10.

186. Thomas L. Smith, *Elements of the Laws* 257 (1860) (recommended by the State Board of Education for use in the public schools of Indiana on Dec. 24, 1852). As in the case of most common law rules, exceptions and qualifications existed. See Nelson, *supra* note 100, at 156-57.

187. Dillon, *Laws and Jurisprudence of England and America* 339-42, reprinted in Roscoe Pound & Theodore F. T. Plucknett, *Readings on the History and System of the Common Law* 241 (3d ed. 1993).

188. See Wigmore, *supra* note 50, § 575. Others include Dillon, *supra* note 187, at 241; Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* 30 (1952) ("Bentham expressing that dissatisfaction" with the ways of civil judicature "with unmistakable emphasis and laying down those postulates which are in time to furnish material for reconstruction" of the law of evidence and civil procedure). See also *id.* at 43.

189. These legislative acts are summarized in Millar, *supra* note 188, at 207. A more detailed summary appears in 2 Wigmore, *supra* note 50, at 488.

190. See 2 Wigmore, *supra* note 50, at 693 n.9, (citing Michigan Rev. St. 1846, ch. 102 § 99).

191. See Millar, *supra* note 188, at 207 (citing Act of 27 June, 1848: Public Acts of Connecticut ch. 80, at 71).

192. See *The Code of Civil Procedure of the State of New York* § 1708 (1998 reprint) (1850) ("All persons, without exception, otherwise than as specified in the next two sections, who, having organs of sense, can perceive, and perceiving can make

At first, if intention was in issue and a party could testify, it seemed to the courts only natural that, as the New Hampshire court put it, “[b]eing himself a competent witness, he could, of course, testify to his intentions.”¹⁹³ The New York court stated, “where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness to inquire of him what his intention was.”¹⁹⁴ The United States Supreme Court agreed,¹⁹⁵ stating that “[i]f the declarations of a man when doing an act may be proved in his own behalf to show the purpose and intent with which it was done . . . it must be competent for a party to the transaction, cognizant of all the circumstances, and a witness of the act, to state its purpose, being subject, of course, to cross-examination.”¹⁹⁶ Clearly, in a criminal case where evidence of subjective intention may make the difference between a conviction for murder and acquittal, the defendant is permitted to testify as to the intention with which he committed an act that resulted in someone’s death.¹⁹⁷

known their perceptions to others, may be witnesses. Therefore neither parties, nor other persons who have an interest in the event of an action or proceeding, are excluded; nor those who have been convicted of crime; nor person on account of their opinions on matters of religious belief. . . .”). Section 1709 provided for the disqualification of persons of unsound mind and some children under the age of ten. Section 1710 is not really an exception; rather it recognized certain privileges such as the attorney-client privilege.

On David Dudley Field and the Codification movement, see Daun van Ee, David Dudley Field and the Reconstruction of the Law (1986), a dissertation submitted in 1974. For a formidable bibliography on the subject see Roscoe Pound, *David Dudley Field: An Appraisal*, in David Dudley Field Centenary Essays 3 (Alison Reppy ed., 1949); Alison Reppy, *The Field Codification*, in *id.* at 17.

193. *Graves v. Graves*, 45 N.H. 323, 324 (1864); see also *Downes v. The Union Congregational Soc. in Francestown*, 63 N. H. 151, 152 (1884) (“[w]hen the intention of the parties to a transaction is material, they may testify to it directly.”); *Delano v. Goodwin*, 48 N.H. 203, 205-06 (1868) (“where the intention or good faith of a party to a suit becomes material . . . the party himself, if a competent witness, may testify directly to his intention or understanding.”); *Hale v. Taylor*, 45 N.H. 405, 407 (1864) (holding that while intention not manifested by words or deeds is irrelevant, testimony to explain the intent of one’s words or deeds is admissible). Compare the preceding with twentieth century New Hampshire cases. *E.g.*, *Riley v. Springfield Sav. Bank*, 168 A. 721 (N.H. 1933) (holding evidence of subjective intent admissible where contract is ambiguous; there is no valid contract if there was a misunderstanding); *A. Perley Fitch Co. v. Phoenix Ins. Co.*, 133 A. 340 (N.H. 1926) (using an objective test to interpret oral contracts).

194. *Thurston v. Cornell*, 38 N.Y. 281, 287 (1868) (examining party’s intent to either receive usurious compensation for a loan or to receive reimbursement of expense of collection); see also *Bedell v. Chase*, 34 N.Y. 386 (1866) (stating that inventory purchasers could testify as to their intent not to defraud seller’s purchasers); *McKown v. Hunter*, 30 N.Y. 625 (1864) (holding that a defendant can testify as to his intention in a malicious prosecution action); *Forbes v. Waller*, 25 N.Y. 430 (1862) (holding that an assignor may be asked whether his intention was to defraud creditors); *Seymour v. Wilson*, 14 N.Y. 567 (1856) (same).

195. See *Bank v. Kennedy*, 84 U.S. 19 (1872).

196. *Id.* at 26.

197. See 2 Wigmore, *supra* note 50, § 581. One observer wrote about “the good old times” when “everybody as witnesses except those who knew something about the

It took some time for courts to place some limits on party testimony and to adjust their substantive-law focus to protect the trial judge and jury from the dangers of perjury. The key case was *Smith v. Hughes* decided in 1871 in the Queen's Bench.¹⁹⁸ The issue was whether the defendant was justified in rejecting a tender of "new oats" when he expected a delivery of "old oats." The trial judge gave the jury a charge based on Paley's rule.¹⁹⁹ In reversing, Blackburn stated:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.²⁰⁰

Here, the vantage point of the reasonable person in the position of the promisee becomes the legally relevant perspective. The parties' own intentions on the meaning of the contract had become irrelevant. This vantage point was quickly adopted in New York for the reasonable woman.²⁰¹ There were, however, foreshadowings in earlier cases.²⁰² In Massachusetts, before Holmes had entered law school, the Massachusetts Supreme Judicial Court in ruling on the trial court's charge to the jury concerning an attorney's words as an agent for his client spoken to a deputy sheriff had taken this perspective. The attorney spoke to the deputy after which the deputy turned over to a third person—a receptor—some property that he possessed under a

subject matter." A. B., *Testimony of the Parties in Criminal Prosecutions*, 14 Am. L. Reg. & U. of Pa. L. Rev. 129, 130 (1866).

198. 6 L.R.-Q.B. 597 (1871).

199. *See id.* at 599.

200. *Id.* at 607.

201. *Phillip v. Gallant*, 62 N.Y. 256 (1875) (apparently the reasonable French woman should understand English).

