VOLUME 87 MARCH 1974 NUMBER 5

HARVARD LAW REVIEW

THE HISTORICAL FOUNDATIONS OF MODERN CONTRACT LAW

Morton J. Horwitz *

It has long been assumed that the development of modern contract law was complete once English judges had declared late in the sixteenth century that "a promise on a promise will maintain an action upon the case." Professor Horwitz argues to the contrary that the modern will theory of contract did not appear until the late eighteenth and early nineteenth centuries, when the spread of markets forced jurists to attack equitable conceptions of exchange as inimical to emerging contract principles such as those allowing recovery of expectation damages.

MODERN contract law is fundamentally a creature of the nineteenth century. It arose in both England and America as a reaction to and criticism of the medieval tradition of substantive justice that, surprisingly, had remained a vital part of eighteenth century legal thought, especially in America. Only in the nineteenth century did judges and jurists finally reject the long-standing belief that the justification of contractual obligation is derived from the inherent justice or fairness of an exchange. In its place, they asserted for the first time that the source of the obligation of contract is the convergence of the wills of the contracting parties.

Beginning with the first English treatise on contract, Powell's *Essay Upon the Law of Contracts and Agreements* (1790), a major feature of contract writing has been its denunciation of equitable conceptions of substantive justice as undermining the "rule of law." [1] "[I]t is absolutely necessary for the advantage of the public at large," Powell wrote, "that the rights of the subject should . . . depend upon certain and fixed principles of law, and not upon rules and constructions of equity, which when applied . . . , must be arbitrary and uncertain, depending, in the extent of their application, upon the will and caprice of the

---

* Assistant Professor of Law, Harvard Law School. B.A., C.C.N.Y., 1959; Ph.D., Harvard, 1964; LL.B., 1967.

I wish to express my gratitude to Duncan Kennedy and Alfred S. Konefsky for many valuable suggestions.

[1] *See also* writings described in subsection II.*B.*, p. 946, *infra.*

judge." [2] The reason why equity "must be arbitrary and uncertain," Powell maintained, was that there could be no principles of substantive justice. A court of equity, for example, should not be permitted to refuse to enforce an agreement for simple "exorbitancy of price" because "it is the consent of parties alone, that fixes the just price of any thing, without reference to the nature of things themselves, or to their intrinsic value . . . . [T]herefore," he concluded, "a man is obliged in conscience to perform a contract which he has entered into, although it be a hard one . . . ." [3] The entire conceptual apparatus of modern contract doctrine — rules dealing with offer and acceptance, the evidentiary function of consideration, and especially canons of interpretation — arose to express this will theory of contract.

Powell's argument against conceptions of intrinsic value and just price reflects major changes in thought associated with the emergence of a market economy. It appears that it was only during the second half of the eighteenth century that national commodities markets began to develop in England. From that time on, "the price of grain was no longer local, but regional; this presupposed [for the first time] the almost general use of money and a wide marketability of goods." [4] In America, widespread markets in government securities arose shortly after the Revolutionary War, and an extensive internal commodities market developed around 1815.[5] The impact of these developments on both English and American contract law was profound. In a market, goods came to be thought of as fungible; the function of contracts correspondingly shifted from that of simply transferring title to a specific item to that of ensuring an expected return. Executory contracts, rare during the eighteenth century,[6] became important as instruments for "futures" agreements; formerly, the economic system had rested on immediate sale and delivery of specific property. And, most importantly, in a society in which value came to be regarded as entirely subjective and in which the only basis for assigning value was the concurrence of arbitrary individual desire, principles of substantive justice were inevitably seen as entailing an "arbitrary and uncertain" standard of value. Substantive justice, according to the earlier view, existed in order to prevent men from using the legal system in order to exploit each other. But where things have no "intrinsic value," there can be

[2] 1 J. POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS x (1790).

[3] 2 *id.* at 229.

[4] K. POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 115 (Beacon Press ed. 1957).

[5] *See* pp. 937–41 *infra.*

[6] *See* p. 930 & note 71 *infra.*

no substantive measure of exploitation and the parties are, by definition, equal. Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of inequality are illusory.

This Article will elaborate the view of the development of modern contract law outlined above. The first Section will describe the distinguishing features of the equitable conception of contract which dominated eighteenth century courts. The second Section will detail the late eighteenth and early nineteenth century disintegration of the equitable conception and the coalescence of new doctrine into the modern will theory of contract.

I. THE EQUITABLE CONCEPTION OF CONTRACT IN THE EIGHTEENTH CENTURY

The development of contract, it often has been observed, can be divided into three stages, which correspond to the history of economic and legal institutions of exchange.[7] In the first stage, all exchange is instantaneous and therefore "involves nothing corresponding to 'contract' in the Anglo-American sense of the term. Each party becomes the owner of a new thing, and his rights rest, not on a promise, but on property." [8] In a second stage, "[e]xchange first assumes a contractual aspect when it is left half-completed, so that [only] an obligation on one side remains." [9] The "third and final stage in the development occurs when the executory exchange becomes enforceable." [10] According to orthodox legal history, when English judges declare at the end of the sixteenth century that "every contract executory is an assumpsit in itself," and that "a promise against a promise will maintain an action upon the case," [11] the conception of contract as mutual promises has triumphed and, according to Plucknett, "the process is complete and the result clear . . . ." [12] "Damages were soon assessed," Ames added, "not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised." [13]

---

[7] *See, e.g.*, L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 121–22 (1972); F. KESSLER & G. GILMORE, CONTRACTS 27–28 (1970); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 643–44 (5th ed. 1956).

[8] L. FULLER & M. EISENBERG, *supra* note 7, at 121.

[9] *Id.*

[10] *Id.* at 122.

[11] T. PLUCKNETT, *supra* note 7, at 643–44.

[12] *Id.* at 644.

[13] J. AMES, LECTURES ON LEGAL HISTORY 144–45 (1913). *See also* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 452 (3d ed. 1923).

It is the purpose of this Section to demonstrate that, contrary to the orthodox view, the process was not complete at the end of the sixteenth century. Instead, one finds that as late as the eighteenth century contract law was still dominated by a title theory of exchange and damages were set under equitable doctrines that ultimately were to be rejected by modern contract law.

To modern eyes, the most distinctive feature of eighteenth century contract law is the subordination of contract to the law of property. In Blackstone's *Commentaries* contract appears for the first time in Book II, which is devoted entirely to the law of property. Contract is classified among such subjects as descent, purchase, and occupancy as one of the many modes of transferring title to a specific thing.[14] Contract appears for the second and last time in a chapter entitled, "Of Injuries to Personal Property."[15] In all, Blackstone's extraordinarily confused treatment of contract ideas[16] occupies only forty pages of his four volume work.

As a result of the subordination of contract to property, eighteenth century jurists endorsed a title theory of contractual exchange according to which a contract functioned to transfer title to the specific thing contracted for. Thus, Blackstone wrote that where a seller fails to deliver goods on an executory contract, "the vendee may seize the goods, or have an action against the vendor for detaining them."[17] Similarly, in the first English treatise on contract, Powell wrote of the remedy for failure to deliver stock on an executory contract as being one for specific performance.[18]

The title theory of exchange was suited to an eighteenth century society in which no extensive markets existed, and goods, therefore, were usually not thought of as being fungible. Exchange was not conceived of in terms of future monetary return, and as a result one finds that expectation damages were not recog-

[14] 2 W. BLACKSTONE, COMMENTARIES *440–70.

[15] 3 *id.* *154–66.

[16] *See* note 72 *infra*.

[17] 2 W. BLACKSTONE, COMMENTARIES *448. The title conception also appears in 1 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 380–81 (1796).

[18] 2 J. POWELL, *supra* note 2, at 232–33. The last important appearance of the title theory in American contract law occurred in Chancellor Kent's *Commentaries*. His treatment of contracts still focused entirely upon the question of when title passes by delivery, and there was as yet no trace of a discussion of damage remedies for breach of contract. *See* 2 J. KENT, COMMENTARIES ON AMERICAN LAW *449–557 (1827). In a world in which markets and speculation were becoming everyday events, *see* pp. 937–41 *infra*, Kent's treatment represented the final expression of the eighteenth century view of contract as simply one mode of transferring specific property.

nized by eighteenth century courts. Only two reported eighteenth century English cases touch on the question of expectation damages for breach of contract. *Flureau v. Thornhill*[19] (1776) seems to have confronted the question of damages for the loss of a bargain. A purchaser of a lease, who sued for failure to deliver because of a defect in title, sought to recover not only his deposit, but also damages sustained as a result of the lost bargain. The report of the case does not disclose whether the plaintiff attempted to recover the increased value of the lease, or, rather, the loss he had suffered from selling stock to finance the payment. In any event, the court refused to allow him more than restitution of his payment, one judge contemptuously noting that he could not "be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost."[20]

A second English case involving the damage issue is *Dutch v. Warren*[21] (1720). The case would be irrelevant were it not for the fact that it was regularly cited by later jurists ransacking the English reports for early instances of the recognition of expectation damages.[22] The case represented a buyer's action for restitution of money paid on a stock purchase contract, the price of the stock having fallen by the time delivery was due. Although the court said the case was "well brought; not for the whole money paid, but the damages in not transferring the stock at that time,"[23] the case obviously does not establish the modern rule that one may recover expectation damages in excess of the purchase price for failure to deliver stock in a rising market.

---

[19] 2 Black. W. 1078, 96 Eng. Rep. 635 (C.P. 1776). The decision in *Flureau v. Thornhill* may have been responsible for the widespread adoption in America during the first quarter of the nineteenth century of the rule that for breach of warranty of good title only the purchase price and not expectation damages was recoverable. *See* Horwitz, *The Transformation in the Conception of Property in American Law, 1780–1860*, 40 U. CHI. L. REV. 248, 285–88 (1973). Although the American decisions adopting this rule may reflect deeper issues concerning the relations between speculative buyers and sellers of land, they also represent the continuing influence of an eighteenth century view of contract that had not yet developed a conception of expectation damages.

[20] 2 Black, W. at 1078, 96 Eng. Rep. at 635. I have been able to find only one buyer's action for nondelivery of goods on an executory contract in the English reports of the eighteenth century, and that case did not deal with the measure of damages. In Clayton v. Andrews, 4 Burr. 2101, 98 Eng. Rep. 96 (K.B. 1767), a buyer's action for nondelivery of corn, Lord Mansfield held that the statute of frauds did not apply to executory contracts.

[21] 1 Strange 406, 93 Eng. Rep. 598 (K.B. 1760). For a more complete discussion of the case, see Moses v. Macferlan, 2 Burr. 1005, 1010–11, 97 Eng. Rep. 676, 680 (K.B. 1760) (Mansfield, J.).

[22] *See, e.g.*, Shepherd v. Johnson, 2 East. 211, 102 Eng. Rep. 350 (K.B. 1802). *See also* 1 J. POWELL, *supra* note 2, at 137–38.

[23] 1 Strange at 406, 93 Eng. Rep. at 598.

Indeed, Lord Mansfield referred to it not as establishing a rule for damages, but as illustrating the equitable nature of the action for money had and received.[24]

One of the handful of executory contracts in America before the Revolution appeared in *Boehm v. Engle*[25] (1767), in which two sellers sued a buyer who, alleging bad title, had refused to accept a deed for land. Since Pennsylvania had no equity court in which a seller could have sued for specific performance,[26] Boehm brought "a special action on the case for the consideration money"[27] or contract price, not, it should be emphasized, for the value of the lost bargain. He was thereby suing, in effect, for specific performance and not for the change in value of the land. The suit was therefore consistent with Blackstone's title theory: the contract had transferred title from seller to buyer and all that remained was an action for the price.