202. A favorite of old casebooks was *White v. Corlies*, 46 N.Y. 467 (1871), which held that an uncommunicated intent to accept an offer does not create a contract. Under the subjective theory, as applied in France, it could be argued that a contract would have been formed because the offeree took concrete steps (purchasing and working on lumber), thus providing objective evidence of the subjective intention to accept. The court, on the cusp of subjective and objective thinking, thought that the concrete steps were not clearly referable to the claimed contract. *See id.* at 470. Silent acquiescence in plaintiff's offered terms could be presumed under certain circumstances. *See Alexander v. Vane*, 150 Eng. Rep. 537 (Ex. D. 1836); *accord*, *Hall v. Inhabitants of Holden*, 116 Mass. 172 (1874). Holmes cited *Hall* for the proposition that "[a]ssent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or in the interpretation of words." *O'Donnell v. Town of Clinton*, 14 N.E. 747, 751 (Mass. 1888). The United States Supreme Court used this language: "the belief of one party to a transaction is not the criterion by which the rights of the parties are to be governed, unless the other party, by his conduct or declarations, induced that belief." *Bank v. Kennedy*, 84 U.S. 19, 28 (1872). This case, however, allowed testimony by a party of his intent. *See id.* This is one of the transitional cases from a subjective to an objective approach.

writ of attachment.²⁰³ The issue was whether the attorney had authorized the transfer of possession. The trial court charged the jury that the deputy would not be liable for wrongfully transferring the property if the attorney's communication to the deputy was "made with the intent on the part of the attorney of influencing or controlling the officer's conduct, and of assuming the risk upon the plaintiff."²⁰⁴ On appeal, this charge was held to be erroneous.

The true inquiry for the jury was to determine what was in fact said by the plaintiff's attorney, and whether what was thus said was of such a nature as to indicate those purposes to influence or control the officer's conduct, and to authorize the officer to act upon such assumption. "The secret intent of the attorney, if not in accordance with the language used by him, would not affect the right of the officer to act upon the instructions actually given."²⁰⁵

In Illinois, the trial judge properly refused an instruction concerning the understandings of the parties. The Illinois Supreme Court in this 1867 case affirmed, stating, "[t]he proper object of inquiry on the part of the jury was, not so much the manner in which the purchaser of the hogs may have understood the contract in his own mind, but rather what was the language used in making the purchase . . ."²⁰⁶

Perhaps an objective test in the post party-testimony era had already been established in New York by *Dillon v. Anderson*.²⁰⁷ A written proposed contract had been drawn up to be signed by three parties. The defendant signed and delivered the writing to the plaintiff. The third party never signed or assented in any way. The court said:

[t]he defendant being a witness in his own behalf, was asked by his counsel: "Did you *intend* to make an individual contract?" which question was overruled by the court. It called for his purpose mentally formed, but undisclosed, to the plaintiff. It sought to annul, by an intention not expressed, words and acts relied upon by the plaintiff, by which he was influenced, and which of themselves were *prima facie* evidence of an agreement. An agreement is said to be the meeting of minds of the parties. But minds cannot meet when

203. A "receptor" is defined as "[a] person who receives from a sheriff another's property seized in garnishment and agrees to return the property upon demand or execution." Black's Law Dictionary 1275 (7th ed. 1999).

204. *Wright v. Willis*, 84 Mass. 191, 193 (1861); see also *Daley v. Carney*, 117 Mass. 288 (1875) (basing decision on evidence which justified the inference of a particular intent on the part of defendant). Holmes entered law school in 1864. Liva Baker, *The Justice from Beacon Hill* 163-77 (1991) (detailing Holmes' 12 years of legal education).

205. *Wright*, 84 Mass. at 193.

206. *Nichols v. Mercer*, 44 Ill. 250, 252 (1867).

207. 43 N.Y. 231 (1870). In a similar case, the court said that a party may not be asked by his counsel whether he intended to be bound by signing a written guaranty, but the question was proper on cross-examination. See *Quimby v. Morrill*, 47 Me. 470 (1859).

one keeps to itself what it means to do, nor can one party know that the other does not assent to a contract, the terms of which have been discussed and settled between them, unless dissent is made known. Here was the oral bargaining going before the written contract. Here was the written contract signed and delivered without qualification of the act of delivery, without the expression of the intention called for by the question that the act of delivery was not to be taken as meaning all it seemed to mean. The testimony called for was not proper.²⁰⁸

The decision was perhaps based on the parol evidence rule, but that rule should not have barred evidence to clarify an ambiguity in the written evidence²⁰⁹ or to show the lack of finality of the instrument.²¹⁰

The 1870's was the transitional decade. This is illustrated by the well-known case of *Dickinson v. Dodds*, which introduced the doctrine of "indirect revocation."²¹¹ Dodds made an offer in writing to sell certain realty to Dickinson. The terms of the offer indicated an intent that the offer be irrevocable until 9:00 A.M. Friday. Prior to that time, Dickinson became aware that Dodds had sold the parcel to a third party. Dickinson then communicated his acceptance. In holding that the offer had been revoked prior to Dickinson's attempted acceptance, the speeches of Lord Justice James, and especially Lord Justice Mellish, show a confused combination of subjective and objective thinking. James stated that there never was "that existence of the same mind between the two parties which is essential in point of law to the making of an agreement."²¹² He allows that the offeror may be required to let the offeree know of the change of mind, although the offeree's acquisition of that information is enough. Mellish made several points. He stated that the intervening sale to a third party is enough to constitute a revocation, a conclusion perfectly in accord with the subjective theory—the sale was objective evidence of the vendor's subjective intent. Moreover, he asserted, parting with the property has the same effect as the offeror's death, another truism under a subjective approach. Nonetheless, he further buttressed his subjective arguments with the fact of the offeree's knowledge of the sale, but this objective fact is not central to his reasoning.

This case in Chancery comes several years after the Queen's Bench had ushered in the modern objective test in *Smith v. Hughes*.²¹³ Clearly, while the Queen's bench was ushering out subjective thinking, some subjective elements were holding out in Chancery, but

208. *Dillon*, 43 N.Y. at 236.

209. See Greenleaf, *supra* note 21, § 297, at 340-41.

210. *Id.* § 284, at 322-23.

211. 2 Ch. D. 463 (1876).

212. *Id.* at 473.

213. See *Dillon*, 43 N.Y. at 236.

even there the objective approach would soon take hold. As I said before, the history of the objective theory is not seamless.

VI. THE ROLE OF THE TEXT WRITERS

Perhaps the first text expression of the modern objective approach was by that extraordinary lawyer, Judah Benjamin.²¹⁴ In his work on Sales, Benjamin wrote:

It must be borne in mind that the general rule of law is, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention manifested was his real intention.²¹⁵

The idea of "manifest" intention took hold, and early in the twentieth century became gospel. The modern objective theory had taken hold, not as just a rule of estoppel, a doctrine that requires a factual finding of injurious conduct in reliance, but as a hard and fast rule. Another Benjamin, Reuben M. Benjamin, wrote, as clearly and emphatically as anyone has, the classical late-nineteenth century view of objective intention:

Agreement is a matter of outward expressions; i.e., words and conduct. A mere mental assent to an offer does not constitute an acceptance. . . . Since the concurrence or union of wills can be ascertained only by means of words and conduct, the law imputes to each of the parties a state of mind or intention corresponding to the reasonable meaning of his words and conduct, whatever may have been the actual state of mind of the party. In construing an agreement "the question is, what by a fair and reasonable construction of the words and acts of the parties, was the bargain between them, and not what was the secret intent or understanding of either of them."²¹⁶

214. "He was elected to the United States Senate in 1852, and refused the offer of a seat on the Supreme Court. He became Attorney General, Secretary of War, and then Secretary of State for the Confederate Government. Biographies by P. Butler (1907) and R.D. Meade (1943), and E. Evans (1988)." A. W. Brian Simpson, *Leading Cases in the Common Law* 240 n.45 (Clarendon Press Oxford 1995) [hereinafter Simpson, *Leading Cases*]. After the Civil War, Benjamin emigrated to England and became England's "leading appellate barrister." *Id.* at 240.

215. J. P. Benjamin, *A Treatise on the Law of Sale of Personal Property* 357-58 (London 1868), as quoted by Simpson, *Leading Cases*, *supra* note 214, at 159. Note, however, that language in case law justified Benjamin's statement. For example, in dictum, Baron Bramwell had said:

intention is immaterial till it manifests itself in an act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had that intention.

Browne v. Hare, 157 Eng. Rep. 561, 565-66 (Ex. 1858).

216. Reuben M. Benjamin, *The General Principles of the American Law of Contract* 7-8 (2d ed. 1907). This Benjamin is described on the title page as "Professor

Before Reuben Benjamin's efforts, Langdell had published his *Summary of the Law of Contracts*.²¹⁷ Langdell parroted the subjective thinking of earlier times, but adopted an objective approach by employing legal fictions. He started his discussion of mutual consent with this wonderfully quirky explanation:²¹⁸ "Mutual consent is of the essence of every contract . . . and therefore it must always exist, in legal contemplation, at the moment when the contract is made."²¹⁹ On the same page, he stated "mutual consent alone is of no avail in making a contract."²²⁰ He ended the discussion on the next page with "[a]t the moment of making the contract, therefore, mutual consent in fact is not necessary, but only *in legal intendment*."²²¹ Langdell's contemporaries, such as Sir Frederick Pollock,²²² and Edward Avery Harriman²²³ dispensed with the fiction and adopted the perspective of the reasonable promisee's understanding.

VII. LASTING CONQUESTS OF SUBJECTIVITY: INSANITY, INTOXICATION, DEATH

One strain of subjectivity did surface early in the United States. The contracts of insane²²⁴ and intoxicated parties²²⁵ were held to be voidable. The law of England has never gone this far into subjectivity.²²⁶

The flirtation with the subjective theory has left one long-lasting rule affecting contract formation. The general rule in the United States is that the death of the offeror terminates an offer.²²⁷ This was an import from the French subjectivists. An admiralty case decided in

of Law in Bloomington Law School." In the same year, a new edition of Bishop on Contracts was published. It contained subjective language similar to that quoted *supra*, at note 73. Joel Prentiss Bishop, *Commentaries on the Law of Contracts* 126 (2d enlarged ed. T. H. Flood and Co. 1907).

217. C.C. Langdell, *A Summary of the Law of Contracts* (2d ed. 1880).

218. Williston's capsule description of Langdell makes Langdell seem weird or, at least, quirky. See Samuel Williston, *Life and Law: An Autobiography* 199-201 (1940).

219. Langdell, *supra* note 217, § 148, at 193 (emphasis supplied).

220. *Id.*

221. *Id.* § 149, at 194 (emphasis supplied).

222. See Frederick Pollock, *Principles of Contract* *30 (1876) ("not intention in the abstract, but communicated intention, is what we have to look to in all questions of the formation of contracts"); see also *id.* at *4.

223. See Edward Avery Harriman, *Elements of the Law of Contracts* 34 (1896).

224. See *Lazell v. Pinnick*, 1 Tyl. 247 (Vt. 1801).

225. See *Wigglesworth v. Steers*, 11 Va. (1 Hen. & M.) 70 (Va. 1806). *But see*, 1 Zephaniah Swift, *A System of the Laws of the State of Connecticut* 358 (photo. reprint 1972) (1795) (stating that drunkenness is "a crime, and is of the party's own procuring," thus not grounds for avoiding a contract unless he was debauched by the other party).

226. See G. H. Treitel, *The Law of Contract* 44, 513-14 (9th ed. 1995).

227. See Restatement (Second) of Contracts § 48 (1979); Restatement of Contracts § 48 (1932); Joseph M. Perillo, 1 *Corbin on Contracts* § 2.34 (revised ed. 1993) (stating and criticizing the rule).

1847, *The Palo Alto*,²²⁸ was one of the first common-law cases to adopt this notion.²²⁹ It stated that the death of the offeror would have acted to revoke the offer. The court canvassed the common-law cases concerning the requirement that a revocation be communicated and also made reference to works in French by Pothier, Touiller, and Merlin. The court then stated "there is one well-established exception" to the rule that a revocation must be communicated. This exception was that "[i]f the party who makes the offer dies or becomes insane before it is received and accepted, the offer is then a nullity, though accepted before the death is known."²³⁰ Pothier had expressly stated that the death of the offeror terminates the power of acceptance even if the death is unknown to the offeree.²³¹ English cases have taken the position that the death of the offeror terminates the power of acceptance only if the offeree is notified of the death;²³² mere knowledge is not sufficient.²³³

Neither the *Palo Alto* court nor, I think, any other common-law court has adopted the rest of Pothier's analysis in the same section as that cited by the court. Pothier asserted that the mere dispatch of a letter of revocation (objective evidence of subjective intention) will revoke an offer subject to the offeror's liability to indemnify an offeree who takes concrete steps in reliance on the offer.²³⁴ Although judicial decisions in common law jurisdictions have not followed Pothier on this point,²³⁵ the Civil Code adopted in California and some other Western states provides that a revocation is effective on dispatch.²³⁶ The California Civil Code was substantially based on the proposed Civil Code of the State of New York drafted by a commission headed by David Dudley Field and first published in 1865.²³⁷ This document was heavily influenced by subjective

228. 18 F. Cas. 1062 (D. Me. 1847).