To appreciate the radical difference between eighteenth century and modern contract law, consider a case decided during a period in which the demise of the title theory was becoming plain. *Sands v. Taylor*[28] was an 1810 New York suit against a buyer who had received a part shipment of wheat but had refused to receive the remainder contracted for. Under the old title theory, sellers were apparently required to hold the goods until they received the contract price from the buyer. But in *Sands v. Taylor* the sellers immediately "covered" by selling the wheat in the market and thereafter suing the buyer for the difference between market and contract price. While acknowledging that there were "no adjudications in the books, which either establish or deny the rule adopted in this case,"[29] the court ratified the seller's decision to "cover" and allowed him to sue for the difference. "It is a much fitter rule," it declared, "than to require . . . [the seller] to suffer the property to perish, as a condition on which his right to damages is to depend."[30] In reaching this result the court was forced to fundamentally transform the title theory. The sellers, it said, "were, by necessity . . . thus constituted trustees or agents, for the defendants . . . "[31] The trust theory was thus

[24] *See* Moses v. Macferlan, 2 Burr, 1005, 1011–12, 97 Eng. Rep. 676, 680 (K.B. 1760). *See also* Clark v. Pinney, 7 Cow. 681, 688–89 (N.Y. 1827) (*Dutch v. Warren* "most manifestly decides nothing which has a bearing upon the question of damages where the action is brought *upon the contract itself*, and not to recover back the money paid . . . .").

[25] 1 Dall. 15 (Pa. 1767).

[26] A. LAUSSAT, AN ESSAY ON EQUITY IN PENNSYLVANIA 19–27 (1826).

[27] 1 Dall. at 15.

[28] 5 Johns. 395 (N.Y. 1810).

[29] *Id.* at 406.

[30] *Id.*

[31] *Id.* at 405.

created in order to overcome a result which, though inherent in eighteenth century contract conceptions, was becoming increasingly anomalous in a nineteenth century market economy. Under an economic system in which contract was becoming regularly employed for the purpose of speculating on the price of fungible goods, the old title theory of contract, conceived of as creating a property interest in specific goods, had outlived its usefulness. As we shall see in the succeeding Section, the demise of the title theory roughly corresponded to the beginnings of organized markets and the transformation of an economic system that had used contract as simply one means of transferring specific property.

The most important aspect of the eighteenth century conception of exchange is an equitable limitation on contractual obligation. Under the modern will theory, the extent of contractual obligation depends upon the convergence of individual desires. The equitable theory, by contrast, limited and sometimes denied contractual obligation by reference to the fairness of the underlying exchange.

The most direct expression of the eighteenth century theory was the well-established doctrine that equity courts would refuse specific enforcement of any contract in which they determined that the consideration was inadequate.[32] The rule was stated by South Carolina's Chancellor Desaussure as late as 1817:[33]

> [I]t would be a great mischief to the community, and a reproach to the justice of the country, if contracts of very great inequality, obtained by fraud, or surprise, or the skillful management of intelligent men, from weakness, or inexperience, or necessity could not be examined into, and set aside.

Four years later, the Chief Justice of New York noted the still widespread opinion of American judges that equity courts would refuse to enforce a contract where the consideration was inadequate.[34]

[32] *See, e.g.*, Carberry v. Tannehill, 1 Har. & J. 224 (Md. 1801); Campbell v. Spencer, 2 Binn. 129, 133 (Pa. 1809); Clitherall v. Ogilvie, 1 Des. 250, 257 (S.C. Eq. 1792); Ward v. Webber, 1 Va. (1 Wash.) 354 (1794). On the other hand, Swift stated that "[i]nadequacy of price, abstracted from all other considerations, seems of itself to furnish no ground on which a court of equity can set aside or relieve a party to a contract." 2 Z. SWIFT, *supra* note 17, at 447–48. Swift, however, acknowledged that when inadequacy existed, together with other circumstances, a "court may conclude that the consent of the party was not free, or was conditional, thro [*sic*] mistake, fear, or misrepresentation, or under the impulse of distress, known to the other party . . . ." *Id.* at 448. In short, even according to Swift, inadequacy of consideration could lead to refusal to enforce a contract without a finding of fraud.

[33] Desaussure made this remark as an unnumbered footnote to his report of a case, Clitherall v. Ogilvie, 1 Des. 250, 259 n. (S.C. Eq. 1792).

[34] Seymour v. Delancey, 3 Cow. 445, 447 (N.Y. 1824) (Savage, C.J.).

Supervision of the fairness of contracts was not confined to courts of equity. The same function was performed at law by a substantive doctrine of consideration which allowed the jury to take into account not only whether there was consideration, but also whether it was adequate, before awarding damages. The prevailing legal theory of consideration was expressed by Chancellor Kent as late as 1822, on the very eve of the demise of the doctrine that equity would not enforce unfair bargains.[35] In contract actions at law, he wrote, where a jury determined damages for breach of contract, "relief can be afforded in damages, with a moderation agreeable to equity and good conscience, and . . . the claims and pretensions of each party can be duly attended to, and be admitted to govern the assessment." [36]

Eighteenth century American reports amply support Kent's statement. In Pennsylvania, for example, where no equity court sat,[37] eighteenth century judges instructed juries in actions on bonds that they "ought to presume every thing *to have been paid*, which . . . in equity and good conscience, *ought not to be paid*." [38] Without an equity court, Chief Justice McKean declared, courts were obliged to turn to juries for "an equitable and conscientious interpretation of the agreement of the parties." [39] As a result, Pennsylvania lawyers often argued that a plaintiff's claim on a contract "should be both legal and equitable before he can call on a jury to execute the agreement," [40] and that "[i]nadequacy of price, known to the other party, is a ground to set aside a contract." [41]

In Massachusetts, the eighteenth century rule was that a defendant in an ordinary contract case could offer evidence of inadequacy of consideration in order to reduce his damages. At three separate points in his student notes, written around 1759, John Adams indicated that "sufficient Consideration" was necessary to sustain a contract action.[42] "No Consideration, or an insufficient Consideration, a good Cause of Motion in Arrest of Judgment," Adams noted in one of these entries.[43] In *Pynchon*

[35] Kent refused to specifically enforce a contract on the grounds of the unfairness of the bargain, but he was to be overruled on appeal. Seymour v. Delancey, 3 Cow. 445 (N.Y. 1824), *rev'g* 6 Johns. Ch. 222 (N.Y. Ch. 1822).

[36] Seymour v. Delancy, 6 Johns. Ch. 222, 232 (N.Y. Ch. 1822).

[37] *See* note 26 *supra*.

[38] Holingsworth v. Ogle, 1 Dall. 257, 260 (Pa. 1788).

[39] Wharton v. Morris, 1 Dall. 125, 126 (Pa. 1785). *See also* Conrad v. Conrad, 4 Dall. 130 (Pa. 1793).

[40] Gilchreest v. Pollock, 2 Yeates 18, 19 (Pa. 1795) (argument of counsel).

[41] Armstrong v. McGhee, Addis. 261 (Pa. C.P. 1795) (argument of counsel).

[42] 1 LEGAL PAPERS OF JOHN ADAMS 9 (L. Wroth & H. Zobel eds. 1965). *See also id.* at 12, 15.

[43] *Id.* at 9. Pondering the implications of the conception of objective value

v. Brewster [44] (1766), Chief Justice Hutchinson instructed the jury in an action for a fixed price that they "might . . . if they thought it reasonable, lessen the Charges in the [plaintiff's] Account." [45] One year later Hutchinson observed that "[i]t seems hard that an Inquiring into the Consideration should be denied, and that Evidence should be refused in Diminution of Damages." [46]

Another indication of the equitable nature of damage judgments in the eighteenth century was the almost universal failure of American courts either to instruct juries in strict damage rules or else to reverse damage judgments with which they disagreed. As a result, the community's sense of fairness was often the dominant standard in contracts cases. A commentator, referring to a 1789 Connecticut commercial case, noted that "[t]he jury were the proper judges, not only of the fact but of the law that was necessarily involved in the issue . . . ." [47] Whatever they believed about the proper allocation between judge and jury on matters of law, most judges were prepared to leave the damage question to the jury. For example, in a 1786 lawsuit in which the jury's award was lower than the agreed contract price, the South

that lay at the foundation of these rules, Adams was finally undecided whether their "Inconvenience to Trade" was greater than "the Injustice" of enforcing unequal bargains.

> It is a natural, immutable Law, that the Buyer ought not to take Advantage of the sellers Necessity, to purchase at too low a Price. Suppose Money was very scarce, and a Man was under a Necessity of procuring a £ 100 within 2 Hours to satisfy an Execution, or else go to Goal. He has Quantity of Goods worth £ 500 that he would sell. He finds a Buyer who would give him £ 100 for them all, and no more. The poor Man is constrained to sell £ 500s worth for £ 100. Here the seller is wronged, tho he sell voluntarily in one sense. Yet, the Injustice, that may be done by some Mens availing them selves of their Neighbours Necessities, is not so Great as the Inconvenience to Trade would be if all Contracts were to be void which were made upon insufficient Considerations. But Q. What Damage to Trade, what Inconvenience, if all Contracts made upon insufficient Considerations were void.

1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 112 (L. Butterfield ed. 1961). In recognizing the inconvenience to trade, Adams had presaged later attacks on the substantive doctrine of consideration. *See* pp. 941–45 *infra.*

[44] Quincy 224 (Mass. 1766).

[45] *Id.* at 225 (emphasis deleted).

[46] Noble v. Smith, Quincy 254, 255 (Mass. 1767). The case held, by a 3–2 vote, that evidence of inadequate consideration could not be admitted in an action on a promissory note brought by the promisee against the promisor. But it is clear from the case that the court treated notes as an exception to the general rule governing contracts. Indeed, promissory notes soon became the leading example emphasized by those who wished to destroy the doctrine of consideration itself. *See* pp. 941–43 *infra.* Although Hutchinson voted to exclude evidence of inadequacy of consideration, his statement does acknowledge the general rule, which he did not contest.

[47] 1 Z. SWIFT, *supra* note 17, at 410, *referring to* Hamlin v. Fitch (Conn. Sup. Ct. Err. 1789).

Carolina Supreme Court refused to grant a new trial since "this is a case sounding in damages, and . . . the jury have thought proper to give a kind of equitable verdict between the parties . . . ." [48] Likewise, the Virginia General Court appeared to adopt the position that excessive damages were not sufficient cause for a new trial.[49] Where "positive law, and judicial precedents, [are] totally silent on the subject [of damages]," Pennsylvania's Chief Justice McKean remarked, "the principles of morality, equity, and good conscience, would furnish an adequate rule to influence and direct our judgment." [50] And it was entirely clear that it was the jury's sense of equity that would prevail. While trying a case in the United States Circuit Court, Supreme Court Justice Washington found that, by awarding a lesser judgment, the jury had ignored his instruction that the plaintiff was entitled to recover the full amount of the contract. Asked to award a new trial, Washington refused on the ground that "the question of damages . . . belonged so peculiarly to the jury, that he could not allow himself to invade their province . . . ." [51]

Further support for the existence of a substantive doctrine of consideration in the eighteenth century is found in American courts' enforcement of the rule that "a sound price warrants a sound commodity." [52] While there is no direct evidence of a substantive doctrine of consideration in eighteenth century England, several unreported trial decisions supported the "sound price" rule,[53] and as late as 1792 Blackstone's successor in the

[48] Pledger v. Wade, 1 Bay 35, 37 (S.C. 1786). *See also* Bourke v. Bulow, 1 Bay 49 (S.C. 1787).

[49] Waugh v. Bagg (Va. 1731), *reported in* 1 VIRGINIA COLONIAL DECISIONS, R77, R78 (R. Barton ed. 1909).

[50] Perit v. Wallis, 2 Dall. 252, 255 (Pa. 1796).

[51] Walker v. Smith, 4 Dall. 389, 391 (C.C.D. Pa. 1804).

[52] *See, e.g.*, Dean v. Mason, 4 Conn. 428, 434 (1822) (Chapman, J.); Baker v. Frobisher, Quincy 4 (Mass. 1762); Garretsie v. Van Ness, 1 Penning. 20, 27–29 (N.J. 1806) (Rossell, J.) (dictum); Toris v. Long, Tayl. 17 (N.C. Super. Ct. 1799); Whitefield v. McLeod, 2 Bay 380 (S.C. 1801); Mackie's Ex'r v. Davis, 2 Va. (2 Wash.) 219, 232 (1796); Waddill v. Chamberlayne (Va. 1735), *reported in* 2 VIRGINIA COLONIAL DECISIONS, *supra* note 49, at B45; 1 Z. SWIFT, *supra* note 17, at 384; *cf.* Rench v. Hile, 4 Har. & McH. 495 (Md. 1766). *See also* Z. SWIFT, DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 341 (1810) ("as in all other cases of the sale of personal property, our law implies a warranty"). W. Wyche's treatise on New York procedure contains an index entry," "Assumpsit for implied warranties." W. WYCHE, TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW-YORK IN CIVIL ACTIONS 339 (1794). The text notes that the action "for deceit in selling unsound horses, or the like" was "especially of late years, usually *declared upon in assumpsit* . . . ." *Id.* at 23.

[53] *See* Parkinson v. Lee, 2 East. 314, 322, 102 Eng. Rep. 389, 392 (K.B. 1802) (Grose, J.); W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 333 (1844); G. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING

Vinerian Chair at Oxford, Richard Wooddeson, proclaimed the sound price doctrine to be good law.[54] Thus, one may conclude that in both England and America, when the selling price was greater than the supposed objective value of the thing bought, juries were permitted to reduce the damages in an action by the seller, and courts would enforce an implied warranty in actions by the buyer.

What we have seen of eighteenth century doctrines suggests that contract law was essentially antagonistic to the interests of commercial classes. The law did not assure a businessman the express value of his bargain, but at most its specific performance. Courts and juries did not honor business agreements on their face, but scrutinized them for the substantive equality of the exchange.

For our purposes, the most important consequence of this hostility was that contract law was insulated from the purposes of commercial transactions. Businessmen settled disputes informally among themselves when they could, referred them to a more formal process of arbitration when they could not, and relied on merchant juries to ameliorate common law rules.[55] And, finally, they endeavored to find legal forms of agreement with which to conduct business transactions free from the equalizing tendencies of courts and juries. Of these forms, the most important was the penal bond.

AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS 28–29 (1825). *But see* 2 W. BLACKSTONE, COMMENTARIES *451 (warranties of good title, but not of soundness, are implied by law). An early English manuscript contract treatise had declared that an action lies on an implied warranty of merchantability, "for the party [seller] ought to make them Merchantable goods & see them well delivered without any special provision in the contract . . . ." "Of Contracts" (c. 1720) (Hargrave Ms. 265, British Museum). I am grateful to Professor John Langbein of the University of Chicago Law School for calling the manuscript to my attention. Professor Langbein believes that the eminent British lawyer, Baron Gilbert, wrote the treatise around 1720.

[54] 2 R. WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 415 (1792). On the basis of a doubtfully reported seventeenth century case, Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603), *noted in* 8 HARV. L. REV. 282 (1894), it was supposed by later courts that English law had never allowed an action on an implied warranty. *See, e.g.*, Seixas v. Woods, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804). Let, like so many other early decisions in English legal history, the court's ruling seems to have been more the product of narrow considerations of pleading than of any direct confrontation with issues of substantive policy. *See* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1166–68 (1931); *Implied Warranty on Sale of Personal Chattels*, 12 AM. JUR. 311, 315–16 (1834). *See also* 8 W. HOLDSWORTH, *supra* note 13, at 68–70; McClain, *Implied Warranties in Sales*, 7 HARV. L. REV. 213 (1893).

[55] Various practices involving extrajudicial settlement of commercial disputes during the eighteenth century will be examined in a forthcoming book by the author.

The great advantage of the penal bond or sealed instrument was that at common law it precluded all inquiry into the adequacy of consideration for an exchange. In the medieval legal system, the use of "penal bonds with conditional defeasance," as they were called, enabled individuals to impose unlimited penalties on parties who had failed to perform agreed upon conditions.[56] The use of penal bonds declined somewhat in England during the seventeenth and eighteenth centuries as first equity, then common law courts undertook to relieve against the penal feature — the recovery of the entire sum stipulated because of even a minor breach of a specified condition.[57] Although American courts appear to have followed the English and also "chancered" these bonds,[58] virtually all large business transactions in America until the beginning of the nineteenth century took the form of two independent bonds, each of which stipulated damages for failure to perform the agreed act.[59]

Despite the practice of "chancering," the use of bonds may still have avoided an equitable inquiry into the fairness of the exchange in most cases. From the beginning of the eighteenth century English judges had begun to distinguish between penalties — which they would relieve against — and liquidated damages — which the parties were free to stipulate without the interference of courts.[60] By the time Lord Mansfield ascended to the bench, the English courts were predisposed to regard most damage provisions in bonds as liquidated and hence enforceable. "[W]here the covenant is 'to pay a particular liquidated sum,' " Mansfield declared, "a Court of Equity can not make a new covenant for a man . . . ." [61] And summing up developments during the preceding century, Lord Eldon declared in 1801 that he could "not but lament" any supposed principle that even an "enormous and excessive" damage provision, to which the parties had agreed, should be voided as a penalty.[62] "[I]t appears to me extremely difficult to apply, with propriety, the word 'excessive' to the terms in which parties choose to contract with each other. . . . It

---

[56] Simpson, *The Penal Bond with Conditional Defeasance*, 82 L.Q. REV. 392, 411–12 (1966).

[57] *Id.* at 415–21.

[58] *See* Wroth & Zobel, *Introduction* to 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 42, at xliii n.38.

[59] *See, e.g.*, Thompson v. Musser, 1 Dall. 458 (Pa. 1789); Cummings v. Lynn, 1 Dall. 444 (Pa. 1789); Wharton v. Morris, 1 Dall. 124 (Pa. 1785).

[60] 6 W. HOLDSWORTH, *supra* note 13, at 663 ("already equity had begun to limit . . . relief to cases in which the sum promised was clearly out of proportion to the loss incurred").

[61] Lowe v. Peers, 4 Burr. 2225, 2228, 98 Eng. Rep. 160, 162 (K.B. 1768).

[62] Astley v. Weldon, 2 B. & P. 346, 351, 126 Eng. Rep. 1318, 1321 (C.P. 1801).

has been held . . . that mere inequality is not a ground of relief . . . ." [63]

It is impossible to determine from court records whether American courts also distinguished penalties from liquidated damages. If juries were simply instructed to ignore stipulated damages in a bond and to return verdicts for actual damages, bonds could not have represented an important device for avoiding the jury's equitable inquiry into the nature of a transaction. However, it appears that even as late as the last decade of the eighteenth century the number of bonds used to effect business transactions still vastly exceeded the number of ordinary contracts containing mutual promises; this suggests that courts did not have unlimited discretion in cases involving bonds.

The late use of bonds, the absence of widespread markets, and the equitable conception of contract law conspired to retard the development of a law of executory contracts. Indeed, the primitive state of eighteenth century American contract law is underscored by the surprising fact that some American courts did not enforce executory contracts where there had been no part performance. For example, in *Muir v. Key*,[64] a Virginia case decided in 1787, a buyer of tobacco brought an action for nondelivery on a bond containing mutual promises. In the same action, the seller sued for the price. The jury returned a verdict for the buyer, which the court reversed on the ground that unless the plaintiff had paid in advance he could not sue on the contract. Thus, as late as 1787 in Virginia, there could be no buyer's action on a contract without prepayment. Nor, according to one of the judges, could the seller sue without delivery of the tobacco.[65]

---

[63] *Id.*

[64] St. George Tucker, Notes of Cases in the General Court, District Court & Court of Appeals in Virginia, 1786–1811, Apr. 18 & Oct. 15, 1787 (ms. in Tucker-Coleman Collection, Swen Library, College of William & Mary).

[65] Some of the language of the judges in the case may allow for other interpretations. Judge Tazewell, for example, seems to allow for enforcement of executory contracts without part performance when he states "that in an action upon mutual promise the parties may maintain reciprocal Actions . . . ." Tucker, *supra* note 64. He also may be recognizing expectation damages when he states that the jury "ought to have assessed Damages according to the differences of price, or any other *Special Damage* which plt. could have proved but here no special Damage appears: the plt. has failed in proving that he paid the whole money. The Damages therefore are excessive & a new Trial must be granted." *Id.*

At the new trial, Tucker reports, John Marshall for the defendant "submitted to the court whether the plt. must not prove paymt. on his part, in order to maintain the present Action." *Id.* The court, with Judge Tazewell dissenting, decided that he must. Thus, it is clear that enforcement of executory contracts in which there was no part performance did not yet exist in Virginia as late as 1787. Whether the requirement of payment was regarded simply as a necessary

The view that part performance was required for contractual obligation seems to have been held elsewhere in eighteenth century America as well. In his study of Massachusetts law, William Nelson states that "[a]s a general rule . . . executory contracts were not enforced . . . in pre-Revolutionary Massachusetts unless the plaintiff pleaded his own performance of his part of the bargain." [66] Thus, in his "Commonplace Book" [67] (1759) John Adams insisted that in "executory Agreements . . . the Performance of the Act is a Condition preecedent [*sic*] to the Payment." [68] For example, if two men agree on a sale of a horse, Adams wrote, "yet there is no reason that [the seller] should have an Action for the Money before the Horse is deliverd." [69] And even as late as 1795, Zephaniah Swift of Connecticut wavered between the view that performance is unnecessary for an action on a contract and the view that without either payment or delivery, "the bargain is considered of no force and does not bind either [party]." [70] It is not difficult to understand why some courts did not enforce executory contracts without part performance. The pressure to enforce such contracts would not be great in a pre-market economy where contracts for future delivery were rare,[71] and where merchants

---

formality or whether buyers' actions were still conceived of as simply for restitution of money paid is not entirely clear.

[66] W. Nelson, The Americanization of the Common Law During the Revolutionary Era, ch. 4 at 26 (ms. of forthcoming book in author's possession).

[67] 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 42, at 4.

[68] *Id.* A modern lawyer would, of course, observe that the condition could be satisfied if the seller had tendered the horse. But in America, the first legal writer explicitly to use the concept of tender for this purpose was Daniel Chipman. *See* D. CHIPMAN, AN ESSAY ON THE LAW OF CONTRACTS FOR THE PAYMENT OF SPECIFICK ARTICLES 31–40 (1822).

[69] 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 42, at 4.

[70] 1 Z. SWIFT, *supra* note 17, at 380–81. In Gilchreest v. Pollock, 2 Yeates 18 (Pa. 1795), defendant's counsel reiterated the eighteenth century view that part performance was "a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money till the thing be performed for which he is to pay." *Id.* at 20. But by enforcing one of the early executory stock contracts the court rejected this view.

[71] Given the colonial economy, the only conceivable subject of futures contracts would have been agricultural commodities. However, "[t]he lack of a wide market for farm products was a fundamental characteristic of northern agriculture in the colonial period." P. BIDWELL & J. FALCONER, HISTORY OF AGRICULTURE IN THE NORTHERN UNITED STATES, 1620–1860, at 133 (1941). Lewis Cecil Gray states that there were "occasional instances of future-selling" in colonial Virginia. 1 L. GRAY, HISTORY OF AGRICULTURE IN THE SOUTHERN UNITED STATES TO 1860, at 426 (1941). He offers only one example, a contract entered into by George Washington with Alexandria merchants for the sale of his wheat at a uniform price over a period of seven years. And he offers no instances of futures contracts in international trade, which provided the major market for commodities during the

framed most executory transactions that did arise in terms of independent covenants through the use of bonds.