229. A predecessor was *Mactier's Adm'rs v. Frith*, 6 Wend. 103 (N.Y. 1830).

230. *Palo Alto*, 18 F. Cas. at 1067.

231. See R. J. Pothier, *A Treatise on the Contract of Sale No. 32* (Legal Classics Library 1988) (photo. reprint 1839) (1762). Other American cases have reached the same result by analogy to the common law of agency pursuant to which the death of the principal terminates the agent's authority even if the agent is unaware of the death. See *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209 (1856) (death of promisor of a letter of credit), *overruled on other grounds* by *Austin v. Curtis & Walker*, 31 Vt. 64 (1858). *Michigan State Bank*, which employed the analogy to agency, has been cited for the broader ground that death terminates the power of acceptance created by an offer. See *Chain v. Wilhelm*, 84 F.2d 138, 141 (4th Cir. 1936).

232. See *Westhead v. Sproson*, 158 Eng. Rep. 301 (Ex. 1861); Treitel, *supra* note 226, at 43.

233. See *Harriss v. Fawcett*, 8 L.R.-Ch. 866, 869 (Ch. App. 1873).

234. See Pothier, *supra* note 15, at 32.

235. See Perillo, *supra* note 227, § 2.19.

236. See Cal. Civ. Code §§ 1586-1588 (West 1982).

237. See N.Y. Civil Code (reprint 1998) (1865). Revocation is dealt with in § 771-772. Section 772 states that the manner of transmission is governed by §§ 766 and 768. Section 768 adopts the mailbox rule of *Adams v. Lindsell*. For a brief history of

thinking.²³⁸ The subjectively inspired Field Code had its objective side also. It enacted, as a rule of interpretation, a version of Paley's rule. Section 814 of the Code provides: "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promiser [sic] believed, at the time of making it, that the promisee understood it."²³⁹

In this form, with some slight changes in grammar and spelling, it is law in California,²⁴⁰ Georgia,²⁴¹ Iowa,²⁴² Montana,²⁴³ North Dakota²⁴⁴ and Oklahoma.²⁴⁵ Under these statutes, a party to the contract can testify as to his or her intention with respect to ambiguous terms.²⁴⁶

Ironically, Field's Civil Code's earlier companion piece, the Code of Civil Procedure, was adopted in New York and widely accepted elsewhere in the United States. The Code of Civil Procedure introduced the competency of parties to testify in their own behalf, a reform that led to the resurgence of the objective theory of contract formation and interpretation.²⁴⁷

VIII. ANOTHER ENDURING CONQUEST: DURESS, UNDUE INFLUENCE, MISREPRESENTATION, MISTAKE

This article does not claim to analyze the relative potency of the objective and subjective theories as applied in the law courts today. Suffice it to say, that they vary from the intensely objective approach of the New York Court of Appeals²⁴⁸ to the subjective "knowing and

the adoption of the California Civil Code, see Joseph L. Lewinsohn, *Contract Distinguished from Quasi Contract*, 2 Cal. L. Rev. 171, 171 n.1 (1914).

238. One commentator noticed the subjective elements in the California Code and appeared perplexed by their presence and pronounced its provisions with respect to contract formation as "radically defective both in form and content" and replete with "unexplained departures from established principles." Joseph L. Lewinsohn, *Mutual Assent in Contract Under the Civil Code of California*, 2 Cal. L. Rev. 345, 366 (1914).

239. N.Y. Civil Code § 814.

240. See Cal. Civ. Code § 1649 (West 1985).

241. See Ga. Code Ann. § 13-2-4 (Michie 1982) ("The intention of the parties may differ among themselves. In such case, the meaning placed on the contract by one party and known to be thus understood by the other party at the time shall be held as the true meaning.").

242. See Iowa Code Ann. § 622.22 (West 1999) ("When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which a party had reason to suppose the other understood it.").

243. See Mont. Code Ann. § 28-3-306 (1999).

244. See N.D. Cent. Code § 9-07-14 (1987).

245. See Okla. Stat. Ann. tit. 15, § 165 (West 1993).

246. See *Kytlica v. Albertson & Co.*, 190 N.W. 159 (Iowa 1922); *Brannen v. State Exch. Bank of Parkersburg*, 180 N.W. 886 (Iowa 1921); *Musselshell Valley Farming & Livestock Co. v. Cooley*, 283 P. 213 (Mont. 1929); *Peterson v. Ramsey County*, 563 N.W.2d 103 (N.D. 1997).

247. See *supra* note 192 for a discussion of The Code of Civil Procedure's impact on party testimony.

248. See *Continental Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506 (N.Y. 1993) (stating that evidence of practical construction not admissible if the contract is

voluntary” test imposed by the federal courts for the surrender of federal rights enacted for the protection of employees against various forms of discrimination.²⁴⁹ Some other formulations fall in between. For example, in Oregon, where apparently no relevant statute exists, a party can testify to his or her belief that a contract has been made but not with respect to intention related to ambiguous terms.²⁵⁰

The subjective test has, however, been victorious in some of the grounds for avoidance of a contract. Since the earliest days of equity, deeds, contracts, and other instruments have been set aside on grounds of duress, fraud, and mistake. It has been said that no specific doctrines appeared to have existed for these decisions, other than ideas of fairness or reasonableness.²⁵¹ To the contrary, I think there is strong evidence that the courts had a conceptual understanding of what they were doing. The important point is that none of these doctrines engage the intent of the promisor but instead focus on the outside circumstances that induced the promise.

In a recent article, Professor Ricks has identified the rationale of the early cases giving relief for mistake. The courts employed the doctrine of failure of consideration,²⁵² which stated that because of mistake, one party did not or would not get an important part of the bargain, the bargained for consideration failed. Ricks did not place his own spin on what the courts of that era did, but discovered what they in fact said.

A rationale for duress can be deduced from Blackstone’s discussion. He stated that relief from an agreement on grounds of duress was a possibility only if the agreement was coerced by actual (not threatened) imprisonment or fear of loss of life or limb. “A fear of battery * * * is no duress; neither is the fear of having one’s house burned, or one’s goods taken away or destroyed;” Blackstone wrote, “because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life, or limb.”²⁵³ Blackstone

unambiguous); *W.W.W. Associates, Inc. v. Giancontieri*, 566 N.E.2d 639 (N.Y. 1990) (holding that parol evidence inadmissible to show that a term with a plain meaning is ambiguous).

249. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974); *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir. 1997); *Gorman v. Earmark Inc.*, 968 F. Supp. 58, 62 (D. Conn. 1997) (addressing pension claims under ERISA, age and disability discrimination statutes and comparable state law).

250. See *Kabil Devs. Corp. v. Mignot*, 566 P.2d 505 (Or. 1977).

251. See Gordley, *supra* note 13, § 68.

252. See Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 La. L. Rev. 663, 688-704 (1998). I have subscribed to the notion that the term “failure of consideration” should be abandoned. See Calamari & Perillo, *supra* note 22, § 11.21. Nonetheless, we are here discussing doctrine prior to the twentieth century which employed this concept. Today, scholars generally subscribe to Corbin’s terminology, “failure of constructive condition.”

253. 1 William Blackstone, *Commentaries on the Laws of England* *127 (William

seems to have understood relief for duress to be based on a party's interest in bodily integrity and freedom from physical restraint.²⁵⁴ Blackstone was not strictly correct, for the doctrine of duress of goods had already been originated when he wrote.²⁵⁵ A more modern doctrine was aborning.²⁵⁶ Several decades later, a Virginia judge was able to give a different doctrinal explanation to support relief for duress—in a word, oppression.²⁵⁷ He equated the coercing party with guardians who took advantage of their wards, lawyers who abused their clients and similar oppressors. Parsons, whose general approach seems to have been a throwback to sixteenth century thinking, here adopted the theory of the lack of consent, straddling with it also the censure of wrong-doing.²⁵⁸

Relief for fraudulent misrepresentation was based on moral notions. One 1806 case from Virginia helps prove this point.²⁵⁹ Judge Tucker wrote of “moral guilt,”²⁶⁰ and the “folly, or depravity”²⁶¹ of the conspiring creditor. Judge Roan, concurring, spoke of his “turpitude,”²⁶² “iniquity”²⁶³ and “iniquitous gains.”²⁶⁴ The key point for this paper is that the basis was not some defect in the consent of the promisor, but some moral fault in the promisee who extracted the promise. Parsons, for one, agreed that the basis of relief for fraud was its immorality, but pointed to the impossibility of making all deception actionable. Human law, he opined, cannot adopt God's entire moral code or we would forever be punishing each other; thus “a certain amount of selfish cunning passes unrecognized by the law.”²⁶⁵ Parsons further preached that it is a principle of the common law that fraud be

S. Hein & Co., Inc. 1992) (1766).

254. W.W. Story shared a similar belief. See his eloquent passage in Story, *supra* note 75, § 92.

255. The doctrine of duress of goods originated with the case of *Astley v. Reynolds*, 2 Strange 915, 93 Eng. Rep. 939 (K.B. 1732) where a pledgee refused to surrender pledged property to the pledgor except on payment of an unjustified bonus. The pledgor made the payment and recovered the excess payment, the court stating the owner “might have such an immediate want of his goods, that an action of trover would not do his business.” *Id.*

256. See, e.g., *Jones v. Barkley*, 2 Doug. 684, 696-98, 99 Eng. Rep. 434, 441-44 (1781) (discussing the unreported case of *Smith v. Bromley*).

257. See *Austin's Adm'x v. Winston's Ex'x*, 11 Va. (1 Hen. & M.) 33, 44 (1806).

258. Parsons deals with duress under “Persons of Insufficient Mind to Contract,” along with *non compos mentis*, spendthrifts and seamen. This category is sandwiched between infants and married women on one side, and aliens, slaves, and outlaws on the other. 1 Parsons, *supra* note 152, at 319-21. Williston, who edited the eighth edition of Parsons' treatise, speaks disparagingly of the work. Williston, *supra* note 218, at 136-37.

259. See *Austin's Adm'x*, 11 Va. (1 Hen. & M.) at 33.

260. *Id.* at 35.

261. *Id.* at 39.

262. *Id.* at 43 (Roan, J., concurring).

263. *Id.* at 45, 49.

264. *Id.* at 48.

265. Parsons, *supra* note 152, at 769.

undefined, because “[t]he very definition would give the crafty just what they wanted.”²⁶⁶

As James Gordley has written, “Aristotle and Thomas Aquinas concluded that a person acts voluntarily even if he must choose among evils, as when a captain has to jettison cargo in a storm.”²⁶⁷ Thus, under this view, when parents pay a kidnapper to save their daughter’s life they may be expressing “the most genuine, heartfelt consent.”²⁶⁸ Holmes agreed with the Aristotelian view of duress which states that “conduct under duress involves a choice.”²⁶⁹ “It always is for the interest of a party under duress,” he wrote, “to choose the lesser of two evils.”²⁷⁰ Lord Coke looked to the external causes for a different reason, that is, “so in pleading must hee shew some just cause of feare, for feare of it selfe is internall and secret.”²⁷¹ Coke thus expressed a preference for objective facts and an a priori rejection of proof of subjective states of mind. He laid down a substantive rule of law with evidentiary concerns in mind.

Will theorists of eighteenth and nineteenth century France found a different basis for relief. They argued that duress, fraud, and mistake vitiated the will, and contaminated the appearance of consent. The theory held that such apparent consent was not voluntary. Pothier, for one, stated that there was no consent if the parties were mistaken about the substance of a sale or its price, or if they misunderstood each other as to the substance of the deal.²⁷² In illustrating such a misunderstanding, he put forth the case of a party who intends to sell a house for 9,000 *livres* while the other understands that the agreement is for a nine year lease at that price.²⁷³ American misunderstanding cases agreed with this principle.²⁷⁴

266. *Id.*

267. Gordley, *supra* note 13, at 30.

268. John Dalzell, *Duress by Economic Pressure*, I, 20 N.C. L. Rev. 237, 238 (1942); see also Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 Colum. L. Rev. 603 (1943) (discussing the notion that one’s choices under compulsion are still “voluntary”); F.C. Sharp, *The Ethics of Breach of Contract*, 45 Int’l J. of Ethics 27, 30-31 (1934).

269. *Union Pac. R.R. Co. v. Public Serv. Comm’n of Mo.*, 248 U.S. 67, 70 (1918).

270. *Id.*

271. 2 Edward Coke, *The First Part of the Institutes of the Laws of England* *253b (19th ed. 1832) (1628).

272. Pothier, *supra* note 15, at 20-22.

273. See *id.* at 20. Common law text writers usually distinguish misunderstanding (Pothier’s example) from mistake, but common law courts do not generally make the distinction. See, e.g., *Hughes v. Mercantile Mut. Ins. Co.*, 55 N.Y. 265 (1873) (the two ships “Empress”). Usually cited to illustrate misunderstanding is *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864) (the two ships “Peerless”), but Simpson has shown us how little we can understand about the case as the court dismissed the complaint without opinion. Simpson, *Leading Cases*, *supra* note 214, at 135-62 (1995). For a discussion of misunderstanding, see George E. Palmer, *The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second*, 65 Mich. L. Rev. 33 (1966).