Even where executory contracts were enforced without part performance, the infrequency with which they arose slowed the development of precise legal rules for dealing with them.[72] Eighteenth century courts were regularly confronted instead with commercial cases framed in terms of penal bonds. The legal categories required to enforce independent covenants were radically different from a conception of contracts depending on mutual promises. There was no need to inquire into questions of offer and acceptance to determine whether there had been "a meeting of minds." Nor was there any reason to develop rules for regulating "order of performance" or tender where each covenant was treated as independent.[73] Finally, because of its liquidated damage provision, the bond delayed until the nineteenth century any detailed inquiry into precise rules of damages.[74]

The use of bonds seems to have substantially declined in both England and America during the early decades of the nineteenth century. If, in fact, bonds were still an important vehicle for avoiding inquiry into the fairness of an exchange during the eighteenth century, they became increasingly unnecessary as judges took control of the rules for measuring damages. Furthermore,

---

colonial period. Nor is any mention made of futures contracts in any other southern colonies. *See id.* at 409–33. In addition, the widespread use of bills of exchange in commercial transactions made executory contracts unnecessary. A 1791 Virginia case noted "that it was the general custom of the English merchants, who solicited tobacco consignments, to appoint agents in this country for that purpose, with power to make advances to the planters, and to draw bills [of exchange] on their principals . . . ." Hooe v. Oxley, 1 Va. (1 Wash.) 19, 23 (1791).

[72] Blackstone's confused account of assumpsit demonstrates that English lawyers had little occasion to think through the rules governing executory contracts of sale. First, he seemed to deny that executory contracts could be enforced without part performance when he wrote: "If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed." 2 W. BLACKSTONE, COMMENTARIES *447. Order of performance and contractual obligation, it appears, are confounded. "[I]f neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract . . . ." *Id.* Here Blackstone seems to waver between part performance as a necessary requisite for contractual obligation and a conception of executory contracts made enforceable simply through tender but not delivery.

[73] The problem of order of performance, inseparably linked to the idea of executory contracts, had not been worked out until the late eighteenth century. *See* Kingston v. Preston (K.B. 1773) (Mansfield, C.J.), *summarized in* Jones v. Barkley, 2 Doug. 685, 689–92, 99 Eng. Rep. 434, 437–38 (K.B. 1781). Even after Mansfield's resolution, the problem continued to confuse American courts for another generation. *See, e.g.*, Havens v. Bush, 2 Johns. 387 (N.Y. 1807); Seers v. Fowler, 2 Johns. 272 (N.Y. 1807).

[74] *See* p. 940 & note 124 *infra.*

liquidated damage provisions were not well suited to predicting market fluctuations in an increasingly speculative economy.[75] The result was that the executory contract came gradually to supersede the bond for most nineteenth century business transactions.

Before turning to outright reversals of eighteenth century law, however, it is important to note that there was a period of uneasy compromise between the old learning and the new. The transitional nature of the late eighteenth and early nineteenth centuries is revealed most explicitly in the confused relationship between the common counts, which by the end of the eighteenth century had emancipated the law of contract from the tyranny of the older forms of action, and Blackstone's 1768 division of the field of contract law into express and implied contracts.[76]

By highlighting the express agreement, Blackstone's division was an early indication of a tendency away from an equitable and toward a will theory of contract law. It also represented an effort to create a theoretical framework as a substitute for the older forms of action. However, Blackstone himself placed the common counts in the category of implied contracts,[77] which had the significant effect of identifying them with the still dominant equitable conception of contract. Implied contracts, Blackstone wrote, "are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform . . . ."[78] For one of the common counts — indebitatus assumpsit for money had and received — Blackstone cited Lord Mansfield's then recent path-breaking decision in *Moses v. Macferlan*,[79] in which the Chief Justice declared: "In one word, the gist of this kind of action is, that the defendant, upon the circum-

[75] *See* Graham v. Bickham, 2 Yeates 32 (Pa. 1795) (recovery allowed on a bond in excess of penalty where there had been a sharp market fluctuation).

[76] 3 W. BLACKSTONE, COMMENTARIES *154–64. Blackstone's discussion of express contracts was brief and essentially uninformative. Its most important break with the past lies in his assertion that, except for the seal, ordinary promises were "absolutely the same" as sealed instruments. 3 W. BLACKSTONE, COMMENTARIES *157. Thus, we see the beginnings of a generic conception of contracts united by common principles that transcended the particular form of action under which suits on contracts were brought. But we have yet to see any detailed elaboration of the major categories of nineteenth century contract law: offer and acceptance, consideration, and, most important, rules of contract interpretation.

[77] 3 W. BLACKSTONE, COMMENTARIES *161. He divided implied contracts into two main headings. The first group consisted of obligations imposed by courts or statutes, which arose, Blackstone thought, from an original social contract. *Id.* at *158–59. A second class, including all of the common counts, arose, he explained, "from natural reason, and the just construction of law." *Id.* at *161. In the latter class, the law assumed "that every man hath engaged to perform what his duty or justice requires." *Id.*

[78] *Id.* at *158.

[79] 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

stances of the case, is obliged by the ties of natural justice and equity to refund the money." [80]

As a result of this unrestrained identification of contract with "natural justice and equity," the triumph of the common counts threatened to reinforce the equitable conceptions which Blackstone's distinction between express and implied contracts had appeared to displace as the unifying principle of contract. This persistence of an equitable tradition in English contract law also influenced American courts. *Palfrey v. Palfrey* [81] (1772), for example, involved an action in contract by children against their mother for improper occupation of a house they had inherited on their father's death. Rejecting the defendant's argument that the proper form of action was in trespass, the Massachusetts Superior Court held that the contract action would lie. In a long and elaborate opinion, the normally form-bound and technically oriented Judge Edmund Trowbridge maintained that there was an implied contract by the defendant to pay. Judge Trowbridge noted that "it [was] necessary to know what is at this day intended by an implied contract . . . because . . . 'many of the old cases are strange & absurd, the strictness has been relaxed & is melting down in common sense of late times.' " [82] Since the plaintiffs were "clearly entitled to recover upon the merits & must in another action if not in this," the judges "ought to use [their] utmost sagacity to give them judgment . . . ." [83] Judge Trowbridge concluded, using language borrowed from Blackstone and Mansfield: [84]

> [I]t seems to be settled that implied contracts are such as reason & justice dictate; Therefore if one is under obligation from the ties of natural justice to pay another money and neglects to do it, the law gives the sufferer an action upon the case, in nature of a bill in equity to recover it; and that mere justice & equity is a sufficient foundation for this kind of equitable action.

Blackstone's interpretation of the common counts as implied contracts did not ultimately secure the dominance of the equitable conception of contract, however, because of unresolved confusions in the pleading system. It appears that the common

---

[80] *Id.* at 1012, 97 Eng. Rep. at 681.

[81] *Reported in* W. Cushing, Notes of Cases Decided in the Superior and Supreme Judicial Courts of Massachusetts, 1772–1789, at 1–2 & App. 1–7 (unpublished ms. in Harvard Law School Library).

[82] *Id.*, App. at 3.

[83] *Id.*, App. at 5.

[84] *Id.*, App. at 6–7. In Griffin v. Lee (Va. 1792), *reported in* Tucker, *supra* note 64, Judge Tucker protested that the common counts had been "extended far beyond the limits which appear to be reasonable" and "need[ed] no Extending."

count of indebitatus assumpsit was variously used both for suing on an express contract price and for suing on an implied contract. When it was used to sue on an express contract, another common count, quantum meruit, was employed to sue on an implied contract. "[I]n an action for work done," a mid-eighteenth century English commentator noted, "it is the best way to lay a Quantum Meruit with an Indebitatus Assumpsit. For if you fail in the proof of an express price agreed, you will recover the value." [85] As late as the turn of the century, it was also the prevailing practice in America to sue in indebitatus assumpsit for an express contract and for counts in both indebitatus and quantum meruit to be "usually joined in the declaration; so that on failure of proof of an express debt or price, the Plf. may resort ad debitum equitatis," [86] that is, to an equitable action in quantum meruit.

The transitional nature of the late eighteenth century is thus revealed in the failure of eighteenth century lawyers to perceive any latent theoretical contradictions involved in joining counts on express and implied contract.[87] Their failure to do so undoubtedly resulted from the theoretical confusions underlying the common counts themselves. Two very different conceptions of contract were submerged within actions on the common counts. One was based on an express bargain between the parties; the other derived contractual obligation from "natural justice and equity." But in the eighteenth century there was little occasion to see the two doctrinal strands as contradictory. Contract had not yet become a major subject of common law adjudication. The existence of mercantile arbitration, on one hand, and the predominance of bills of exchange, bonds, and sealed instruments in business dealings, on the other, meant that few of the legal problems that a modern lawyer would identify as contractual entered the common law courts.[88]

[85] T. WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 555–56 (9th ed. 1763), *quoted in* C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 363 (1949).

[86] AMERICAN PRECEDENTS OF DECLARATIONS 95 (B. Perham ed. 1802). In Cone v. Wetmore (Mass. 1794). (F. Dana papers, Box 16, "Court Cases A–L," Mass. Historical Society), for example, the plaintiff sued in indebitatus assumpsit for cattle sold and delivered. The Supreme Judicial Court declared that "the Deft may have every advantage of the special [express] agreement in this action which he could have had if it had been special declared on. He might show the appraised value was less than plt. demanded . . . ." *Id.* The case thus supports the proposition that a suit on the common counts could be maintained even though an express agreement existed. *Cf.* pp. 935–36 *infra.*

[87] In the nineteenth century the practice of joining counts on express and implied contracts began to be perceived as contradictory, and the rule was ultimately laid down that the existence of an express agreement precludes recovery in quantum meruit. *See* p. 952 *infra.*

[88] *See* pp. 927–31 *supra.*

In eighteenth century America, the equitable tradition in the common counts was tied not only to a general theory of natural justice but also to an economic system often based on customary prices. The striking existence of this remnant of the medieval just price theory of value can be seen in two Massachusetts colonial cases. In *Tyler v. Richards* [89] (1765), the plaintiff brought indebitatus assumpsit for boarding and schooling the defendant's son. The defendant argued that indebitatus "will not lye; they ought to have brought a *Quantum Meruit*." [90] For the plaintiffs, John Adams and Samuel Quincy argued that "[i]t ha[d] always been the Custom of this Court, to allow" the action "if the Services alledged were proved to have been done. As every Man is supposed to assume to pay the customary Price. Assumpsit is always brought for Work done by Tradesmen, and is always allowed. The Price for Boarding and Schooling is as much settled in the Country, as it is in the Town for a Yard of Cloth, or a Day's Work by a Carpenter." [91] Adams and Quincy were thus attempting to convince the court that if the value of goods or services was "settled" and bore a "customary Price," there was no difference between this action and indebitatus for a "sum certain." The defendant, however, argued that "[i]f this Proof is admitted, there will be an End of any Distinction between *Indebitatus Assumpsit* and a *Quantum meruit*." [92] The court accepted the defendant's argument and dismissed the action.

In *Pynchon v. Brewster* [93] (1766), the plaintiff brought indebitatus "upon a long Doctor's Bill for Medicines, Travel into the Country and Attendance." [94] This time, Adams, for the defendant, argued on the authority of *Tyler v. Richards* that indebitatus would not lie. The Chief Justice, however, distinguished *Tyler* on the ground that "Travel for Physicians, their Drugs and Attendance, had as fixed a Price as Goods sold by a Shopkeeper, and that it would be a great Hardship upon Physicians to oblige them to lay a *Quantum Meruit*." [95]

What emerges from these cases is that in America suits in indebitatus were sometimes based on a system of fixed and customary prices. Though the *Richards* court denied the analogy between the price of schooling and the "settled" price for a yard of cloth, it never challenged Adams' premise that the prices of most goods and services were conceived of as "settled." Similarly,

[89] Quincy 195 (Mass. 1765).
[90] *Id.*
[91] *Id.* at 195–96.
[92] *Id.* at 196.
[93] Quincy 224 (Mass. 1766).
[94] *Id.*
[95] *Id.*

while acknowledging the "uncertain" price of schooling, Chief Justice Hutchinson had no doubt that the price of a doctor's medicine and services "had as fixed a Price as Goods sold by a Shopkeeper." [96]

Of course, there could not have been a customary rate for every exchange that might be entered into and sued upon; the jury's power to set a reasonable price in quantum meruit was necessary to fill in the gaps. Indeed, it appears that the jury had discretion to mitigate or enlarge the damages even in indebitatus actions.[97] But the concept of customary prices formed the necessary foundation for a legal system which awarded contract damages according to measures of fairness independent of the terms agreed to by the contracting parties. By the end of the eighteenth century, however, the development of extensive markets undermined this system of customary prices and radically transformed the role of contract in an increasingly commercial society.

II. The Rise of a Market Economy and the Development of the Will Theory of Contract

A. Early Attacks on Eighteenth Century Contract Doctrine

For a variety of reasons, it is appropriate to correlate the emergence of the modern law of contract with the first recognition of expectation damages. Executory sales contracts assume a central place in the economic system only when they begin to be used as instruments for "futures" agreements; to accommodate the market function of such agreements the law must grant the contracting parties their expected return. Thus, the recognition of expectation damages marks the rise of the executory contract as an important part of English and American law. Furthermore, the moment at which courts focus on expectation damages, rather

---

[96] In *Pynchon*, Hutchinson also remarked that it was not the practice in England to allow an indebitatus for a customary price. Quincy at 224.

[97] *See* Pynchon v. Brewster, Quincy 224, 225 (Mass. 1766) (Hutchinson, C.J.); 1 Legal Papers of John Adams, *supra* note 42, at 16. This concession to jury discretion may not, however, mean that courts had eroded every practical difference between quantum meruit and indebitatus assumpsit. It was one thing to acknowledge a complete jury power to set "reasonable" prices in quantum meruit; it was another to place a special burden on the jury to modify a fixed price that the court had established as the standard measuring rod for actions in indebitatus assumpsit. In any case, all of this home-grown lawmaking was swept aside in Glover v. LeTestue, Quincy 225 n.1 (Mass. 1770), where the Massachusetts court, after hearing extensive citations of English authority, held that only quantum meruit and not indebitatus assumpsit would lie for "Visits, Bleeding [or] Medicines" by a doctor. *Id.* at 226. *Cf.* note 96 *supra.*

than restitution or specific performance to give a remedy for non-delivery, is precisely the time at which contract law begins to separate itself from property. It is at this point that contract begins to be understood not as transferring the title of particular property, but as creating an expected return. Contract then becomes an instrument for protecting against changes in supply and price in a market economy.

The first recognition of expectation damages appeared after 1790 in both England and America in cases involving speculation in stock. Jurists initially attempted to encompass these cases within traditional legal categories. Thus, Lord Mansfield in 1770 referred to a speculative interest in stock as "a new species of property, arisen within the compass of a few years." [98] In 1789 the Connecticut Supreme Court of Errors held that recovery of expectation damages on a contract of stock speculation would be usurious.[99] And as late as 1790, John Powell concluded that specific performance, and not an action for damages, was the proper remedy for failure to deliver stock on a rising market.[100]

These efforts to encompass contracts of stock speculation within the old title theory were soon to be abandoned, however. Between 1799 and 1810 a number of English cases applied the rule of expectation damages for failure to deliver stock on a rising market.[101] In America the transformation occurred a decade earlier, in response to an active "futures" market for speculation in state securities which rapidly developed after the Revolutionary War in anticipation of the assumption of state debts by the new national government. The earliest cases allowing expectation damages on contracts of stock speculation appeared in South Carolina, Virginia, and Pennsylvania.

In South Carolina, three cases between 1790 and 1794 established the rule of expectation damages in stock cases. The first case, *Davis v. Richardson* [102] (1790), involved a "short sale" of South Carolina indents, or government stock. The defendant had borrowed the stock, promising its return with interest at a future

[98] Nightingal v. Devisme, 5 Burr. 2589, 2592, 98 Eng. Rep. 361, 363 (K.B. 1770).

[99] Fitch v. Hamlin (Conn. Sup. Ct. Err. 1789), *reported in* 1 Z. SWIFT, *supra* note 17, at 410–12.

[100] 2 J. POWELL, *supra* note 2, at 232–33.

[101] The leading case is Shepherd v. Johnson, 2 East. 211, 102 Eng. Rep. 349 (K.B. 1802). *See also* M'Arthur v. Seaforth, 2 Taunt. 257, 127 Eng. Rep. 1076 (C.P. 1810); Payne v. Burke (C.P. 1799), *discussed at* 2 East. 212 n.(a), 102 Eng. Rep. 350 n.(a). While these cases deal explicitly with the question of whether damages should be measured as of the promised date of delivery or as of the date of trial, they are nevertheless also the first cases that recognize any measure of expectation damages.

[102] 1 Bay 105 (S.C. 1790).

time. "[I]n consequence of the prospect of the adoption of the funding system by Congress," the value of the stock increased and the defendant could only "cover" at a substantially higher price.[103] The South Carolina Supreme Court made no effort to conceal the significance of the damage question before it. "[I]t is of extensive importance to the community, that the principle should *now be settled and ascertained with precision*," [104] the court declared. "A great number of contracts in every part of the state, depend upon the determination of this question: and it is fortunate, that so respectable a jury are convened for the purpose of fixing a standard for future decisions." [105] And with the aid of advice from a "respectable" merchant jury, the court announced its holding: "Whenever a contract is entered into for the delivery of a specific article, the value of that article, at the time fixed for delivery, is the sum a plaintiff ought to recover." [106]

It is entirely possible, of course, that the defendant in *Davis v. Richardson* was not the stock speculator that I have supposed him to be. In specie-scarce postrevolutionary South Carolina, where bonds and securities were regularly used for money, he may simply have been treating the indents as currency. As a result, he may have been one of the earliest casualties of the almost instant creation of a speculative market for state securities after the establishment of the national government. Prevailing economic and legal conceptions about the true nature of stock transactions were in a state of flux. Twice in the next four years, lawsuits [107] involving expectation damages on stock were carried to the Supreme Court of South Carolina in an attempt to reverse the ruling in *Davis v. Richardson.* The major argument put forth by Charles Pinckney, the leader of the South Carolina bar, was that the allowance of expectation damages was nothing more than the allowance of usury.[108] In *Atkinson v. Scott* [109] (1793), where the disputed securities had appreciated by 850% in one year, the Supreme Court admitted that such contracts "must strike every mind at the first blush" as "evidently usurious." [110] If, Pinckney argued, South Carolina stock was to be treated as money, the borrower could only be expected to pay the value at the time of the contract plus interest. But in a world in which a "respect-

[103] *Id.*

[104] *Id.* at 106.

[105] *Id.*

[106] *Id.*

[107] Wiggs v. Garden, 1 Bay 357 (S.C. 1794); Atkinson v. Scott, 1 Bay 307 (S.C. 1793).

[108] Atkinson v. Scott, 1 Bay 307 (S.C. 1793) (argument of counsel).

[109] 1 Bay 307 (S.C. 1793).

[110] *Id.* at 309. *Cf.* p. 937 & note 99 *supra.*

able" jury of merchants had recognized that stocks were traded on speculation, it made no sense for courts to deny the speculative purpose of the transaction. The result was that Pinckney's argument was rejected, and by 1794, the South Carolina legal system applied the rule of expectation damages to what appear to be the first organized markets that had developed in that state.[111]

In Virginia, the transformation of legal conceptions took an identical path. In *Groves v. Graves* [112] (1790), the rule of expectation damages arose in connection with a buyer's action for securities. After a jury had awarded the plaintiff expectation damages, however, Chancellor Wythe, still reflecting eighteenth century moral and legal conceptions, enjoined the enforcement of the judgment on the grounds that the transaction "appeared to have been designed to secure unconscionable profit . . . and to have been obtained from one whom he had cause to believe at that time to be needy . . . ." [113] He allowed damages only to the extent of the original value plus interest.[114] But the Virginia Court of Appeals reversed his decree, holding that "the contract was neither usurious, or so unconscionable as to be set aside . . . ." [115] And, in marked contrast to the earlier practice of not reviewing jury damage awards,[116] the court held that the jury erred in measuring damages as of the time of trial and not as of the time of delivery.[117] The case thus suggests that judicial supervision of juries' damage awards may have arisen simultaneously with the recognition of expectation damages.

The first published opinion in Pennsylvania allowing expectation damages for failure to deliver stock certificates on a rising market was decided in 1791.[118] The rule was elaborated in a 1795 case, *Gilchreest v. Pollock*,[119] where a seller of stock sued the buyer's surety for failure to accept the transfer of United States securities that had fallen in price after the contract was made.

---

[111] *See* cases cited note 107 *supra*.

[112] 1 Va. (1 Wash.) 1 (1790).

[113] *Id.* at 3 (recitation of chancellor's opinion).

[114] *Id.*

[115] *Id.*

[116] *See* pp. 925–26 *supra*.

[117] 1 Va. (1 Wash.) at 4. This issue remained unsettled ten years later. In Kirtley v. Banks (Va. 1800), *reported in* Tucker, *supra* note 64 (Dec. 9, 1800), a suit for failure to deliver securities, the court instructed the jury that it "may take the price at either period, but not any higher price at any intermediate period." *Id.* The jury selected the time of delivery as its standard.

[118] Marshall v. Campbell, 1 Yeates 36 (Pa. 1791).

[119] 2 Yeates 18 (Pa. 1795). Two other cases also granted expectation damages to enforce contracts for the sale of United States securities. *See* Livingston v. Swanwick, 2 Dall. 300 (C.C.D. Pa. 1793); Graham v. Bickham, 4 Dall. 149 (Pa. 1796).

While the merchant jury in South Carolina had had no difficulty in reaching their result, the Pennsylvania court felt compelled to charge its lay jurors that "[t]he sale of stock is neither unlawful nor immoral. It is confessed, that an inordinate spirit of speculation approaches to gaming and tends to corrupt the morals of the people. When the public mind is thus affected, it becomes the legislature to interpose." [120]

The early Pennsylvania case is somewhat anomalous in that it rested on an unpublished opinion, rendered in 1786, which recognized a market price for wheat and announced that "[t]he rule or measure of damages in such cases is to give the difference between the price contracted for and the price at the time of delivery." [121] With this one exception, however, the evidence appears to indicate that the rule for expectation damages first arose in connection with stock speculation both in England and in America.[122] In England the principle of expectation damages was not generalized in cases dealing with sales of commodities until 1825,[123] and Chitty's treatise on contracts, published in 1826, is the first to announce a general rule of expectation damages for failure to deliver goods.[124]

---

[120] 2 Yeates at 21.

[121] Lewis v. Carradan (Pa. 1786), *cited in* 1 Yeates at 37.

[122] The first reported case in Massachusetts involving the measure of damages for nondelivery is also a securities case. Gray v. Portland Bank, 3 Mass. 364, 382, 390–91 (1807).

[123] Greening v. Wilkinson, 1 Car. & P. 625, 171 Eng. Rep. 1344 (K.B. 1825); Gainsford v. Carroll, 2 B. & C. 624, 107 Eng. Rep. 516 (K.B. 1824); Leigh v. Paterson, 8 Taunt. 540, 129 Eng. Rep. 493 (C.P. 1818).

[124] J. CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS, NOT UNDER SEAL 132 (1826). Powell's *Essay Upon the Law of Contracts* (1790) does not appear to deal with sales. His only recognition of the effect of changes in the market on contracts of sale is his statement that if, after a contract for delivery of corn, the price *falls* to 5 pounds, the buyer "will be entitled either to . . . [the] corn, or five pounds." 1 J. POWELL, *supra* note 2, at 409. He also states the rule that "if one of the parties fail in his part of the agreement, he shall pay the other party such damages as he has sustained by such neglect or refusal." *Id.* at 137. Powell cited the famous case of Dutch v. Warren, 1 Strange 406, 93 Eng. Rep. 598 (K.B. 1720), which, as we have seen, was simply an action for restitution. *See* pp. 921–22 *supra*.

In Samuel Comyn's *Treatise on Contracts*, an entire chapter is devoted to contracts for the sale of goods. While Comyn does recognize executory contracts, most of the discussion is devoted either to formation of binding contracts or to sellers' remedies for breach. In his very brief reference to buyers' actions for nondelivery, Comyn concluded only that if the buyer tenders payment, he "may take and recover the things." 2 S. COMYN, TREATISE ON CONTRACTS 212 (1807). For this conclusion he cites only an obscure early seventeenth century treatise. Indeed, this discussion is more in line with Blackstone's title theory analysis of contract as one mode of transfer of property than with a nineteenth century market approach.