274. See *Coles v. Bowne*, 10 Paige Ch. 526 (N.Y. Ch. 1844).

Because the parol evidence rule does not bar evidence of duress, fraud, mistake or any other ground for showing that a contract can be set aside or reformed, the adoption of a subjective theory of contract formation had more than a rhetorical impact on grounds for avoidance. In the United States, the doctrinal explanations for relief on these grounds shifted from the outside forces that induced the promise, to the interior of the mind of the promisor.

Modern doctrine has shifted again and has returned to the Aristotelian conception that duress and other grounds for avoidance of contracts involve abuses of the bargaining process.²⁷⁵ But in the nineteenth century, the French-grounded notion of lack of true consent became the accepted explanation for avoidance or reformation of contracts and has found adherents even into the twentieth century. Clark's 1894 hornbook covered these matters in a chapter entitled "Reality of Consent."²⁷⁶ The last edition of this hornbook, published in 1931, contained the same chapter heading.²⁷⁷ Reuben Benjamin, an early proponent of the modern objective theory of formation and interpretation,²⁷⁸ nonetheless in 1907 dealt with the avoidance of contracts under "Reality of Consent."²⁷⁹ Clarence Ashley in 1911 wrote in terms of "no meeting of the minds."²⁸⁰ Williston, however, in 1920 blasted the notion that reality of consent has anything to do with grounds for avoidance. He restricted the notion of the unreality of consent to cases of fraud in the factum and the like, e.g., a shotgun-induced signing of an unread document or where the promisor signs a document that has been switched by sleight of hand.²⁸¹ Corbin in 1960 treated mistake as free standing and did not deal with other grounds of avoidance;²⁸² Corbin's treatment of mistake cannot be described as either subjective or objective.

Do the doctrinal differences between current text writers and the law-book authors of the late nineteenth and early twentieth centuries

275. See Calamari & Perillo *supra* note 22, ch. 9 ("Avoidance or Reformation for Misconduct or Mistake"); Farnsworth, *supra* note 55, at 241 ("Abuse of the Bargaining Process," except that mistake is dealt with in Chapter nine under "Failure of a Basic Assumption"); Murray *supra* note 55, at § 92 ("Abuse of the Bargaining Process," except for mistake which is dealt with in section 91 under "Operative Expressions of Assent.").

276. See Clark, *supra* note 43, ch. 7 (1894). Clark, a professional writer of law books, is best known today for his contract with West which contained a condition that he not imbibe alcoholic beverages and for the consequences of noncompliance with that condition. *Clark v. West*, 86 N.E. 1 (N.Y. 1908).

277. See Wm. L. Clark, Jr., *Handbook of the Law of Contracts* ch. 7 (Archibald H. Throckmorton & Alvin C. Brightman eds., 4th ed. 1931).

278. See *supra* text accompanying note 216.

279. See Benjamin, *supra* note 216, ch. 5. [Reference is to Reuben B., not Judah B.]

280. Clarence D. Ashley, *The Law of Contracts* § 46 (1911).

281. See 1 Williston, *supra* note 55, § 20; 3 Williston, *supra* note 55, §§ 1486-1627 (1920).

282. See 3 Holmes, *supra* note 45, ch. 27. This volume deals with interpretation, the parol evidence rule, and mistake.

make a difference in the actual decision of the cases? Perhaps not, because, as current text writers agree, although the objective theory dominates the formation and interpretation of contracts, the tests for avoidance are largely subjective. Take the case of duress. My own hornbook states:²⁸³

as in the case of all contractual rules that make reference to mental processes, we must ask whether the test is objective or subjective. This last is the easiest of the questions posed. In contrast to earlier cases, the overwhelming weight of modern authority uses a subjective test. Thus the issue now is whether the will of the particular person has been overcome,²⁸⁴ and not, as the earlier cases had held, whether a brave person would be put in fear or whether the will of a person of ordinary firmness would be overcome.²⁸⁵

Murray discusses the treatment of the Restatement (Second) and sees it as applying a subjective test to "easily frightened" persons, but an objective test as to other persons.²⁸⁶ Farnsworth's treatment is quite similar to Murray's.²⁸⁷ Thus, subjectivity survives, because a person who is indeed frightened by something less than gunfire, arguably fits into the category of an "easily frightened" person.

Let me illustrate the subjectivity of the avoidance cases with well-known cases. Take the casebook example of *Gallon v. Lloyd-Thomas Co.*,²⁸⁸ where the court held that duress caused the plaintiff to agree to a modified employment contract:

Plaintiff stated that he was very upset; that he and Goran found Gatenbey in the room and the latter began reading from a paper " * * and telling me that I was a bad man, a bigamist, promiscuous or maybe worse and went on for nearly an hour and a half or two *until I was completely broken down.*"²⁸⁹

The subjective state of mind—"completely broken down"—was the key element in the finding of duress.

283. See Calamari & Perillo, *supra* note 22, at 309.

284. See *Kaplan v. Kaplan*, 182 N.E.2d 706, 709 (Ill. 1962); *Silsbee v. Webber*, 50 N.E. 555 (Mass. 1898) (a classic exposition by Holmes); *Rubenstein v. Rubenstein*, 120 A.2d 11 (N.J. 1956); 13 Samuel Williston, *The Law of Contracts* § 1605 (3d ed. 1957). *But see* *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975) (applying a standard of duress whereby threats of actual bodily harm are required).

285. See *Young v. Hoagland*, 298 P. 996 (Cal. 1931). At times the "mind of a person of ordinary firmness" rule is routinely stated, but usually in a case where the precise test is not really at issue. See, e.g., *Bata v. Central-Penn Nat'l Bank*, 224 A.2d 174 (Pa. 1966), where the old rule is stated but in a context where "we find it inconceivable that appellant was subject to any degree of restraint or danger." *Id.* at 180. The test is, however, repeated in *Strickland v. University of Scranton*, 700 A.2d 979 (Pa. Super. Ct. 1997).

286. See Murray, *supra* note 55, § 93(1).

287. See Farnsworth, *supra* note 55, § 4.18.

288. 264 F.2d 821, 824 (8th Cir. 1959).

289. *Id.* at 824.

Consider another casebook case, this time illustrating undue influence. In *Methodist Mission Home of Texas v. N—A.—B—*,²⁹⁰ an unwed mother was persuaded to release her newborn child for adoption. Note the subjectivity of the court's description of the circumstances leading to the release.

Plaintiff's testimony concerning her emotional distress during the critical period following the birth of her child is rendered credible by the fact that an unwed mother who has just given birth is usually emotionally distraught and peculiarly vulnerable to efforts, well-meaning or unscrupulous, to persuade her to give up her child. Immediately following plaintiff's announcement that, contrary to the expectations of Mrs. Burns, she intended to keep her son, she was subjected to an intensive campaign, extending over a five-day period, designed to convince her to give up her baby, rather than to insure that her decision, whatever it might be, would be based on a consideration of all relevant factors.²⁹¹

A subjective test for avoidance was adopted by Samuel Williston, a scholar who is famous or infamous—depending on one's point of view—for propagating the objective approach to contract formation and interpretation. It is difficult to find a more subjective approach to grounds for avoidance than Williston's in the following passage that deals with duress and misrepresentation.