Finally, with Joseph Chitty's *Treatise on Contracts*, the rule of expectation

In America the application of expectation damages to commodities contracts correlates with the development of extensive internal commodities markets around 1815. The leading case is *Shepherd v. Hampton*[125] (1818), in which the Supreme Court held that the measure of damages for failure to deliver cotton was the difference between the contract price and the market price at the time of delivery. Within the next decade a number of courts worked out the problems of computing expectation damages for commodities contracts,[126] one of them noting that "[m]ost of the [prior] cases in which this principle has been adopted, have grown out of contracts for the delivery and replacing of stock . . . ."[127]

The absorption of commodities transactions into contract law is a major step in the development of a modern law of contracts. As a result of the growth of extensive markets, "futures" contracts became a normal device either to insure against fluctuations in supply and price or simply to speculate. And as a consequence, judges and jurists began to reject eighteenth century legal rules which reflected an underlying conception of contract as fair exchange.

It has already been noted that in the eighteenth century, commercial classes endeavored to cast their transactions in legal forms which avoided the equalizing tendencies of early contract doctrine. Not surprisingly, the first direct assault upon the equitable conception of contract appeared in adjudications involving one of these forms, the negotiable instrument.

During the second half of the eighteenth century, a movement developed to eliminate the substantive significance of the doctrine of consideration in cases involving negotiable instruments. In

damages is announced: "In an action of assumpsit, for not delivering goods upon a given day, the measure of damages is the difference between the contract price, and that which goods of a similar quality and description, bore on or about the day, when the goods ought to have been delivered." J. CHITTY, *supra*, at 131–32. Interestingly, he cites only two cases decided in the previous five years.

The chapters on damages in the treatises of Powell, Comyn, and Chitty do not mention the problem of expectation damages. Rather, they address themselves exclusively to the problem of how to distinguish penal clauses from clauses providing for liquidated damages. This emphasis reveals the extent to which commercial transactions were still far more dependent on the use of bonds than on contracts. *See* pp. 927–29 *supra*.

[125] 16 U.S. (3 Wheat.) 200 (1818). McAllister v. Douglass & Mandeville, 15 F. Cas. 1203 (No. 8657) (C.C.D.D.C. 1805), *aff'd*, 7 U.S. (3 Cranch) 298 (1806), superficially resembles *Shepherd*, but there was no agreed upon contract price.

[126] *See, e.g.*, West v. Wentworth, 3 Cow. 82 (N.Y. Sup. Ct. 1824) (salt); Merryman v. Criddle, 18 Va. (4 Muni.) 542 (1815) (corn).

[127] Clark v. Pinney, 7 Cow. 681, 687 (N.Y. Sup. Ct. 1827). One earlier case involving a commodity was Sands v. Taylor, 5 Johns. 395 (N.Y. Sup. Ct. 1810), *discussed* pp. 922–23 *supra*.

1767, the Massachusetts Superior Court held by a 3–2 vote that even in an action between the original parties to a promissory note, the promisor could not offer evidence of inadequate consideration in mitigation of damages.[128] "People," Chief Justice Hutchinson declared, "think themselves quite safe in taking a Note for the Sum due, and reasonably suppose all Necessity of keeping the Evidence of the Consideration at an End; it would be big with Mischief to oblige People to stand always prepared to contest Evidence that might be offered to the Sufficiency of the Consideration. This would be doubly strong in Favour of an Indorsee." [129]

It was one thing to argue that in order to make notes negotiable a subsequent indorsee would be allowed to recover on a note regardless of the consideration between the original parties. This argument, of course, itself entailed a sacrifice of judicial control over bargains that commercial convenience was beginning to demand. It was, however, quite a different matter to exclude evidence of consideration between the original parties to the note, as the Massachusetts court decided. With this decision, it became possible for merchants to exclude the question of the equality of a bargain by transacting their business through promissory notes.

The Massachusetts decision was handed down two years after Lord Mansfield's dramatic but unsuccessful attempt to destroy the doctrine of consideration in the case of *Pillans v. Van Mierop*,[130] a case between merchants involving a promise to accept a bill of exchange. "I take it," Mansfield declared in dictum, "that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration." [131] While it is impossible to know from this pronouncement whether Mansfield's *ratio decidendi* was that consideration was unnecessary for all written instruments or merely for those between merchants, two conclusions are clear. First, by explaining the requirement of consideration exclusively in terms of its evidentiary value in proving the existence of a contract, Mansfield had cut the heart out of the traditional equalizing function of consideration. Second, whether or not upon reflection Mansfield would have extended these views to cover all written

[128] Noble v. Smith, Quincy 254 (Mass. 1767).

[129] *Id.* at 255.

[130] 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765). There is no citation of this case in *Noble v. Smith*. The third volume of Burrow's reports was first published in 1771, four years after *Noble v. Smith* was decided.

[131] *Id.* at 1669, 97 Eng. Rep. at 1038.

instruments — where the writing was itself sufficient evidence of a contract — he at least meant to apply the rule to negotiable instruments. Indeed, as Mansfield's decision was being announced, the second volume of Blackstone's *Commentaries* was at the press, also propounding the rule that evidence of lack of consideration would not be admitted in an action on a negotiable instrument.[132] For thirteen years, English law stood thus on the verge of rejecting the ancient requirement of consideration. But in *Rann v. Hughes* [133] (1778), the House of Lords reaffirmed the requirement of consideration for written instruments.

The views of Mansfield and Blackstone were to have a greater effect than the decision by the House of Lords, however. The report of that decision was unpublished until 1800, and was unknown by American judges before the early years of the nineteenth century.[134] Thus, even after Mansfield's opinion was overruled we find Zephaniah Swift, the first American treatise writer, stating that the principle that had emerged from negotiable instruments law — he cited Blackstone — "clearly destroys all distinction between sealed and unsealed contracts." [135] The result, he concluded, was that a written contract "precludes an enquiry into the consideration." [136] A more important factor than the accident of reporting, however, was the congeniality of Mansfield's and Blackstone's views to American judges, whose own opinions were gradually inclining towards a conception of contract as a sacred bargain between private parties.

The most persistent American advocate of the Mansfield position was the able judge of the New York Supreme Court, Brockholst Livingston, whose commercial law practice before he ascended to the bench was probably second only to that of Alexander Hamilton. In 1804, Livingston reiterated the position that as between even the original parties to a negotiable instrument, the failure of consideration could not be shown. "It is not necessary, as in other simple contracts, to state a consideration in the declaration; the instrument itself imports one, and in this respect

---

[132] 2 W. BLACKSTONE, COMMENTARIES *446.

[133] 7 T.R. 350 n.1, 101 Eng. Rep. 1014 n.1 (1778).

[134] In the typically chaotic fashion of law reporting of the time, the decision was casually included as a footnote to the report of another case, Mitchinson v. Hewson, 7 T.R. 350, 101 Eng. Rep. 1014 (1797). The earliest recognition of the House of Lords decision in America that I am aware of is St. George Tucker's citation in his 1803 edition of Blackstone. 3 BLACKSTONE'S COMMENTARIES *446 n.1 (St. G. Tucker ed. 1803). In 1804, William Cranch acknowledged that he just learned of the decision as he was about to publish his elaborate essay on negotiable instruments. 5 U.S. (1 Cranch) 445 n.1.

[135] 1 Z. SWIFT, *supra* note 17, at 373.

[136] *Id. See also* Z. SWIFT, DIGEST, *supra* note 52, at 339.

partakes of the quality of a speciality [sealed instrument]." [137] Livingston extended the argument to cover simple contracts in a case decided one year later. In *Lansing v. McKillip*,[138] he dissented from the court's opinion requiring that consideration be proved by the plaintiff before he could recover on a contract. At first, he urged only that the traditional burden of proof be altered so that a defendant who wished to negate a contract be required to show lack of consideration.[139] In the process, however, he was moved to attack the very requirement of consideration itself. Ridiculing a rule of consideration that "does not demand an absolute equivalent, but is satisfied, in many cases, with the most trifling ground that can be imagined," he urged the court to "be content in point of evidence, with a declaration . . . that he has received a *valuable one*, without indulging the useless curiosity of prying further into the transaction." [140] Livingston was fully aware that his opinion directly attacked the traditional equalizing function of consideration. "Why," he asked, is a court "so very careful of a defendant's rights as not to suppose him capable of judging for himself, what was an adequate value for his promise? Would it not be more just, and better promote the ends of justice, that one, who had signed an instrument of this kind, should, without further proof, be compelled to perform it, unless he could impeach the validity on other grounds?" [141]

Like Mansfield's earlier effort, this attack on consideration initially failed, but in its most important respect it ultimately succeeded. It was part of a movement, which had begun in England during Mansfield's tenure and continued throughout the nineteenth century, toward overthrowing the traditional role of courts in regulating the equity of agreements. The underlying logic of the attack on a substantive doctrine of consideration came to fruition in America with the great New York case of *Seymour v. Delancy* [142] (1824), in which a sharply divided High Court of Errors reversed a decision of Chancellor Kent, who had refused to specifically enforce a land contract on the ground of gross inadequacy of consideration between the parties. "Every member of this Court," the majority opinion noted, "must be well aware how much property is held by contract; that purchases are constantly made upon speculation; that the value of real estate

---

[137] Livingston v. Hastie, 2 Cai. R. 246, 247 (N.Y. Sup. Ct. 1804).

[138] 3 Cai. R. 286 (N.Y. Sup. Ct. 1805).

[139] *Id.* at 289–91 (Livingston, J., dissenting). This position was also adopted by another judge, William Cranch. *See* 1 Cranch 445.

[140] 3 Cai. R. at 290.

[141] *Id.*

[142] 3 Cow. 445 (N.Y. 1824), *rev'g* 6 Johns. Ch. 222 (N.Y. Ch. 1822).

is fluctuating . . . ." [143] The result was that there "exists an honest difference of opinion in regard to any bargain, as to its being a beneficial one, or not." [144] The court held that only where the inadequacy of price was itself evidence of fraud would it interfere with the execution of private contracts.[145]

The nineteenth century departure from the equitable conception of contract is particularly obvious in the rapid adoption of the doctrine of caveat emptor. It has already been noted that, despite the supposed ancient lineage of caveat emptor, eighteenth century English and American courts embraced the doctrine that "a sound price warrants a sound commodity." [146] It was only after Lord Mansfield declared in 1778, in one of those casual asides that seem to have been so influential in forging the history of the common law, that the only basis for an action for breach of warranty was an express contract,[147] that the foundation was laid for reconsidering whether an action for breach of an implied warranty would lie. In 1802 the English courts finally considered the policies behind such an action, deciding that no suit on an implied warranty would be allowed.[148] Two years later, in the leading American case of *Seixas v. Woods*,[149] the New York Supreme Court, relying on a doubtfully reported seventeenth century English case,[150] also held that there could be no recovery against a merchant who could not be proved knowingly to have sold defective goods. Other American jurisdictions quickly fell into line.[151]

While the rule of caveat emptor established in *Seixas v. Woods* seems to be the result of one of those frequent accidents of historical misunderstanding, this is hardly sufficient to account for the widespread acceptance of the doctrine of caveat emptor elsewhere

[143] *Id.* at 533.

[144] *Id.*

[145] *Id.* The year before *Seymour v. Delancey* was decided, Nathan Dane had already anticipated its main thrust. *See* p. 950 *infra.*

[146] *See* pp. 926–27 *supra.*

[147] Stuart v. Wilkins, 1 Doug. 18, 20, 99 Eng. Rep. 15, 16 (K.B. 1778). Though Mansfield was laying the foundation for the subsequent rejection of the sound price doctrine, his purpose was not clearly understood. Nathan Dane, for one, misread the case as upholding the doctrine and, therefore, attempted in 1823 to show that it was "contrary to most of the settled cases in the books . . . ." 2 N. DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 542 (1823).

[148] Parkinson v. Lee, 2 East. 314, 102 Eng. Rep. 389 (K.B. 1802).