The tendency of the modern cases, and undoubtedly the correct rule is that any unlawful threats which do in fact overcome the will of the person threatened, and induce him to do an act which he would not otherwise have done, and which he was not bound to do, constitute duress. The age, sex, capacity, relation of the parties and all the attendant circumstances must be considered. This follows the analogy of the modern doctrine of fraud which tends to disregard the question whether misrepresentations were such as would have deceived a reasonable person, and confines the question to whether the misrepresentations were intended to deceive and did so.²⁹²

Williston wrote this passage in 1920. Has the situation changed? Allan Farnsworth suggests that it has, the pendulum having swung away from a subjective standard of free will to a standard of whether a reasonable alternative exists.²⁹³ Granted, this is the standard that courts employ when business organizations assert that defense of duress. After all, how can we define or probe the "free will" of the Loral Corporation?²⁹⁴

290. 451 S.W.2d 539 (Tex. Civ. App. 1970).

291. *Id.* at 543-44. Other well-known undue influence cases clearly employing a subjective test include *Francois v. Francois*, 599 F.2d 1286 (3d Cir. 1979), *cert. denied*, 444 U.S. 1021 (1980), and *Odorizzi v. Bloomfield School Dist.*, 54 Cal. Rptr. 533 (1966).

292. 3 Williston, *supra* note 55, § 1605 at 2832-33 (footnotes omitted).

293. See Farnsworth *supra* note 55, § 4.18 at 270.

294. See *Loral Corp. v. United States*, 434 F.2d 1328 (Ct. Cl. 1970); Austin

But where an individual raises the defense, the courts seem to focus on the subjective mental state of the individual as well as the existence of a reasonable alternative. Thus, in one recent case, an employee alleged that she was terminated for protesting criminal accounting practices by her employer.²⁹⁵ She sought to disavow a general release of claims against her employer, alleging duress stemming from three threats. The threats were (1) to withhold her last two weeks salary and severance pay, (2) to withhold a letter of recommendation, and (3) an implicit threat to her safety. While the first threat was certainly not a sufficient basis for a plea of duress because court action was a reasonable alternative, the second was a sufficiently wrongful threat "depend[ing] greatly upon the subjective state of mind of the plaintiff."²⁹⁶ Court action could not supply her with a letter of recommendation! Of course, the third threat might suffice even under Blackstone's criteria, although the threat was only implicit.

History is not seamless, and neither is current law. In another recent case, governed by New Jersey law, the court found that questions of fact needed to be resolved on the issue of duress. It quoted one guiding precedent to the effect that "the 'decisive factor' is the wrongfulness of the pressure exerted."²⁹⁷ This quotation is squarely in accord with the objective theory of duress. On the next page, the court quotes another precedent to the effect that since duress is based on "the unreality of the apparent consent, the controlling factor is the condition, at the time, of the mind of the person. . . rather than the means by which the given state of mind was induced, and thus the test is essentially subjective."²⁹⁸ Consistency was not the hobgoblin of the judge who wrote or signed onto this opinion. Doctrinal writers, including myself, suffer from the same inconsistency. This New Jersey case represents the state of the law of duress affecting individuals. Wrongful coercive conduct or a wrongful threat of coercion must have subjectively induced the assent of the victim.²⁹⁹

I have focused on duress and undue influence, but similar subjective factors are at work in cases claiming relief for misrepresentation. Misrepresentation cases generally do not discuss the reliance factor. The focus of most of the cases is on the nature of the deception and

Instrument, Inc. v. Loral Corp., 272 N.E.2d 533 (N.Y. 1971).

295. See *King v. Donkenny, Inc.*, 84 F. Supp. 2d 737 (W.D. Va. 2000).

296. *Id.* at 739.

297. *Farris v. County of Camden*, 61 F. Supp. 2d 307, 336 (D. N.J. 1999) (quoting *Continental Bank v. Barclay Riding Acad., Inc.*, 93 N.J. 153, 177 (1983)).

298. 61 F. Supp. 2d at 337 (quoting *McBride v. Atlantic City*, 146 N.J. Super. 498, 503 (Law Div. 1974)).

299. Wrongful conduct need not be criminal or tortious. The abusive exercise of a legal right can be the predicate for duress. See Calamari & Perillo, *supra* note 22 § 9.3; Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 Pac. L. J. 37, 60-69 (1995).

the justification for any reliance.³⁰⁰ The Restatement (Second) states a rule concerning reliance that is totally subjective. Section 167 provides that "[a] misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest assent."³⁰¹ The caselaw rarely looks directly into the "internal and secret" recesses of the claimant's mind, as he or she can testify to what induced the consent to the contract, release, or other instrument. The testimony is rebuttable, if at all, by circumstantial evidence of lack of reliance. Thus, if the claimant conducted its own investigation of the facts, the court may conclude that there was no reliance.³⁰² Similarly, circumstantial evidence can be marshaled to corroborate the fact of reliance.³⁰³

Cases involving allegations of mistake are similar. No one seems to discuss the state of mind of the party seeking to invoke the doctrine of mistake. If the risk of a mutual mistake has not been assumed, and the mistake is about a basic assumption of the parties, relief is warranted if the "mistake has a material effect on the agreed exchange of performances."³⁰⁴ The assumption is that if these three factors coexist, the mistake is an inducing cause of the claimant's assent to the contract. Mistake is, however, defined as "a belief that is not in accord with the facts." Beliefs are subjective. The predicate for applying the three-prong test for relief is a subjective belief. Relief cannot be said to be based entirely on a subjective or objective basis because the subjective beliefs must have an objectively material effect on the agreed exchange.

The explanation for the greater concentration on the claimant's mental state in cases of duress, undue influence, and misrepresentation than in cases of mistake is that the former are based on the wrongful conduct of the promisee that overwhelmed or corrupted the mental processes of the promisor. On the other hand, mutual mistake is a no-fault doctrine. More objective criteria are in order; no one has toyed with the mind of the promisor.

IX. THE ROLE OF OLIVER WENDELL HOLMES, JR.

Holmes left law school in 1866, and entered the practice of law, while simultaneously writing for the *American Law Review*. There is

300. See, e.g., *Am. Life Ins. Co. v. Parra*, 63 F. Supp. 2d 480, 502 (D. Del. 1999) (methodically going through the elements for relief for misrepresentation, though ignoring reliance, proceeding to ask the question "[w]as Parra's reliance on Fernandez's misrepresentation justifiable?").