[149] 2 Cai. R. 48 (N.Y. Sup. Ct. 1804).

[150] The case relied upon was Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603); *see* note 54 *supra.*

[151] *See, e.g.*, The Monte Allegre, 22 U.S. (9 Wheat.) 616 (1824); Dean v. Mason, 4 Conn. 428 (1822); Bradford v. Manly, 13 Mass. 139 (1816); Curcier v. Pennock, 14 S. & R. 51 (Pa. 1826); Wilson v. Shackleford, 25 Va. (4 Rand.) 5 (1826).

in America. Nor are the demands of a market economy a sufficient cause. Although the sound price doctrine was attacked on the ground that there "is no standard to determine whether the vendee has paid a *sound* price," [152] the most consistent legal theorist of the market economy, Gulian Verplanck, devoted his impressive analytical talents to an elaborate critique of the doctrine of caveat emptor.[153] The sudden and complete substitution of caveat emptor in place of the sound price doctrine must therefore be understood as a dramatic overthrow of an important element of the eighteenth century's equitable conception of contract.[154]

B. The Synthesis of the Will Theory of Contract

The development of extensive markets at the turn of the century contributed to a substantial erosion of belief in theories of objective value and just price. Markets for future delivery of goods

---

[152] Dean v. Mason, 4 Conn. 428, 434–35 (1822) (Chapman, J.).

[153] *See* p. 948 *infra*. I have not meant to assert that caveat emptor is more conducive to a market economy than the contrary doctrine of caveat venditor, though this might be independently demonstrated. Rather, I have argued that the importance of caveat emptor lies in its overthrow of both the sound price doctrine and the latter's underlying conception of objective value.

[154] We can best see the nature of the attack on the "sound price" doctrine in South Carolina, the only state in which it persisted well into the nineteenth century. Urging reversal of the sound price doctrine and adoption in its place of a rule of caveat emptor, the Attorney General of South Carolina argued in 1802 that "[s]uch a doctrine . . . if once admitted in the formation of contracts, would leave no room for the exercise of judgment or discretion, but would destroy all free agency; every transaction between man and man must be weighed in the balance like the precious metals, and if found wanting in . . . adequacy, must be made good to the uttermost farthing . . . ." Whitefield v. McLeod, 2 Bay 380, 382 (S.C. 1802) (argument of counsel). If a court should refuse to enforce a contract made by a man who has had "an equal knowledge of all the circumstances" as well as "an opportunity of informing himself, and the means of procuring information . . . ," he maintained, "good faith and mutual confidence would be at an end. . . . To suffer such a man to get rid of such a contract, under all these circumstances," he concluded, "would establish a principle which would undermine and blow up every contract . . . ." *Id.* at 383. According to South Carolina lawyer Hugh Legaré, the rule of caveat emptor was desirable because it rejected the "refined equity" of the civil law in favor of "the policy of society." Though there was "something captivating in the equity of the principle, that a sound price implies a warranty of the soundness of the commodity," he was "certain that this rule is productive of great practical inconveniences . . . ." 2 WRITINGS OF HUGH SWINTON LEGARÉ 110 (M. Legaré ed. 1845). In South Carolina, he noted, "where we have had ample opportunity to witness its operation, there are very few experienced lawyers but would gladly expunge from our books the case which first introduced it here." *Id.* *See also* Barnard v. Yates, 1 N. & McC. 142, 146 (S.C. 1818) (noting "the perversion and abuse of [the] rule" which many "thought to have opened a door for endless litigation" in those cases where "the contracting parties had not placed themselves upon a perfect footing of equality in point of value").

were difficult to explain within a theory of exchange based on giving and receiving equivalents in value. Futures contracts for fungible commodities could only be understood in terms of a fluctuating conception of expected value radically different from the static notion that lay behind contracts for specific goods; a regime of markets and speculation was simply incompatible with a socially imposed standard of value. The rise of a modern law of contract, then, was an outgrowth of an essentially procommercial attack on the theory of objective value which lay at the foundation of the eighteenth century's equitable idea of contract.

We have seen, however, that there was a period during which vestiges of the eighteenth century conception of contract coexisted with the emerging will theory.[155] It was not until after 1820 that attacks on the equitable conception began to be generalized to include all aspects of contract law. If value is subjective, nineteenth century contracts theorists reasoned, the function of exchange is to maximize the conflicting and otherwise incommensurable desires of individuals. The role of contract law was not to assure the equity of agreements but simply to enforce only those willed transactions that parties to a contract believed to be to their mutual advantage. The result was a major tendency toward submerging the dominant equitable theory of contract in a conception of contractual obligation based exclusively on express bargains. In his *Essay on the Law of Contracts* (1822), for example, Daniel Chipman criticized the Vermont system of assigning customary values to goods that were used to pay contract debts. Only the market could establish a fair basis for exchange, Chipman urged. "[L]et money be the sole standard in making all contracts," for "[i]f, therefore, it were possible for courts in the administration of justice, to take this ideal high price as a standard of valuation, every consideration of policy, and a regard for the good of the people would forbid it." [156]

We will see that Nathan Dane's *Abridgment* (1823) and Joseph Story's *Equity Jurisprudence* (1836) also contributed to the demise of the old equitable conceptions. But nowhere were the underlying bases of contract law more brilliantly and systematically rethought than in Gulian C. Verplanck's *An Essay on the Doctrine of Contracts* (1825).

Verplanck was the first English or American writer to see in the "different parts of the system" of contract law "clashing and wholly incongruous" doctrines.[157] He emphasized "the singular incongruity" of a legal system that "obstinately refuses redress

[155] *See* note 18 & pp. 923, 924, 932–34 *supra.*

[156] D. CHIPMAN, *supra* note 68, at 109–11.

[157] G. VERPLANCK, *supra* note 53, at 57.

in so many, and such marked instances of unfairly obtained advantages" and yet "occasionally permit[s] contracts to be set aside upon the ground of inadequacy of price . . . ." [158] There were, he asserted, many "difficulties and contradictions" to be found in existing legal doctrine over "the question of the nature and degree of equality required in contracts of mutual interest," [159] as well as over the standards of "inadequacy of price" and "inequality of knowledge." "Where," he asked, "shall we draw the line of fair and unfair, of equal and unequal contracts?" [160]

Verplanck's *Essay* was written as an attack on the doctrine of caveat emptor, which had then only recently been adopted by the United States Supreme Court in *Laidlaw v. Organ* [161] (1817), one of the first cases to come before the Court involving a contract for future delivery of a commodity. The case, Verplanck wrote, raised "the important and difficult question of the nature and degree of equality in compensation, in skill or in knowledge, required between the parties to any contract . . . in order to make it valid in law, or just and right in private conscience." [162] He attacked caveat emptor on the ground that it should be fraudulent to withhold "any fact . . . necessarily and materially affecting the common estimate which fixes the present market value of the thing sold . . . ." [163]

In refusing to separate law and morals,[164] Verplanck was boldly independent of other theorists of the market economy.[165] But at its deepest level, Verplanck's *Essay* marks the triumph of a subjective theory of value in a market economy. Wishing to base legal doctrine on "the plainer truths of political economy," [166] he insisted that although just price doctrines bore "the impression of a high and pure morality," [167] they were "mixed with error"

[158] *Id.* at 199.

[159] *Id.* at 14 (emphasis deleted).

[160] *Id.* at 10.

[161] 15 U.S. (2 Wheat.) 178 (1817). The case grew out of a futures contract for sale of tobacco purchased by a merchant who had advance knowledge that the United States and England had signed a peace treaty ending the War of 1812. "The question in this case," Chief Justice Marshall wrote, "is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor?" *Id.* at 195. The Chief Justice held that there was no duty to communicate the information, since "[i]t would be difficult to circumscribe the contrary doctrine within proper limits . . . ." *Id.*

[162] G. VERPLANCK, *supra* note 53, at 5.

[163] *Id.* at 125–26.

[164] Verplanck referred to the issue of fraud as "the [only] purely ethical part of the question . . . ." *Id.* at 117.

[165] *See, e.g.*, pp. 949–50 *infra* (N. Dane).

[166] G. VERPLANCK, *supra* note 53, at 106.

[167] *Id.* at 96.

and arose "from the introduction of a false metaphysic in relation to equality . . . ." [168] Thus, he disputed the view of "[l]awyers and divines . . . that all bargains are made under the idea of giving and receiving equivalents in value." [169] There could be no "such thing in the literal sense of the words, as adequacy of price [or] equality or inequality of compensation," since "from the very nature of the thing, price depends solely upon the agreement of the parties, being created by it alone. Mere inequality of price, or rather what appears so in the judgment of a third person, cannot, without reference to something else, be any objection to the validity of a sale, or of an agreement to sell." [170]

Verplanck's *Essay* represents an important stage in the process of adapting contract law to the realities of a market economy. Verplanck saw that if value is solely determined by the clash of subjective desire, there can be no objective measure of the fairness of a bargain. Since only "facts" are objective, fairness can never be measured in terms of substantive equality. The law can only assure that each party to a bargain is given "full knowledge of all material facts." [171] Significantly, Verplanck defined "material facts" so as not to include "peculiar advantages of skill, shrewdness, and experience, regarding which . . . no one has a right to call upon us to abandon. Here, justice permits us to use our superiority freely." [172] Thus, while he refused in theory to separate law and morality, Verplanck confined fraud to a range sufficiently narrow to permit the contract system to reinforce existing social and economic inequalities.

Though Verplanck's reconsideration of the philosophical foundations of contract law was by far the most penetrating among the American treatise writers, Nathan Dane and Joseph Story were more influential in contributing to the overthrow of an equitable conception of contract. In the very first chapter of his nine volume work, Dane elaborated some of the principles of contract law. One of his most important themes involved the "[d]ifference between morality and law." [173] He explained that while "in some special cases the *law of the land* and *morality* are the same," they

---

[168] *Id.* at 104.

[169] *Id.* at 8.

[170] *Id.* at 115. *See also id.* at 133.

[171] *Id.* at 225.

[172] *Id.* at 135.

> All know what a wide difference exists among men in these points, and whatever advantage may result from that inequality, is silently conceded in the very fact of making a bargain. It is a superiority on one side — an inferiority on the other, perhaps very great, but they are allowed. This must be so; the business of life could not go on were it otherwise.

Id. at 120.

[173] 1 N. DANE, *supra* note 147, at 100 (emphasis deleted).

differ in most cases, "when policy, or arbitrary rules must, also, be regarded." [174] " '*Virtue is alone the object of morality,*' " he continued, but "law has, . . . often, for its object, the peace of society, and what is practicable: Hence, though every . . . undue advantage in a bargain, to the hurt of another party, practised by one, is an act of injustice in the eyes of *morality*; yet it is not the mean [*sic*] of restitution in the eyes of the *law*; because [it is] often, impracticable *in every minute degree.*" [175]

Dane also attacked all conceptions of a substantive theory of exchange. Equity decisions, Dane exclaimed, had become "trash" since they were "the productions of inferior lawyers" and "ignorant and indolent judges" who offered "no rule of property or conduct . . . ." [176] "Inadequate price in a bargain," he wrote, "does not defeat it, merely because inadequate . . . ." [177] But Dane remained willing to regard an unequal bargain as evidence that a "person did not understand the bargain he made, or was so oppressed, that he thought it best to make it . . . ." [178] Indeed, in his characteristic style, he continued to repeat the substance of the old learning while contributing to its overthrow. "[W]hen an agreement appears very unequal, and affords any ground to suspect any imposition, unfairness, or undue power or command, the courts will seize any very slight circumstances to avoid enforcing it." [179]

Dane was still reflecting an eighteenth century world view in which unequal bargaining power was conceived of as an illegitimate form of duress and in which lack of understanding was not yet identified only with mental disability. And yet in the world of speculation and futures markets, in which all value must simply turn on "an honest difference of opinion," [180] legal doctrine eventually renounced all claims to make judgments about oppression. With the publication of Joseph Story's *Equity Jurisprudence* (1836), American law finally yielded up the ancient notion that the substantive value of an exchange could provide an appropriate measure of the justice of a transaction. "Inadequacy of consideration," Story wrote, "is not then, of itself, a distinct principle of relief in Equity. The Common Law knows no such principle . . . . The value of a thing . . . must be in its nature fluctuating, and will depend upon ten thousand different circumstances . . . . If Courts of Equity were to unravel all these

[174] *Id.*
[175] *Id.*
[176] *Id.* at 107–08.
[177] *Id.* at 661.
[178] *Id.*
[179] *Id.*
[180] Seymour v. Delancey, 3 Cow. 445, 533 (N.Y. 1824).

transactions, they would throw every thing into confusion, and set afloat the contracts of mankind." [181]

The replacement of the equitable conception of contract with the will theory can be seen in Dane's assault on the eighteenth century practice of suing on a theory of implied contract where there had been a express agreement. In a long and unusually polemical technical discussion, Dane argued that once there is an express contract there could be no quantum meruit recovery off the contract on a theory of natural justice and equity.[182] Dane's attack on quantum meruit becomes comprehensible only as an effort to destroy an equitable conception of exchange in light of a newly emerging theory of value based on the subjective desires of contracting parties. Without a socially imposed standard of value, implied contracts make no sense. Where "there is no fixed or unchangeable comparative value between one price of property and another" and all value "depends on the wants and opinions of men," [183] it becomes impossible to measure damages by reference to customary value. The only basis for measuring contractual obligation, then, derives from the "will" of parties, and the crucial legal issue shifts to whether there has been a "meeting of minds."

The victory of the emerging will theory of contractual obligation was not at first complete. When Theron Metcalf delivered his lectures on contracts in 1828 he still reflected the tension between the old learning and the new.[184] Implied contracts, he wrote, were "inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice; to compel the performance of a legal and moral duty . . . ." [185] In support of this, he cited Chief Justice Marshall's statement that implied contracts "grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair, and just men, they ought

---

[181] 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 249–50 (1836).

[182] 1 N. DANE, *supra* note 147, at 223–29.

[183] G. VERPLANCK, *supra* note 53, at 133.

[184] Metcalf's lectures were first published between 1839 and 1841, although they were first delivered in 1828 at a law school he had founded in Dedham, Massachusetts. *See* 1 U.S. L. INTELL. & REV. 142 (1829). When, in 1867, Metcalf published his *Principles of the Law of Contracts*, he acknowledged that "[t]he first manuscript of the . . . work was prepared, in the years 1827 and 1828" and was published in *American Jurist* between 1839 and 1841. T. METCALF, PRINCIPLES OF THE LAW OF CONTRACTS iii (1867) [hereinafter cited as LAW OF CONTRACTS]. "That publication," he wrote, "has recently been revised and enlarged by reference to reports and treatises published since 1828; but no change has been made in the original arrangement." *Id.*

[185] LAW OF CONTRACTS 4; 20 AM. JUR. 5 (1838).

to have made." [186] Though both Metcalf and Marshall were beginning to pretend that contractual obligation derives only from the will of the parties, their predominant form of expression continued to recognize standards of justice external to the parties. Indeed, Metcalf still maintained that "[i]n sound sense, divested of fiction and technicality, the only true ground, on which an action upon what is called an implied contract can be maintained, is that of justice, duty, and legal obligation." [187]

By the time William W. Story's *Treatise on the Law of Contracts* appeared in 1844, however, the tension between the two theories had dissolved. "Every contract," he wrote, "is founded upon the mutual agreement of the parties . . . ." [188] Both express and implied contracts were "equally founded upon the actual agreement of the parties, and the only distinction between them is in regard to the mode of proof, and belongs to the law of evidence." [189] For implied contracts, he concluded, "the law only supplies that which, although not stated, must be presumed to have been the agreement intended by the parties." [190] Since the only basis for the contractual obligation was the will of the parties, Story now maintained, implied promises "only supply omissions, and do not alter express stipulations"; he was thus prepared to announce the "general rule" that there could be no implied contract where an express agreement already existed.[191]

With Story's announcement of the "general rule," the victory of the will theory of contractual obligation was complete. The entire conceptual apparatus of modern contract doctrine — rules dealing with offer and acceptance, the evidentiary function of consideration, and canons of construction and interpretation — arose to articulate the will theory with which American doctrinal writers expressed the ideology of a market economy in the early nineteenth century.

---

[186] Ogden v. Saunders, 25 U.S. (12 Wheat.) 341 (1827); *see* LAW OF CONTRACTS 4 n.(b); 20 AM. JUR. at 5 n.1.

[187] LAW OF CONTRACTS 5–6. This passage does not appear in *American Jurist*, though Metcalf did write that "it is manifestly only by a fiction, that a contract or promise is implied. And, indeed, the whole doctrine of implied contracts, in all their varieties, seems to be merely artificial and imaginary." 20 AM. JUR. at 9.

[188] W. STORY, *supra* note 53, at 4.

[189] *Id.*

[190] *Id. See also* 2 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 87 (1850) ("The distinction between general or *implied contracts* and special or *express contracts* lies not in the nature of the undertaking, but in the mode of proof").

[191] W. STORY, *supra* note 53, at 6. *Cf.* pp. 933–34 *supra*.

C. *The Application of the Will Theory of Contract to Labor Contracts*

Thus far, we have seen the changes in contract law which were necessary to meet the needs of the newly emerging market economies in England and America. There is evidence, however, that the change from the eighteenth to the nineteenth century also involved a pervasive shift in the sympathies of the courts. In the eighteenth century the subjection of individual bargains to the extensive supervisory powers of courts and juries expressed the legal and ethical culture of the small town, of the farmer, and of the small trader. In the nineteenth century, the will theory of contract was part of a more general process whereby courts came to reflect commercial interests. The changing alliances are painfully obvious in nineteenth century courts' discriminatory application of the recently discovered chasm between express and implied contracts.

The most important class of cases to which this distinction applied was labor contracts in which the employee had agreed to work for a period of time — often a year — for wages that he would receive at the end of his term. If he left his employment before the end of the term, jurists reasoned, the employee could receive nothing for the labor he had already expended. The contract, they maintained, was an "entire" one, and therefore it could not be conceived of as a series of smaller agreements. Since the breach of any part was therefore a breach of the whole, there was no basis for allowing the employee to recover "on the contract." Finally, citing the new orthodoxy proclaimed by the treatise writers, judges were led to pronounce the inevitable result: where there was an express agreement between the parties, it would be an act of usurpation to "rewrite" the contract and allow the employee to recover in quantum meruit for the "reasonable" value of his labor.[192]

Courts in fact seemed driven to resolve all ambiguity in contracts in favor of the employer's contention that they were "entire." It made no "difference . . . whether the wages are estimated at a gross sum, or are to be calculated according to a certain rate per week or month, or are payable at certain stipulated times, provided the servant agree for a definite and whole term . . . ." [193] Under these circumstances, it should be emphasized, the assumption that the agreement was "for a definite and whole term" was simply a judicial construction not required by the terms of the agreement. Moreover, it did not "make any

[192] *See* Annot., 19 AM. DEC. 268, 272 (1880).

[193] 1 T. PARSONS, THE LAW OF CONTRACTS 522 n.(1) (1853).

difference, that the plaintiff ceased laboring for his employer, under the belief that, according to the legal method of computing time, under similar contracts, he had continued laboring as long as could be required of him." [194] Nor did it matter that the "employer, during the term, has from time to time made payments to the plaintiff for his labor." [195] The result of the cases was that any employee not shrewd or independent enough to demand immediate payment for his work risked losing everything if he should leave before the end of the contract period. The employer, in turn, had every inducement to create conditions near the end of the term that would encourage the laborer to quit.

The disposition of courts ruthlessly to follow conceptualism in the labor cases was not, however, quite matched in cases involving building contracts. Building contracts are similar to labor agreements in that there is no way of restoring the status quo after partial performance. Nevertheless, nineteenth century courts allowed builders to recover "off the contract" when they had committed some breach of their express obligation. The leading case is *Hayward v. Leonard* [196] (1828), in which the Supreme Judicial Court of Massachusetts held that a builder could recover in quantum meruit "where the contract is performed, but, without intention, some of the particulars of the contract are deviated from." [197] If there was "an honest intention to go by the contract, and a substantive execution of it," [198] the court held, it would not decree a forfeiture. It should be noted that the Massachusetts court in *Hayward v. Leonard* expressly rejected Dane's view that the existence of an express contract barred recovery in quantum meruit. There was, Chief Justice Parker declared, "a great array of authorities on both sides, from which it appears very clearly that different judges and different courts have held different doctrines, and sometimes the same court at different times." [199] The result was that in Massachusetts and in most other states two separate lines of cases were developed, one dealing with service contracts, for which recovery in quantum meruit was barred, and another applying to building contracts, for which recovery "off the contract" of the reasonable value of the performance was permitted.

Few courts attempted to rationalize what Theophilus Parsons was later to call these "very conflicting" decisions.[200] The leading

---

[194] *Id.*

[195] *Id.*

[196] 24 Mass. (7 Pick.) 181 (1828), *annotated*, 19 AM. DEC. 268 (1880).

[197] 24 Mass. (7 Pick.) at 186.

[198] *Id.* at 187.

[199] *Id.* at 184.

[200] 2 T. PARSONS, *supra* note 193, at 35 & n.(d). There were two exceptions in this trend. The New York courts applied the express contract theory to building

explanation came from *Hayward v. Leonard* itself. In the labor cases the employee usually broke his contract "voluntarily" and "without fault" of his employer. Breach of building contracts was often "without intention" and compatible with an "honest intention" to fulfill the contract.[201] Thus, it was not that courts had abandoned an underlying moral conception of contracts, but that the morality had fundamentally changed. The focus had shifted from an emphasis on the role of quantum meruit in preventing "unjust enrichment." The express contract had become paramount; denial of quantum meruit recovery was now employed to enforce the contract system. It was now regarded as just for the employer to retain the unpaid benefits of his employee's labor as a deterrent to voluntary breach of contract. But it was still unjust for the beneficiary of a building contract to enrich himself because of an honest mistake in performing the contract.[202]

While the judges who adhered to the distinction between labor and building contracts never acknowledged an economic or social policy behind the distinction, it seems to be an important example of class bias. A penal conception of contractual obligation could have deterred economic growth by limiting investment in high risk enterprise. Just as the building trade was beginning to require major capital investment during the second quarter of the nineteenth century, courts were prepared to bestow upon it that special solicitude which American courts have reserved for infant industry. Penal provisions in labor contracts, by contrast, have only redistributional consequences, since they can hardly be expected to deter the laboring classes from selling their services in a subsistence economy.

Although nineteenth century courts and doctrinal writers did not succeed in entirely destroying the ancient connection between contracts and natural justice, they were able to elaborate a system that allowed judges to pick and choose among those groups in

---

as well as to labor contracts. Smith v. Brady, 17 N.Y. 173, 187 (1858). The second exception is the solitary challenge in New Hampshire to the doctrine against quantum meruit recovery in labor cases. *See* Britton v. Turner, 6 N.H. 481 (1834).

[201] 24 Mass. (7 Pick.) at 185.

[202] Even when courts modified in building contracts cases the dominant view of the treatise writers that express contracts barred all recovery on an implied contract, they shared at a deeper level the treatise writers' basic assumption about the relationship between express and implied agreements. The contract price, all agreed, set the limit on recovery in quantum meruit. *See, e.g.*, Hayward v. Leonard, 24 Mass. (7 Pick.) 181, 187 (1828). Similarly, in the great case of Britton v. Turner, 6 N.H. 481 (1834), where New Hampshire Chief Justice Joel Parker stood almost alone in resisting the orthodox view barring quantum meruit recovery on labor contracts, he permitted the employer to deduct from recovery "any damage which has been sustained by reason of the nonfulfillment of the contract." *Id.* at 494.

the population that would be its beneficiaries. And, above all, they succeeded in creating a great intellectual divide between a system of formal rules — which they managed to identify exclusively with the "rule of law" — and those ancient precepts of morality and equity, which they were able to render suspect as subversive of "the rule of law" itself.