301. Restatement (Second) of Contracts § 167 (1981).

302. See *McCormick & Co. v. Childers*, 468 F.2d 757 (4th Cir. 1972); *Gary v. Politte*, 878 S.W.2d 849 (Mo. Ct. App. 1994); *Copland v. Nathaniel*, 624 N.Y.S.2d 514 (Sup. Ct. 1995). But see *Fisher v. Mr. Harold's Hair Lab Inc.*, 527 P.2d 1026, 1034 (Kan. 1974); Restatement (Second) of Contracts § 167 ill. 1 (1981).

303. See *Engalla v. Permanente Med. Group*, 64 Cal. Rptr. 2d 843, 859 (1997).

304. Restatement (Second) of Contracts § 152, cmt. a.

no hint of an objective theory of contracts in these early writings. In 1871 he was comfortable talking about the meeting of the minds.³⁰⁵ In 1870, he began teaching constitutional law at Harvard. Repelled by the newly appointed Dean Langdell's case method of instruction, he left Harvard³⁰⁶ and spent three years producing a new edition of *Kent's Commentaries*. A biographer has stated that Holmes totally eliminated and rewrote the notes to the text that had been added by earlier editors.³⁰⁷

In this 1873 publication, in a brief note on duress, Holmes employs the rhetoric of subjective intent ("his will is not free").³⁰⁸ Holmes' note on insanity fails to notice that the English cases are based on objectivity and the American cases on subjectivity. He connects the English with the American with a "but," as if the cases were distinguishable, rather than based on differing doctrinal premises.³⁰⁹

In his annotations to Kent's discussion of fraud and nondisclosure, Holmes wrote about the cases in which the fraud is of such a sort that "the minds of the parties never meet," a phrase repeated twice in the same paragraph.³¹⁰

In the segment on interpretation of contracts,³¹¹ none of the key cases of the 1860s or early 1870s are cited. Indeed, they are all absent from the table of cases, save *Smith v. Hughes*, which is cited on a point of misrepresentation law, rather than for the principle for which it principally has been cited, that is, the ushering in of the modern objective theory.³¹² By the way, these cases from the 1860s and 1870s with the exception of *Bank v. Kennedy*,³¹³ were about individuals, not corporations. For example, Smith was a farmer, and Hughes was a trainer of horses.

It is only in his 1880 lectures at the Lowell Institute that were published the following year as *The Common Law* that we see a citation to *Smith v. Hughes* in the context of interpretation,³¹⁴ and Holmes' assertion of a full-blown objective theory of contracts. The courts had preceded him. Moreover, given the antiquarian bent of the

305. See, e.g., *American Law Review* 6:3550 (1871), reprinted in 1 *The Collected Works of Justice Holmes* 271-73 (Sheldon M. Novick ed. 1995) (reporting Massachusetts District Court Bankruptcy decisions).

306. Baker, *supra* note 204, at 208-09.

307. See *id.* at 209-12.

308. See 2 *Kent, Commentaries on American Law*, *supra* note 138, at 452 n.1(c).

309. *Id.* at 451 n.1(a).

310. *Id.* at 482 n.1.

311. See *id.* at 553-57.

312. The true usher appears to have been Judah Benjamin. See *supra* text accompanying notes 214-15. Benjamin's text on sales was cited to the court on another point. *Smith v. Hughes*, 6 L.R.-Q.B. 597, 599 (1871). Thus, all the lawyers and judges in the case were familiar with this text.

313. 84 U.S. 19 (1872). This was a suit by a receiver of one bank against another bank.

314. See Holmes, Jr., *supra* note 82, at 310 n.1.

lectures, his statement of the objective theory may have been inspired largely by the objective approach to contract law preceding the legitimization of party testimony rather than the new cases that deemed testimony of intent to be irrelevant.

In *The Common Law*, Holmes lent a clear and dogmatic voice to provide scholarly validation to what the courts had started. Courts had not yet made such sweeping generalizations as his statement that "the making of a contract does not depend on the state of the parties' minds, it depends on their overt acts."³¹⁵ He reiterates the point as follows "[t]he law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."³¹⁶ He continued preaching his highly objective outlook. In 1897, he wrote, "the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having *meant* the same thing but on their having *said* the same thing."³¹⁷

Holmes' statement of the objective theory became one of the canons of contract law of most of the twentieth century, and in many quarters remains so.³¹⁸ There is, however, one aspect of his objective approach that has had no noticeable impact. Holmes formulated an objective approach to voidable contracts, concentrating on mistake and fraud.³¹⁹ This formulation has been critiqued in detail in an article by Robert Birmingham.³²⁰ It has had little effect on the courts.

In the formulation of an objective theory of fraud and mistake, Holmes attempted to lead the courts and failed. In his successful formulation of objective approaches to formation and interpretation, he managed to run fast enough to capture the lead in the parade that was already marching on.

CONCLUSION

Prior discussions of the origins of the objective theory of contract formation and interpretation, by Friedman, Horwitz, and Gilmore, focused on the rhetoric of subjectivism that was prevalent in the mid-nineteenth century cases and texts. These discussions paid little or no attention to the outcome of cases decided in that period; those outcomes were almost entirely objectively based. The language of the

315. *Id.* at 307.

316. *Id.* at 309.

317. O. W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897).

318. Despite the predominance of the objective approach, a considerable number of decisions today are subjectively based and parties testify as to their intentions. *See, e.g.,* Sutton v. Bank of New York, 673 N.Y.S.2d 380 (N.Y. App. Div. 1998) (basing a determination that a bank account was jointly held on parties' submissions).

319. *See* Holmes, Jr., *supra* note 82, at 308-39.

320. *See* Robert L. Birmingham, *Holmes on 'Peerless': Raffles v. Wichelhaus and the Objective Theory of Contract*, 47 U. Pitt. L. Rev. 183 (1985).

cases and texts began shifting in the 1870s and shifted dramatically in the early 1900s. Friedman, Horwitz and Gilmore saw the shift in language through the lens of economic determinism and reached the erroneous conclusion that the shift in language signified a shift in result to accommodate the transformed economic system. A thorough examination of the cases and texts in conjunction with an analysis of the rules of evidence demonstrates that objective approaches have dominated the common law since "to the time that the memory of man runneth not to the contrary."³²¹ The reason for the persistence of objective approaches can be found in the legal profession's distrust of the testimony of parties. This distrust resulted in court-imposed rules forbidding party testimony starting in the sixteenth century. When legislatures overturned these rules in the nineteenth century, the profession, acting through the courts, made party testimony of intention irrelevant, giving birth to the modern objective theory.

321. The phrase is Blackstone's. 1 Blackstone, *supra* note 253, at *76.

Notes & Observations